"INFORMAL" SUSPENSION OF NORMAL PROCESSES: THE "WAR ON TERROR" AS AN AUTOIMMUNITY CRISIS

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INTRODUCTION

[T]he rules we set up speak more about us than [they do] the enemy.[1]

[There is a] bright constellation [of essential principles that] . . . should be the creed of our political faith . . . and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.[2]

The terrorist attack of September 11, 2001, was a traumatic event for America and its citizens. Like most traumatic events, it had both temporary and long-lasting effects. As Jacques Derrida once observed, traumatic events wound the future as much as they do the present.[3] It is not only the experience

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[1] Senator Lindsey Graham, *quoted in* Kate Zernike, *G.O.P. Senator Resisting Bush over Detainees*, N.Y. TIMES, July 18, 2006, at A1.

[2] Thomas Jefferson, The World's Best Hope, First Inaugural Address (Mar. 4, 1801), *reprinted in* THE SPIRIT OF AMERICA 347, 348 (William J. Bennett ed., 1997).

[3] *See* GIOVANNA BORRADORI, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA 97 (2003) ("Traumatism is produced by the *future*, by the *to come*, by the threat of the worst *to come*, rather than by an aggression that is 'over and done with.'").

that makes an event traumatic, but also the belief that it could happen again.[4] In this sense, extraordinary or traumatic events often lead to the belief that one is living in extraordinary *times*.[5] Governmental responses to such events are less likely to be temporary and their effect on the identity of the body politic more likely to be enduring.[6] The idea of extraordinary times therefore leads not only to the suspension (formally or informally) of ordinary processes which are thought to be inadequate, but also to the blurring of the distinction between normalcy and emergency as two different states of affairs.[7]

This Article explores one governmental response to the traumatic event of September 11 – the notion of "war on terror" – and its effects on both national and international institutions. The war on terror has undermined national and international institutions and processes that were developed to carefully manage responses to emergencies. This fact has had the paradoxical effect of undermining the very defenses that in the long term would provide the best protection against the threats of terrorism. The war on terror is weakening the body politic's immune system. Indeed, the rhetoric of the war on terror and the way the "war" is being conducted are leading to what Jacques Derrida has referred to as an "autoimmune disorder."[8] Autoimmunity is a medical condition in which an organism compromises its own integrity by mistaking a

[4] *See id*. at 96-97 ("The ordeal of [a traumatic] event has as its tragic correlate not what is presently happening or what has happened in the past but the precursory signs of what threatens to happen. . . . [The event] bears . . . the terrible sign of what might or perhaps will take place, which will be *worse than anything that has ever taken place*."). The trauma of September 11 is linked not only to the possibility that something like this could happen again, but to the possibility that it may happen in even more spectacular and destructive ways, such as by means of a chemical or nuclear attack. *See, e.g.*, BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 2 (2006) ("And yet September 11 was merely a pinprick compared to the devastation of a suitcase A-bomb or an anthrax epidemic. The next major attack may kill and maim one hundred thousand innocents, dwarfing the personal anguish suffered by those who lost family and friends on 9/11.").

[5] *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 3 (2006) ("[W]e live in a time of grave and increasing danger, comparable to what the nation faced at the outset of World War II."); Vaughan Lowe, *Security Concerns and National Sovereignty in the Age of World-Wide Terrorism*, *in* TOWARDS WORLD CONSTITUTIONALISM 655, 655 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005) ("[T]he Al Qaida attacks of 11 September 2001 . . . are widely regarded as marking the beginning of the age of world-wide terrorism.").

[6] To the extent that the identity of the body politic is partly, and perhaps most importantly, shaped by the institutions, processes, and principles that organize it, the injury to those institutions and processes is clearly an injury to the identity of the body politic. *See infra* note 74 and accompanying text.

[7] *See* Oren Gross, *Misguided Response*, BOSTON REV., Dec. 2002/Jan. 2003, at 16, 16 ("[B]right-line distinctions between normalcy and emergency are untenable."). It is not clear whether those who challenge the distinction between normalcy and emergency do so on conceptual or empirical grounds.

[8] *See* BORRADORI, *supra* note 3, at 20.

part of itself as an enemy invader and attacking it for the purpose of eliminating it.[9] A social crisis shapes the identity of the body politic just as a medical crisis shapes the physical body. Similarly, institutional disfigurement does not heal easily and, at times, may lead to the most significant danger: permanent scars.

Part of the purpose of this Article is, therefore, to suggest that the war on terror is not simply an instrument of state policy or strategy, but is also a catalyst for a process through which the identity of the United States is being constituted or shaped, although not always self-reflectively and certainly not very positively, as the autoimmunity analogy is meant to suggest. The gravest threat from terrorists is not the actual physical attack, but the damage they goad us to inflict on our institutions. Senator John McCain put it perfectly when he asked: "Are we going to be like the enemy, or are we going to be the United States of America?"[10] This is the vital question about identity that this Article explores.

The Article concludes by suggesting that the best strategy to deal with the challenges from terrorism is to embrace, rather than dispense with, ordinary processes. Utilizing ordinary processes will not only be consistent with the identity that the United States wishes to cultivate and project, but will also be a better way of winning the struggle against terrorism.[11]

I. FORMAL SUSPENSIONS OF NORMAL PROCESSES

Institutional responses to extraordinary times could take two forms. The first, and perhaps the most obvious, is what can be referred to as formal suspension of normal processes and the use of emergency powers. Dictatorial regimes in the developing world often favor this route.[12] But even in constitutional democracies, constitutional and statutory provisions allow for the suspension of normal processes in emergencies. The U.S. Constitution, for example, allows the suspension of the Writ of Habeas Corpus when the public

[9] *See* Brian L. Kotzin, *Autoimmunity*, *in* 1 KELLEY'S TEXTBOOK OF RHEUMATOLOGY 305, 305-07 (Shaun Ruddy et al. eds., 6th ed. 2001). As a technical matter, there is no one autoimmune disease; instead, there are many diseases that result from an autoimmunity crisis. *Id*. at 305.

[10] *See* Gail Russell Chaddock, *Just How Far Can CIA Interrogators Go?*, CHRISTIAN SCI. MONITOR, Sept. 20, 2006, at 1.

[11] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring) ("The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.").

[12] *But cf.* H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY 65, 71-72 (Douglas Greenberg et al. eds., 1993) (outlining various ways in which the constitutional order has been subverted in different African countries). The frequency with which dictatorial regimes in the developing world have invoked a state of emergency and the subsequent blurring of normalcy and emergency have often made it very difficult for the idea of constitutionalism and the rule of law to be entrenched.

safety requires it.[13] International and regional human rights conventions also provide for procedures through which a state may derogate from its obligations under the relevant convention in a time of public emergency threatening the life of the nation.[14]

As a general matter, formal suspension of constitutional and treaty-based obligations is required to be done in public. For example, the derogation provision of the International Covenant on Civil and Political Rights (ICCPR) specifically requires that the emergency be "officially proclaimed."[15] The European Convention on Human Rights requires that a member state availing itself of the derogation clause inform the Secretary-General of the Council of Europe of the measures the state has taken and the reasons for them.[16] Thus, one condition of suspending normal processes is that such suspensions be subjected to public scrutiny. This requirement may play a constraining role; suspending normal processes in such a public way will often be a disincentive to leaders when derogation is not absolutely necessary.

Another feature of derogation from normal processes is that the suspension must be limited to what is required by the exigent circumstances. Both the ICCPR and the European Convention state that the derogation must be "strictly required by the exigencies of the situation."[17] In relation to the U.S.

[13] U.S. CONST. art 1, § 9, cl. 2 ("[T]he Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Other constitutional democracies that allow the suspension of normal processes in emergencies include Poland, *see* Konstytucja Rzeczypospolite Polskiej [Constitution] art. 31 (Pol.), *translated in* POLAND (Inter-Univ. Assocs., Inc. trans., 1997), *in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, at 7 (Gisbert H. Flanz et al. eds., 2006) (permitting limitations on constitutional rights when necessary to protect security or public order), and South Africa, *see* S. AFR. CONST. 1996, ch. 2, § 37(4)-(5) (permitting limited derogation from the Bill of Rights when a state of emergency is declared). For further discussion of the emergency provisions in Poland and South Africa's constitutions, see ACKERMAN, *supra* note 4, at 88-90.

[14] *See, e.g.*, American Convention on Human Rights art. 27(1), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 ("In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention . . . ."); International Covenant on Civil and Political Rights art. 4(2), *opened for signature* Dec. 16, 1966, Hein's No. KAV 2306, 999 U.N.T.S. 171 [hereinafter ICCPR] ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties . . . may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation . . . ."); Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] ("In time of war or other public emergency threatening the life of the nation any [state] may take measures derogating from its [treaty obligations] . . . .").

[15] ICCPR, *supra* note 14, art. 4(1).

[16] European Convention, *supra* note 14, art. 15(3).

[17] ICCPR, *supra* note 14, art. 4(1); European Convention, *supra* note 14, art. 15(1).

Constitution, Justice Scalia noted in *Hamdi v. Rumsfeld* that "[w]here the exigencies of war [require it], the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily."[18] Accordingly, the second condition of proclaiming public emergencies is that the derogations from ordinary processes must be limited to what is strictly required by the conditions that led to the derogation. The stringent requirement of proportionality is also meant to discourage the suspension of normal processes unless all other options are explored and found unavailable.

The third and perhaps most important feature of the suspension of ordinary processes is that such measures are temporary interruptions of normalcy. As Justice Scalia observed, the Suspension Clause only allows Congress to relax usual protections "temporarily." Although the idea of temporality is not expressed in the derogation provisions of the ICCPR or the European Human Rights Convention, it has been understood to have been implied by the notion of emergency. According to the U.N. Human Rights Committee, article four of the ICCPR requires that "[m]easures derogating from the provisions of the Covenant . . . be of an exceptional and temporary nature."[19] The U.K. Parliamentary Joint Committee on Human Rights has taken a similar position. In his opinion in *A v. Secretary of State for the Home Department*, Lord Bingham cites the Joint Committee: "'Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary.'"[20] Thus, the suspension of ordinary processes must end when the emergency that required the suspension ceases to exist.

One could argue that some emergency conditions last for a long period of time, and thus temporality is relative to the particular condition. While temporality is necessarily relative to the particular emergency condition, there is a point when the idea of temporality would cease to make sense even if the conditions have not been fully dealt with. The idea of temporality makes little sense if the measures taken to deal with the emergency last for a long time. At any rate, such a view of temporality may also cast doubt on the necessity of the measures to deal with the emergency.

To summarize, formal suspensions of ordinary processes are meant to comply with the conditions of publicity, necessity, and temporality. These requirements are meant to make declared emergencies rare events.[21] Under

[18] Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

[19] U.N. Human Rights Comm., General Comment No. 29: States of Emergency (Article 4), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001).

[20] A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 22 (appeal taken from Eng.) (U.K.) (Lord Bingham) (citing JOINT COMM. ON HUMAN RIGHTS, HL 158, HC 713, REVIEW OF COUNTER-TERRORISM POWERS: EIGHTEENTH REPORT OF SESSION 2003-04, at 6 ¶4 (2004), *available at* http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/158.pdf).

[21] At a minimum, the requirements of publicity, necessity, and temporality are intended to minimize what has been termed "hard emergencies." *See* Kim Lane Scheppele, The International State of Emergency: Challenges to Constitutionalism After September 11,

this formal model, responses to emergencies are viewed as a temporary break from normalcy rather than the beginning of a new normalcy. These three requirements may make formal declarations unattractive or unavailable, at least for governments in liberal democracies. In liberal democracies, however, it is not the *formal* suspension of normal processes that pose the greatest threat to institutions and institutional life. The greatest threat in liberal democracies is the *informal* suspension of normal processes.

II. "INFORMAL" SUSPENSION OF NORMAL PROCESSES

The response of the U.S. government to the threats posed by terrorism after September 11 has not been one of formal suspension of normal processes,[22] but rather suspensions of normal processes in the name of applying them to new conditions. I refer to this process as "informal suspension" of normal processes, by which I mean to refer to the circumstances when ordinary processes are essentially drained of ordinary meaning in the name of applying them to perceived new conditions or circumstances. Primarily through novel readings of the Constitution,[23] existing statutory law,[24] and international law,[25] the Bush administration has responded to the threat from terrorism either by

at 32 (Sept. 21, 2006) (unpublished manuscript), *available at* http://www.law.yale.edu/documents/pdf/Intellectual_Life/scheppele_ltw.pdf.

[22] Congress did not suspend Habeas Corpus and the United States has not derogated from its ICCPR obligations. While President George W. Bush declared a national emergency in the United States within days of the September 11 attack, this formal declaration was limited in scope. *See* Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). The greatest expansion of governmental powers was to come later from an expansive reading of existing laws and the Constitution's executive power.

[23] *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, *in* THE CONSTITUTION IN WARTIME 161, 182 (Mark Tushnet ed., 2005) (reporting that the Bush administration "has asserted a strong version of the unilateral executive position that it views as necessary to respond effectively to terrorism").

[24] The increasing use of signing statements to read statutes in a way that makes parts of those statutes inapplicable is an example. *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425, 425 (Mar. 9, 2006) (asserting that the President has the authority to disregard certain reporting requirements contained in the Act); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1018, 1019 (Dec. 30, 2005) (implying that the Act's prohibition on cruel, inhumane, and degrading treatment does not bind the executive branch). For a critique of President Bush's frequent use of signing statements to avoid the application of certain aspects of the statute being signed, see generally ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWER DOCTRINE, REPORT WITH RECOMMENDATIONS (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

[25] *See infra* notes 55-59 and accompanying text.

cabining normal processes as not being applicable to this new phenomenon,[26] or by stretching existing norms to support its actions in relation to this new condition.[27]

A. *The Rhetoric of "War on Terror"*

The informal suspension of normal processes manifests in the way that the threat from terrorism is viewed and how that threat is countered. The rhetoric of the "war on terror" is the shorthand that defines the counterterrorism strategy of the current U.S. administration. The struggle against terrorism is understood as a war and not a law enforcement issue.[28] However, while the law enforcement paradigm is rejected as inapplicable to dealing with terrorism, the war paradigm is not fully embraced on the account that the fight against

[26] *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002), *reprinted in* THE TORTURE PAPERS 81, 117 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (concluding that "neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners"); Memorandum from President George W. Bush to the Vice President et al. (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra*, at 134, 134-35 (accepting the legal conclusion that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere").

[27] *See infra* notes 55-59 and accompanying text (discussing how the administration has read and applied the self-defense principle).

[28] While the criminal law is viewed as incapable of dealing with this "novel" phenomenon, the trials of Zacarias Moussaoui and earlier World Trade Center bombers undermine such a view. *See* Joseph P. Fried, *Another Verdict: 10 Militant Muslims Guilty of Terrorist Conspiracy*, N.Y. TIMES, Oct. 8, 1995, § 4, at 2 (reporting on the conviction of ten militants who participated in the plot to bomb the World Trade Center in 1993); Adam Liptak, *Moussaoui Verdict Highlights Where Juries Fear To Tread*, N.Y. TIMES, May 5, 2006, at A21 (reporting that the Moussaoui case "ultimately followed the pattern of most federal capital cases"). Although terrorism is often called a "novel" phenomenon, it is important to note that terrorism has been with us for a long time. *See* Alison M. Jaggar, *What Is Terrorism, Why Is It Wrong, and Could It Ever Be Morally Permissible?*, 36 J. SOC. PHIL. 202, 202 (2005) ("[T]he word 'terrorism' was introduced . . . in late eighteenth century France, when the young Jacobin government, dominated by Robespierre, initiated a 'Reign of Terror' intended to deter perceived counter-revolutionary critics."). In recent years, there were the terrorist activities of the 1970s, 1980s, and 1990s, such as the Irish Republican Army (IRA), the Baader-Meinhof of Germany, and the Red Brigade of Italy. *See generally* Cecilia Albin, *The Politics of Terrorism: A Contemporary Survey*, *in* THE POLITICS OF TERRORISM: TERROR AS A STATE AND REVOLUTIONARY STRATEGY 183 (Barry Rubin ed., 1989). Neglect of the past often leads to the erroneous and exaggerated assumption of the uniqueness of the present. The difference between the nature of current terrorism and those before it is that the current reach of terrorism appears to be global. But that wide reach does not and should not transform the struggle against terrorism from what it was then, a criminal act that was a law-enforcement problem, to a war.

terrorism is unlike any war we have seen before.[29] This in-between paradigm tends to lead to the emergence of institutional black holes – conditions where there are breaks in national and international institutional processes that have been set up to arbiter disputes and to regulate responses to threats and emergencies.[30]

The term "war" in the "war on terror" is not used as a metaphor as it is used in various other "wars," such as the "war on drugs," the "war on poverty," the "war on crime," or even the "Cold War." It is in fact used literally. Soon after September 11, President Bush observed: "Ours is a war against terrorism in general."[31] And since then, the phrase "war on terror" has been used as the standard description of the nature of the threat and the means to counter it. For example, in an address to a Joint Session of Congress, the President declared that the "enemies of freedom committed an act of war against our country."[32] To be sure, both the President and his advisors note that this is a different kind of war, an "unconventional war," but a war nonetheless.[33]

To treat the struggle against terrorism as war is to suspend, as informal as it may be, normal processes in two ways. First, the invocation of war orients our view of the world in a way that inverts our understanding of what is normal and what is exceptional in the post-WWII era. To the extent that terrorism has been with us for a long time and the struggle against it will continue for a long time, if not forever, to think of the struggle against terrorism as a war is to think of a radically different way of organizing society for the foreseeable

[29] For the purpose of appropriating some principles of the laws of war (e.g. detaining combatants until active hostilities are over) the struggle against terrorism is denominated as a war, but at the same time aspects of the laws of war (e.g. allowing an independent tribunal to determine the status of detainees) are said not to be applicable on the account that this is not really a traditional war. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 512-13 (2004) (detailing the U.S. government's determination that Hamdi, an American citizen, was an enemy combatant). While the Supreme Court in *Hamdi* held that an independent tribunal is to determine the status of detainees, at least when those detainees are U.S. citizens, the evidentiary procedure that was adopted by the Court for such determination essentially merges the war and criminal law paradigms. *See id.* at 533.

[30] *See* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 26 (2004) ("Emergencies . . . raise the specter of a 'constitutional black hole,' a break in the continuity of law that contradicts the idea of a constitution as an unvarying arbiter of social and political disputes."). *See generally* Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror,"* 87 INT'L REV. RED CROSS 39 (2005); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

[31] The President's News Conference, 2 PUB. PAPERS 1218, 1221 (Oct. 11, 2001) [hereinafter News Conference].

[32] Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1140 (Sept. 20, 2001) [hereinafter President's Address].

[33] *See, e.g.*, News Conference, *supra* note 31, at 1222.

future.[34] In the post-WWII era and as set forth in the U.N. Charter, peace was to be the normal state of affairs and war was to be the disfavored instrument of foreign policy. War was to be a last resort in very limited circumstances as set out under Article 51 of the Charter.[35] Despite President Bush's assertion that the United States will win the war only when "every terrorist group" is wiped out,[36] there does not seem to be any prospect of such a clear victory. Terrorism is the weapon of the weak and will be with us so long as two conditions exist: serious grievances that continue to be unaddressed,[37] and an asymmetry of power between the aggrieved and the source of the grievances. To say that the war on terror is going to end all terrorism is demonstrably false.

Indeed, it would be very hard to know when terrorism has been defeated. One knows when conventional wars have ended: there are treaties or other agreements indicating that hostilities have ended, or an invading army has been expelled from a territory. But there cannot be such signals in the case of the war on terror. There could be a break from terrorist attacks, but that break may not necessarily signal the end of terrorism. Under circumstances where military victory is uncertain and the struggle against terrorism is likely to continue for a long time, to conceive of the struggle against terrorism as a war is to invert our post-WWII understanding that war, not peace, is the exceptional, the rare.[38]

Furthermore, the phrase "war on terror" is not only a description of the process of dealing with the threat from terrorism, it also signals a new way of

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[34] Even if the "war on terror" is to be viewed in metaphorical terms, metaphors still have the power to orient our thinking about our institutions and our relationship with the outside world. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3 (1980); George Lakoff, *Metaphors of Terror: The Power of Images*, IN THESE TIMES, Oct. 29, 2001, http://www.inthesetimes.com/issue/25/24/lakoff2524.html.

[35] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense . . . shall not in any way affect the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

[36] President's Address, *supra* note 32, at 1141 ("Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.").

[37] *See, e.g.*, Zbigniew Brzezinski, *Confronting Anti-American Grievances*, N.Y. TIMES, Sept. 1, 2002, at C9.

[38] *See* John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004) ("The world after September 11, 2001 . . . is very different . . . . It is no longer clear that the United States must seek to reduce the amount of warfare, and it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force. *It is no longer clear that the default state for American national security is peace.*" (emphasis added)).

organizing society.[39] Many of the legal frameworks that have been adopted in the pursuit of this war on terror seem to confirm this reorganization.[40] One of the consequences of the war on terror has, therefore, been the distortion of the basic constitutional allocation of powers both nationally and internationally. The President and his advisors have asserted unilateral executive authority to deal with terrorism and terrorists, ranging from the detention and treatment of suspected terrorists[41] to the use of wiretaps without congressional authorization.[42] Such is the view that this is a war and in war the President has primary, if not exclusive, authority, while the other branches of government have, at best, supporting roles.[43] In times of war the executive branch has no peer institutions.[44] The notion of a war on terror has also had a distorting impact on the allocation of war-making power established by the U.N. Charter, the foundational or basic document of the international community. The Charter prohibits the threat or use of unilateral force by one state against another state unless it is in self-defense.[45] Outside of this right to self-defense, the Security Council retains the power to authorize the use of force for the maintenance of international peace and security through the exercise of police action.[46]

[39] *See* Lowe, *supra* note 5, at 671 ("The choice between the criminal law and the 'Law of War' approaches to dealing with terrorism is in effect a choice of ways of organizing society for the foreseeable future . . . .").

[40] The measures on terrorism that have been adopted by the executive branch without congressional authorization have been part of a sustained campaign by the executive branch and its academic supporters: their view is that the times are of such a nature, a state of war, that the constitutional allocation of power among the two elected braches of government should be read as allowing the President to act unilaterally on many issues that touch on national security. *See* Yoo, *supra* note 38, at 820-21.

[41] *See supra* note 26 and accompanying text.

[42] *See* The President's News Conference, 41 WEEKLY COMP. PRES. DOC. 1885, 1885 (Dec. 19, 2005).

[43] *See* ACKERMAN, *supra* note 4, at 5 ("Calling the challenge a war tilts the constitutional scales in favor of unilateral executive action . . . ."); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 294 (2005) (arguing that the practice of unilateral presidential war making is constitutional because Congress' ability to suspend military spending constitutes an effective check on the President's power, rendering unnecessary any formal requirement for congressional authorization).

[44] Within the executive branch, the Department of Defense takes the lead role in perceived times of emergency or war, and President Bush has relied almost exclusively on the military to wage the war on terror. Robert Dreyfuss, *The Phony War*, ROLLING STONE, Sept. 21, 2006, at 42, 48 ("Since 2001, the administration has spent $430 billion on what [President Bush] calls the 'global war on terrorism' – and nearly ninety cents of every dollar have gone to the Defense Department.").

[45] U.N. Charter art. 51.

[46] *Id.* arts. 39-51.

B. *The Doctrine of Self-Defense*

The self-defense principle is meant to deal with emergencies that could arise in one of two ways: an armed attack or the threat of such an attack. In the case of armed attacks, the U.N. Charter clearly indicates that a state has the inherent right to defend itself.[47] A country is undoubtedly entitled to respond militarily to an attack of the type that took place on September 11. The text of Article 51 does not stipulate that self-defense is only available to a state when an armed attack is made by another state.[48] The existence of an "armed attack" for purposes of Article 51 will depend on the "intensity of the conflict and the organization of the parties to the conflict."[49] The attack on September 11 meets both of those requirements. The intensity of the conflict and the attack was high, and the organizational structure of al Qaeda resembled that of a fairly organized guerrilla group. At any rate, whether an attack by a terrorist group such as al Qaeda should be denominated an armed attack for purposes of Article 51 was not raised by the U.S. attack on Afghanistan, for the military response was against a state which was aiding and abetting the terrorists.[50]

Article 51 of the Charter and customary international law also provide for the right to respond in self-defense to the threat of an attack. As with other emergency measures, the right of self-defense is to be exercised only when the threat of an attack is imminent and when there are no other ways of dealing with the threat. Daniel Webster's statement in the *Caroline* incident is generally regarded as the clearest assertion of when preemptive actions are allowed under international law. A state may resort to force as a form of self-defense when the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[51] Not only should the response be regulated by the requirement of imminence, but the amount of force used must be "justified by the necessity of self-defence . . .

[47] *Id.* art. 51.

[48] *Id.*; *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 215 ¶33 (July 9) (separate opinion of Judge Higgins) ("[N]othing in the text of Article 51 . . . stipulates that self-defence is available only when an armed attack is made by a State."); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) ("[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups . . . .").

[49] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (May 7, 1997).

[50] *See* Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 2 PUB. PAPERS 1201, 1201-02 (Oct. 7, 2001) (announcing military strikes "designed to disrupt the use of Afghanistan as a terrorist base of operations," and justifying the strikes on the ground that "[i]f any government sponsors the outlaws and killers of innocents, they have become outlaws and murders, themselves").

[51] Letter from Daniel Webster, Sec'y of State, to Lord Ashburton (Aug. 6, 1842), *quoted in* DAVID M. ACKERMAN, CONG. RESEARCH SERV., ORDER CODE RS21314, INTERNATIONAL LAW AND THE PREEMPTIVE USE OF FORCE AGAINST IRAQ 2 (2003).

and kept clearly within it."[52] The use of force to deal with the threat or attack must be proportional to the risk posed. Imminence and proportionality are the defining features of all emergency measures, including the notion of self-defense. Outside this narrowly defined emergency measure of self-defense, the international use of force is to be resorted to only with the authorization of the Security Council.[53]

The war on terror is radically recasting the notion of preemptive self-defense from that of an emergency measure designed to allow a state to respond to an imminent threat, to one by which a state (in this case the United States) plays the role of guarantor of international peace and security, a role the Charter explicitly allocates to the Security Council.[54] The reallocation of war-making power is being effected without an amendment to the Charter. There is no dispute that in the era of weapons of mass destruction the international community must be proactive, not merely reactive, in the maintenance of global peace and security. The debate lies in who should authorize such action and whether the self-defense principle should be transformed into a means by which each state plays the role of the guarantor of international peace and security.

The Bush doctrine of preventive war threatens to lead to the reallocation of international war-making power. As part of a new National Security Strategy and the war on terror, the Bush administration has called for preventive attacks on so-called "rogue states" who may be potential enemies, even though their intentions and their capacity to threaten the United States were not yet clear.[55] The rationale for the policy is that living in an age of terrorism, where an attack could come at any time and from anywhere, requires the United States to defend itself by attacking rogue states that give shelter to terrorist groups and those who seek to develop weapons of mass destruction which may end up in terrorist hands. The plan is to deprive terrorists of hiding places and rogue states of the capacity to inflict great damage on the United States in the future.[56] Some commentators have likened this policy of preventive attack to the well-known "Precautionary Principle" employed in the health and environmental fields, which states that lack of scientific certainty should not

[52] Letter from Daniel Webster, Sec'y of State, to Mr. Fox (Apr. 24, 1841), *quoted in* ACKERMAN, *supra* note 51, at 2.

[53] *See supra* note 46 and accompanying text.

[54] *Id.* art. 24, para. 1. The claim here is not that U.S. actions in fact lead to international peace and security. In fact, the result in the war on terror has been exactly the opposite. Rather, the claim is that the U.S. administration has arrogated to itself the role of international sheriff.

[55] THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14-15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf [hereinafter NATIONAL SECURITY STRATEGY]; *see also* David Luban, *Preventive War*, 32 PHIL. & PUB. AFF. 207, 230 (2004) (defining "preventive war" as "a preemptive war in which the imminence requirement is recast from temporal to probabilistic terms").

[56] *See* NATIONAL SECURITY STRATEGY, *supra* note 55, at 14-15.

forestall an action that might prevent serious or irreversible harm.[57] This comparison is borne out by the following passage in the National Security Strategy:

> We cannot let our enemies strike first. . . . The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[58]

The invasion of Iraq was at one time justified as a preventive action,[59] and the U.S. administration has not precluded the possibility that Iran could also be a target of that policy.

The Bush preventive (precautionary) doctrine not only dispenses with the requirement of imminence, but also shifts the burden to the target states to demonstrate that they do not harbor terrorists or WMDs, and are not in the process of developing WMDs.[60] The notion of preventive self-defense that the Bush administration has put forward therefore undermines the idea that self-defense is an emergency measure designed to deal with imminent threats. Further, this version of self-defense undermines the notion that those who claim there is a threat have the burden of demonstrating that a risk exists and that it cannot be prevented by any other means. The report of the High-Level Panel, established by the Secretary-General to advise him on the major issues

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[57] *See* Jaye Ellis, *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, 17 EUR. J. INT'L L. 445, 446 (2006). For an extended discussion of the Precautionary Principle, see generally PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE (Carolyn Raffensperger & Joel A. Tickner eds., 1999). For a discussion of how the principle applies to terrorism, see Jessica Stern & Jonathan B. Wiener, *Precaution Against Terrorism*, 9 J. RISK RES. 393, 394-403 (2006).

[58] NATIONAL SECURITY STRATEGY, *supra* note 55, at 15, *quoted in* Stern & Wiener, *supra* note 57, at 395; *see also* Address to the Nation on Iraq from Cincinnati, Ohio, 2 PUB. PAPERS 1751, 1754 (Oct. 7, 2002) [hereinafter Address from Cincinnati] ("Facing clear evidence of peril, we cannot wait for the final proof, the smoking gun, that could come in the form of a mushroom cloud.").

[59] *See* Address from Cincinnati, *supra* note 58, at 1752 ("If we know Saddam Hussein has dangerous weapons today – and we do – does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?").

[60] *See* Stern & Wiener, *supra* note 57, at 400 ("[T]he US and the UK had a hard time convincing other countries that invading Iraq was warranted. Then the Bush and Blair administrations made the argument that, instead, it was Hussein who bore the burden of proof – to show that Iraq had no WMD . . . ."); Colin Powell, Sec'y of State, Address to the U.N. Security Council (Feb. 5, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html ("This council placed the burden on Iraq to comply and disarm and not on the inspectors to find that which Iraq has gone out of its way to conceal for so long.").

facing the U.N. and the world, cautions that such preventive military action will transform the allocation of war-making power. Additionally, the report states that "in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action . . . to be accepted."[61] Under the doctrine of preventive war, a war-making measure that was devised to deal with emergencies becomes part of the arsenal of ordinary foreign policy strategies. This, of course, takes us back to the pre-WWII paradigm that the United Nations regime was meant to have abolished.

The notion of preventive attack that the Bush administration has adopted as an official policy is premised on the idea that the United States has been engaged in a war since at least September 11. Winning the war under this policy requires preventive attacks that will impair the capacities of not only known enemies but also potential enemies, preventing both known and potential risks. Conceptualizing the struggle against terrorism as a war and viewing preventive attacks as necessary to successfully prosecute the war turns the measure that was developed to respond to emergencies into an ordinary instrument of foreign policy. Such a view also leads to the restructuring of the allocation of war-making powers that was carefully developed by the U.N. Charter and the United Nations system.

The idea of preventive war is an *informal* suspension of the principle of self-defense. The principle of self-defense is not formally suspended or dispensed with, but is drastically altered in the name of applying it to this perceived new circumstance.[62] A doctrine that was carefully crafted to deal with emergencies has, through the policy of preventive war, been transformed into an ordinary foreign and military policy option, the very thing that the post-WWII international order was meant to have rejected.[63]

The effect of the war on terror on the principle of self-defense – and on other aspects of national and international law – is evidenced in more than the restructuring of the allocation of powers and the transformation of emergency measures into ordinary processes. It is also contributing to a condition where,

[61] The Secretary-General, *Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, ¶ 191, *delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *High-Level Panel Report*], *available at* http://www.un.org/secureworld/report.pdf.

[62] I use the word "perceived" not to minimize the threat that terrorism poses, but rather to indicate that although terrorism has now become a worldwide phenomenon, this is not the first era in which terrorism has threatened countries and communities. Many countries have faced it before, even for extended periods of time, and yet there had not been an attempt to view the struggle against it as a formal war allowing the threatened country to transform international principles of war.

[63] *See supra* notes 34-38 and accompanying text; *see also* POSNER, *supra* note 5, at 23 ("[A] national emergency may alter the *scope* of a right, and from a practical standpoint it is the scope rather than the mere existence of a right that is important.").

in the name of fighting terrorism, the evil Other,[64] the United States is turning on its own body, namely, the institutions and processes that define it and that perhaps are the country's best hope for providing immunity from the threats that terrorism poses. Put simply, the war on terror is leading to an autoimmunity crisis.

III. THE WAR ON TERROR AS AN AUTOIMMUNITY CRISIS

Senator Lindsey Graham is one of the few Republicans who held the line, at least for a while, against the Bush administration on the issue of whether the Geneva Conventions applied to terrorism-related detainees. In explaining the necessity of such protections, Senator Graham reminded us that "the rules we set up speak more about us than [they do] the enemy."[65] The way we confront terrorism is not just a matter of military and foreign policy tactics; it is also a way of defining ourselves. It is about the identity we seek to cultivate, project, and defend, a process of demarcating "us" from "them." As many have argued, identities are relationally created.[66] In the process of defining the terrorist "Other," we simultaneously define ourselves. The war on terror has, therefore, both identitarian and utilitarian dimensions.[67]

Conceiving of the struggle against terrorism as a war and the consequent transformation of emergency measures into ordinary military and foreign policy tactics has led to an autoimmunity crisis. Autoimmunity is a scientific term for a medical condition that emerges when an organism compromises its own integrity by perceiving a part of itself as being foreign and attacking it to eliminate it.[68] While the primary function of the immune system is to protect the body from invading microorganisms that can cause illness,[69] the effectiveness of the defense is dependent on the ability of the immune system to distinguish between "self" and "non-self."[70] Autoimmunity emerges when

[64] President Bush has asserted that there are two sides in the war on terror and each nation has to decide which side it is on. *See* President's Address, *supra* note 32, at 1142 ("Every nation, in every region, now has a decision to make: Either you are with us, or you are with the terrorists.").

[65] *See* Zernike, *supra* note 1.

[66] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 3 (1990); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 171-73 (1990). For my views on the subject, see Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 622 (1992).

[67] *See* Adeno Addis, *Economic Sanctions and the Problem of Evil*, 25 HUM. RTS. Q. 573, 586-612 (2003).

[68] *See supra* note 9 and accompanying text; *see also* E. Cohen, *My Self as an Other: On Autoimmunity and "Other" Paradoxes*, 30 MED. HUMAN. 7, 8 (2004) ("[A]utoimmune illnesses seem to manifest the paradoxical and sometimes deadly proposition that the body/self both is and is not itself.").

[69] *See* Kotzin, *supra* note 9, at 305.

[70] *See* Cohen, *supra* note 68, at 7.

the immune system loses the ability to so distinguish and instead attacks the body itself.[71]

Similarly, there may be circumstances when a body politic (a political community) fails to recognize its very nature (identity) and attacks important aspects of the body politic in the belief that it is fighting an external invader. Conceiving the struggle against terrorism as a war is leading to the same type of crisis to the body of the territorial and social community of the United States as when the physical body mistakes itself as alien and turns on itself.[72] To the extent that terrorism is the tool of the weak against the strong, the terrorists' intent might be to do exactly that: to "induc[e] a decisive autoimmune effect."[73]

In the same way that the physical body has clearly demarcated boundaries, the body politic also has defined territorial and institutional boundaries. A political community is defined not only by the territory it occupies and the people that inhabit it, but also by the institutions and norms that organize it.[74] When terrorists attack, they wish to target not only infrastructure and people, but also the institutions and norms that they believe organize and shape that particular political community.[75] Indeed, in some circumstances they announce that to be their objective.[76] The leaders of the target countries often claim this to be the terrorists' objective as well.[77] Ironically, though, when a

[71] The label "autoimmunity disease" is a bit of a misnomer. Autoimmunity is, in fact, an etiology; it is a cause of many diverse human diseases. *See* Kotzin, *supra* note 9, at 305.

[72] *See* W.J.T. Mitchell, *Picturing Terror: Derrida's Autoimmunity*, 27 CARDOZO L. REV. 913, 916 (2005).

[73] John Steinbruner, Terrorism: Practical Distinctions and Research Priorities (Oct. 15, 2004) (unpublished discussion paper), *available at* http://www.cidcm.umd.edu/carnegie/papers/steinbruner.pdf.

[74] *See* A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 91 (appeal taken from Eng.) (U.K.) (Lord Hoffman) ("The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations.").

[75] As Professor John Steinbruner has stated, the purpose of terrorism is "to induce a destructive response in the political system. Terrorism is an autoimmune disease – it is designed to get the political system attacked and do a lot of damage to itself." *See* Online Discussion with John Steinbruner, Dir. of Int'l & Sec. Studies, Univ. of Md. (Sept. 11, 2001) (transcript available at http://www.washingtonpost.com/wp-srv/liveonline/01/nation/attack_steinbruner.htm). The targets of the September 11 attacks were largely chosen for their symbolic value. The terrorists viewed the targets as representing the identity of the United States: a strong military and financial power.

[76] *See, e.g.*, *Transcript: Bin Laden Accuses West*, ALJAZEERA.NET, Apr. 25, 2006, http://english.aljazeera.net/English/archive/archive?ArchiveId=22235 (transcribing an audiotape in which Osama bin Laden railed against the United Nations and other institutions that he believed were designed to perpetuate the "ethnic supremacy" of the West).

[77] *See, e.g.*, President's Address, *supra* note 32, at 1142 ("These terrorists kill not merely to end lives, but to disrupt and end a way of life."); Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban

government responds to this outside invader in the way the United States has, such a response more than anything else threatens the integrity and health of the body politic. The result is similar to an autoimmunity crisis.

There are five distinct ways in which the war on terror may be leading to the injury of the very community (body politic) that the war is supposed to protect from terrorist threat. First, at the most basic level, the war on terror has continually undermined the institutions that define who we are. Practices such as prolonged detentions without trial or access to family and lawyers,[78] the establishment of secret detention centers,[79] the use of rendition to outsource torture and other cruel and inhuman treatment of detainees,[80] and even the use of highly questionable tactics against prisoners for information gathering have done just that.[81] As Lord Hoffmann noted in a concurring opinion in *A v. Secretary of State for the Home Department*, "The real threat . . . comes not

Supporters, 2 PUB. PAPERS 1211, 1212 (Oct. 9, 2001) ("We are responding to the brutal September 11 attacks on our territory, our citizens, and our way of life . . . .").

[78] *See* Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1.

[79] *See id.*

[80] *See* David Johnston, *Terror Suspects Sent to Egypt by the Dozens, Panel Reports*, N.Y. TIMES, May 12, 2005, at A4. *See generally* Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106; COMM. ON INT'L HUMAN RIGHTS, ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NYU SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" (2004), *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf. The New York Times has referred to extraordinary rendition as "another favorite Bush administration practice." Editorial, *The Imperial Presidency 2.0*, N.Y. TIMES, Jan. 7, 2007, § 4, at 13.

[81] There have been numerous allegations that the United States has used interrogation techniques amounting to torture or cruel, inhuman, and degrading treatment. *See, e.g.*, Mark Landler & Souad Mekhennet, *Freed German Detainee Questions His Country's Role*, N.Y. TIMES, Nov. 4, 2006, at A8 ("During the four and a half years he languished in American prison camps in Afghanistan and Guantánamo Bay, Cuba, Murat Kurnaz claims to have been beaten, locked alone for months, dunked in water, sexually humiliated and hung from the ceiling by chains . . . ."). Whether the administration has authorized or tolerates such techniques is uncertain. *See* Dan Eggen, *White House Denies Cheney Referred to Torture*, TIMES-PICAYUNE, Oct. 28, 2006, at A4 ("[T]he Bush administration has declined to say what techniques it believes are off-limits."). Although prohibited by the U.S. Army and likely illegal under detainee legislation, "waterboarding," the torture technique in which a prisoner is secured with his feet over his head while water is poured on a cloth covering his face, is reportedly still practiced. *See id.* ("Numerous sources have confirmed that the CIA used waterboarding in its interrogation of alleged Sept. 11 mastermind Khalid Sheik Mohammed and other 'high value' prisoners."). Tellingly, the U.S. government has tried to prevent detainees in U.S. custody from sharing their abuse stories with lawyers or the press. *See* Leonnig & Rich, *supra* note 78.

from terrorism but from [practices] such as these."[82] In the process of undermining the institutions and processes that define us, the war on terror threatens to collapse the distinction between "us" and "them." Our tactics increasingly become similar to tactics used by those we define as the Other.[83]

Second, the institutions that the war on terror has continually undermined in the guise of fighting terrorism make up the very fabric of our defense structure. Take, for example, the self-defense principle discussed above.[84] Undermining this principle in the name of effectively fighting terrorist threats will lead to an unstable world, a detriment to the global interests of the United States. With America's unprecedented status as a world power comes unparalleled exposure to such threats and attacks. The administration's doctrine of preventive war may provide analogous support for other states to act out their own paranoia or imperial ambition.[85] Not only will this policy likely encourage other states to invoke self-defense to intervene in the internal affairs of others,[86] it may even encourage terrorists to provide similar justifications. Rather than achieving total victory, the war on terror is simply recycling and endlessly circulating the violence by engaging in repressive actions.[87] Also, noncompliance by the United States with the dictates of international institutions and processes, either in relation to the laws of war or human rights, has provided justification for other countries to flout aspects of international norms and processes.[88]

Third, the war on terror is undermining the capacity of the United States to lead internationally. The United States is a hegemon, and as such is only able to lead if it has the respect and trust of those whom it seeks to lead.[89] Prior to the war on terror, the United States was able to provide leadership on a range of issues partly because the institutions that defined it were respected and its

[82] A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 97 (appeal taken from Eng.) (U.K.) (Lord Hoffman).

[83] *See* R. Jeffrey Smith & Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, WASH. POST, Dec. 22, 2004, at A1 (cataloguing alleged abuses of detainees).

[84] *See supra* Part II.B.

[85] *See* Thomas Fuller & Brian Knowlton, *Losing High Ground on Moral Leadership*, INT'L HERALD TRIB., July 5, 2004, at 1 ("[H]uman rights workers note that in some places the United States has become a different type of role model: Some governments now cite the Patriot Act or the Guantanamo experience to justify crackdowns or extrajudicial detentions.").

[86] *See, e.g.*, Mark Mazzetti, *U.S. Signals Backing for Ethiopian Incursion into Somalia*, N.Y. TIMES, Dec. 27, 2006, at A6 ("The United States . . . signaled its support for the Ethiopian offensive in Somalia, calling it a response to 'aggression' . . . .").

[87] *See* BORRADORI, *supra* note 3, at 99 ("[R]epression in both its psychoanalytical sense and its political sense – whether it be through the police, the military, or the economy – ends up producing, reproducing, and regenerating the very thing it seeks to disarm.").

[88] *See supra* note 85 and accompanying text.

[89] *See* ANDREW H. KYDD, TRUST AND MISTRUST IN INTERNATIONAL RELATIONS 5 (2005) ("[H]egemony . . . can promote cooperation, but only if the hegemon is relatively trustworthy.").

motives generally trusted.[90] The respect that the United States commanded greatly amplified its voice, and the vast majority of the members of the international community trusted its commitment to the international rule of law and to mutual cooperation.[91]

The war on terror, and the unilateralism that it has engendered, have diminished that trust.[92] A large part of the world now views the United States as increasingly bellicose, intent on domination rather than cultivating mutual cooperation.[93] This diminution of trust affects the body politic in two ways. The United States will have difficulty obtaining the cooperation it needs from the international community for a successful strategy against terrorism, and it will have less influence over a range of issues for which its leadership continues to be vital.

There is a fourth sense in which the war on terror may be leading to an autoimmunity crisis. A view of the historical record reveals that some of those who planned the September 11 attack were actually trained and equipped as allies by the United States during the Cold War "as antibodies against Soviet military power in Afghanistan."[94] As W.J.T. Mitchell points out, "[t]he most dangerous threat to the immune system . . . is amnesia."[95] After an initial attack, a healthy immune system will "remember" how to identify the threat in case it appears again.[96] If the United States forgets the lesson that "today's terrorists . . . were yesterday's allies,"[97] further attacks may be inevitable.

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[90] *See, e.g.*, DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 44 (2d ed. 2006) ("The USA did not have to coerce other states into compliance with its views . . . but rather exercised hegemonic leadership through a series of initiatives, burdens, payments, etc."); KYDD, *supra* note 89, at 6 ("European states were able to cooperate with each other, the United States, and Germany after World War II because the United States, as a trustworthy hegemon, enabled them to overcome serious mistrust problems. Contrary to prevalent explanations, the United States neither provided a free ride to the Europeans nor coerced them into accepting an American-preferred order.").

[91] *See* KYDD, *supra* note 89, at 6 (defining trust in international relations as "a belief that the other side prefers mutual cooperation to exploiting one's own cooperation").

[92] *See id.* at 254 tbl.9.1 (finding that overwhelming majorities in every country surveyed, except the United States, have less confidence in the United States following the invasion of Iraq); Brian Knowlton, *Global Image of the U.S. Is Worsening, Survey Finds*, N.Y. TIMES, June 14, 2006, at A8 (reporting that "the global image of America has slipped," as evidenced by a fifteen-country opinion poll in which most respondents stated that the U.S. presence in Iraq posed "more of a danger to world peace" than Iran's nuclear ambitions).

[93] *See* KYDD, *supra* note 89, at 249.

[94] Mitchell, *supra* note 72, at 919.

[95] *Id*.

[96] *Id*.

[97] *Id*.; *see also* Arthur M. Schlesinger Jr., *Folly's Antidote*, N.Y. TIMES, Jan. 1, 2007, at A23 ("As persons deprived of memory become disoriented and lost, not knowing where they have been and where they are going, so a nation denied a conception of the past will be disabled in dealing with its present and its future.").

The fifth way in which the response of the United States is analogous to an autoimmunity crisis is in the way the government is treating its citizens and other members of the political community. Governments may mistake their citizens as enemies in the same way that an immune system may lose its ability to distinguish between the body's own cells and pathogens. The most famous and tragic event illustrating this phenomenon was the internment of Japanese Americans after the bombing of Pearl Harbor. Tens of thousands of individuals were detained in camps throughout the country and treated as "antigens" even though there was no evidence that they posed any threat to the health and integrity of the body politic.[98] Although there have been repeated claims that the war on terror is not a war on Islam or immigrants,[99] some immigrants, including permanent residents, continue to bear the brunt of the Justice Department's anti-terrorism initiatives.[100] "[E]thnic profiling is being broadly engaged in, and widely defended as reasonable."[101] The Military Commissions Act of 2006 gives military tribunals the authority to try not only al Qaeda members and others captured abroad, but approximately twenty million permanent residents as well.[102] While this is what is publicly known,

[98] *See* Korematsu v. United States, 323 U.S. 214, 215-17 (1944). Another example is the McCarthy era of the 1950s, in which citizens suspected of communist sympathies were treated as antigens. *See* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 360-68 (1998) (describing the economic, legal, and extralegal sanctions placed on suspected communists during the McCarthy era).

[99] *See, e.g.*, Remarks to the United Nations General Assembly in New York City, 42 WEEKLY COMP. PRES. DOC. 1633, 1635 (Sept. 19, 2006).

[100] *See* DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 168-71 (2002).

[101] *Id.* at 149. There is no conclusive empirical evidence to show that ethnic and racial profiling is effective in the anti-terrorism context. Bernard E. Harcourt, *Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right To Be Free from Discrimination?*, at 4 (John M. Olin Law & Econ. Working Paper No. 288, Pub. Law & Legal Theory Working Paper No. 123, 2006), *available at* http://ssrn.com/abstract=893905. Moreover, such tactics are likely to alienate the very communities whose assistance may be most needed to counter terrorist threats. Profiling is likely to produce resentment and hence a loss of political legitimacy not only domestically, but internationally as well. When a group is viewed as a potential antigen, there is a high likelihood that loyalty and commitment to the political community will be undermined. For further discussion of profiling, see generally Bernard E. Harcourt, United States v. Brignoni-Ponce *and* United States v. Martinez-Fuerte*: The Road to Racial Profiling*, *in* CRIMINAL PROCEDURE STORIES 315 (Carol S. Steiker ed., 2006).

[102] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948d, 120 Stat. 2600, 2603 (to be codified at 10 U.S.C. § 948d). The Act establishes commissions similar to the one convened by the President and held illegal in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006). For a critique of the distinction between citizens and permanent residents for purposes of commission jurisdiction, see generally Adeno Addis, Lecture, *Strangers to the Constitution?: Resident Aliens, Military Tribunals, and the Laws of War*, 37 VAL. U. L. REV. 627 (2003).

there are indications that there are secret programs as well in which some citizens and residents are treated as antigens.[103]

IV. IN DEFENSE OF ORDINARY PROCESSES FOR "EXTRAORDINARY TIMES"

Many prominent jurists and academics have put forth theories as to how the United States ought to deal with the threat from terrorism. These include Judge Posner's "pragmatic" view of bending the Constitution so as to save it,[104] Bruce Ackerman's suggestion of a "supermajoritarian escalator" of congressional reauthorization as a way of curtailing presidential power,[105] and many others.[106] These novel suggestions are premised on the assumption that we live in an emergency which requires drastically different measures and responses. We do not, however, need to bend our Constitution, for we might break it, or to dream up other new ways of adjusting our institutions and processes. Perhaps what we need the most is to reaffirm ordinary processes.

One institution that is central to ordinary processes is a credible jurying system. Jurying could take a legal or political form.[107] In either form, its function in the war on terror is to ensure that the executive, the entity meant to manage the perceived emergencies, is not the sole or even the primary arbiter of the severity of emergencies and the appropriate response to them. This is because the executive is likely to err on the side of exaggerating both the seriousness of the emergency and the proportionality of the response.[108] The notion of credible jurying is meant to minimize the possibility of acting on the basis of incomplete information and cognitive error induced by anxiety and fear.[109]

In the fight against terrorism, a credible jurying system would entail several dimensions. In the domestic arena, it would suggest abandoning the rhetoric of

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[103] *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts: Secret Order To Widen Domestic Monitoring*, N.Y. TIMES, Dec. 16, 2005, at A1.

[104] *See* POSNER, *supra* note 5, at 1-8.

[105] *See* ACKERMAN, *supra* note 4, at 80-83.

[106] *See generally* THE CONSTITUTION IN WARTIME, *supra* note 23.

[107] The idea of credible jurying was recently suggested as a way to understand and explain the role of the U.N. Security Council in adjudging the legitimacy of humanitarian interventions. *See* Thomas Franck, *Legality and Legitimacy in Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION 143, 150-52 (Terry Nardin & Melissa S. Williams eds., 2006).

[108] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 215-17 (1944); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002).

[109] Numerous psychological studies have demonstrated that people tend to respond aggressively to perceived risks that are vivid in their minds. There is a high tendency both to exaggerate the likely occurrence of such events and to adopt stringent protective measures. *See* Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 464-78 (Daniel Kahneman et al. eds., 1982). This exaggeration is likely to be high in relation to those (such as the executive branch) whose duty is to provide security for citizens.

"war" and the war paradigm, to the extent that it has been embraced, and viewing the struggle against terrorism as one of law enforcement with, of course, a sharper focus. The traditional legal form of jurying would dictate that the role of courts and juries should be an important, not peripheral, aspect of the struggle against terrorism. Courts and juries have in the past functioned well in combating terrorism, both in this and other countries.[110] Juries often require that governmental actors comply with the full scope of the law, but have also applied the law selectively or in ways that "narrow the gap between the strictures of strict legality and the importunings of popular moral intuition."[111] There is no reason to suspect that the role of juries would be any different in relation to the struggle against terrorism.

Jurying could also take a political form, where peer political institutions assess the judgment of those who are entrusted to make the initial determination as to the existence of an extraordinary circumstance and the proportionate response to it. Congressional review of the executive branch's initial judgment of the nature of the threat and the appropriate level of response could be one form of political jurying. Indeed, to the extent that juries are supposed to be composed of peers, Congress is a prime example, as it was clearly established as one of the three peer institutions of the federal government. One problem with Congress carrying out its jurying function, especially in times of perceived emergencies, has been that Congress is often politically intimidated. There are indications, however, that it may be prepared to perform that function.[112]

The clearest form of political jurying is found in the international context. Professor Franck has observed, based on previous humanitarian interventions, that "[i]t is impossible . . . to conclude that the Security Council is incapable of discharging the 'jurying' function in a credible fashion."[113] In emergencies, the Security Council has authorized the collective use of force, endorsed unilateral use of force in self-defense, or simply declined to condemn the

[110] *See supra* note 28.

[111] Franck, *supra* note 107, at 151.

[112] Many committees of the new Congress are holding (or plan to hold) oversight meetings to investigate aspects of the executive branch's actions and policies in relation to Iraq and the war on terror. *See* Thom Shanker & David S. Cloud, *Troop Increase Stirs Skeptics in 2 Parties*, N.Y. TIMES, Jan. 12, 2007, at A1; Jeff Zeleny & Carl Hulse, *Democrats Plan Symbolic Votes Against Bush's Iraq Troop Plan*, N.Y. TIMES, Jan. 10, 2007, at A1.

[113] Franck, *supra* note 107, at 151; *see also id.* at 155 ("The Security Council, in its case-by-case consideration of uses of force not in compliance with the strict letter of the Charter, has shown considerable acumen in interpreting the law so as to narrow the gap between its injunctions and the admonitions of ethical intuition."); *High-Level Panel Report*, *supra* note 61, ¶ 190 ("[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.").

recourse to force.[114] But at other times, the Security Council simply did not allow the recourse to force or has condemned such recourse, believing that there was no emergency and that the use of force cannot be part and parcel of an ordinary foreign and military policy.[115] If the United States had submitted itself to the jury of its peers in the Security Council and accepted its verdict on Iraq, we may have avoided the terrible situation that currently prevails in Iraq, and the great cost to this country in terms of servicemen and women injured and killed. In the Iraq case, it turned out that the political jury was right in its assessment of the evidence and the imminence of the threat.

Of course, the credibility of the jury is enhanced when it is a cross-section of the community. Admittedly, the Security Council is hardly a cross-section of the international community, but this fact simply acknowledges that the institution will have greater credibility if reconstituted to better reflect the diversity of the international community.[116] As imperfect as it is, the Security Council has in fact acted as a reasonably credible jury. In any case, it is not the lack of cross-sectionality that makes the U.S. government reluctant to submit itself to the judgment of the Council. Indeed, a cross-sectional political jury would likely be viewed as even less appealing.

In the war on terror, the executive branch has attempted to dispense with the legal jurying system and has essentially declared that there are no peer political institutions to act as political juries in either the domestic or the international realm. Because this is wartime, the executive branch views Congress not as a peer, but rather as a supporting institution.[117] However, there are signs that Congress may be starting to take its coequal status seriously.[118]

The resistance of the U.S. government to submit to the authority of the international jurying system is based on the implicit view of the exceptionalism of the United States. Exceptionalism in this sense has three versions: the United States has no political peers, as we live in a one-superpower world; international institutions are meant to facilitate, not constrain, the policies and actions of the United States; and the United States is always on the side of good.[119] The way to make the jury system work is to reject the idea of U.S. exceptionalism internationally and executive branch exceptionalism domestically, in the same way that we reject claims of exceptionalism (e.g. wealth or fame), at least formally, when legal juries preside over a case. The

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[114] *See* Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677, 685 (2004).

[115] *See id.* at 689.

[116] *See* Addis, *supra* note 67, at 612-16.

[117] *See* Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort To Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1.

[118] *See supra* note 112 and accompanying text.

[119] *See* Michael Ignatieff, *Introduction* to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 3-11 (Michael Ignatieff ed., 2005); Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1482 (2003).

first step of this process is to dispense with the idea that we live in a time of war, for the notion of war encourages the claim of exceptionalism on both grounds.

CONCLUSION

Institutional responses to extraordinary times can lead to either the formal or informal suspension of normal processes. The "war on terror" has appropriated the strategy of informal suspension. This strategy has had significant impact on the allocation of constitutional and international war-making powers as well as on the distinction between normalcy and emergency. The "war on terror" has also reshaped the identity of the United States. This identity can be analogized to an autoimmunity crisis, where in the name of fighting "the terrorist Other," the United States seems to be undermining the very principles and institutions that define it and may ultimately guarantee its immunity from the threats that terrorism poses. Terrorism is a social and political action by which the body politic is tricked to wage war against itself, to turn its own strength against itself. Contrary to the assertion of government officials and many commentators, what is needed to respond to the threats of terrorism is not to dispense with ordinary processes or to bend our institutions in the name of preventing their breaking. Rather, we need to reaffirm ordinary processes and the cultivation of normal moral perceptions to ensure that our responses to the threats do not end up disfiguring our institutions, our principles, and our very identity.

As Thomas Jefferson advises us, there is a bright constellation of nonnegotiable values that combine to form "the creed of our political faith."[120] If we wander from them in moments of alarm, we must take care to retrace our steps, for they alone lead us to "peace, liberty, and safety."[121] In response to the traumatic event of September 11, we may be wandering from the "creed of our political faith." It is time to retrace our steps. When politicians and policymakers believe it to be in society's immediate benefit to skirt the creed of our political faith, we must firmly speak out against the long-term costs to both safety and identity.[122]

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[120] Thomas Jefferson, The World's Best Hope, First Inaugural Address (Mar. 4, 1801), *reprinted in* THE SPIRIT OF AMERICA, *supra* note 2, at 348.

[121] *Id.*

[122] *See* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 620 (2003) ("What, then, is the proper role for the lawyer? Surely, it is to stand tall for the rule of law. What this entails is self-evident. When the policymakers believe it to society's immediate benefit to skirt the law, the lawyer must speak of the longer-term costs. When the politicians seek to bend the law, the lawyers must insist that they have broken it. When a faction tries to use power to subvert the rule of law, the lawyer must defend it even at some risk to personal advancement and safety. When the powerful are tempted to discard the law, the lawyer must ask whether someday, if our omnipotence wanes, we may not need the law.").