

Center for American Progress



SPECIAL BOOK FORUM:

“BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM.”

INTRODUCTIONS:

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FEATURED SPEAKER:

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PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM***

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MS. NEERA TANDEN: Hi. Thank you for coming this morning to the Center for American Progress. We appreciate it, especially on this slightly rainy Friday, after a lot that is going on the Hill and around town. As part of our mission at the Center when we started two and a half years ago, we wanted to bring new and innovative ideas from around the country to Washington. A lot of people complain about a stale debate in Washington and part of our mission over the long term is to help connect innovative leading policy thinkers to the debates here, especially focusing on ideas that are looking to solve the problems around the bend.

And in that vein we are very proud to welcome Bruce Ackerman here, who has over the last several decades provided the national policy debate very interesting thoughts on stake-holding, patriot dollars, and campaign finance reform and other ideas as such. Today he is going to talk to us about his new book, *Before the Next Attack*, which is looking at issues that are really vital to today's newspaper headlines. The issues behind NSA domestic wiretapping, are raised by this book in an interesting and innovative way; which is to say, Bruce really looks at what's going to happen if the United States is attacked again and what kind of legal frameworks we should have to in essence check presidential power.

As we see from domestic wiretapping and the discussions we have had over the last several months on this issue, the president does not under our normal framework feel compelled to follow the law as is. So Professor Ackerman is raising an important discussion for us in this as we debate these issues and we are proud to have him here today.

And I am especially pleased that Congressman Baird is here. Congressman Baird is one of the few members who have really been focusing on what does Congress do if we're attacked again. And a lot of people think that members often are not focused on the long term problems; they are more focused on the day-to-day, sexy headlines, but Congressman Baird has stepped up into the leadership to question whether Congress is really thinking these issues through. And when we really do face them, history will look very well on his actions, so we are very pleased to have him here today and thankful that he could make it.

Congressman Baird?

REP. BRIAN BAIRD: Thank you for the kind introduction and thank you all for being here. This is one of those topics that you'd prefer to not talk about or think about or think about, but we that we have to. Professor Ackerman, who I will have the privilege of introducing in a moment, and has done, I think, us a great service by introducing by raising some of these issues.

Let me share with you if I might how I became involved in this. When the second plane hit the World Trade Center, I called my staff together in our office on the seventh floor of the Longworth House Office Building, southeast corner office, and I said, “If they’ve hit New York,” – the second plane made it absolutely clear it was terrorists – “If they’ve hit New York, they will hit us as well today at some point. I want you to all be very careful. We will evacuate instantly on a fire alarm,” not in the usual lackadaisical manner that pre-9/11 everyone did.

Our office happened to face southeast and look directly out at National Airport and at the Pentagon. I then went in and talked to my wife, who was heading to a meeting at the State Department and advised her not to attend that meeting as I thought the State Department would be a pretty darn good place to set off a car bomb. It was less than three minutes later that a staff member yelled, “Brian come quick, something has just exploded.” I ran to the window and there was the fireball immerging from the Pentagon.

As I instructed my staff to evacuate the building – forgive my sexism here, but I sent the male staff floor by floor by floor to evacuate the lower floors. I stayed on the seventh floor, we got everybody out of that. I had a surreal experience of running through the building, realizing that the world had changed, wondering if my life would end very shortly having just seen the second building hit. And in those days, we had large trucks parked outside the building all of the time, delivering and removing goods and if it were a truck bomb it could be over very quickly. And then also as a legislator wondering, even as you thought of all those other things, even as I ran at top speed and got people out of offices, wondering, gee, what would happen constitutionally if they killed us all? It was a very surreal experience.

And I went home that night and got out the Constitution and got out the House Rules and got out every textbook that I could find on the subject and, lo and behold, it turns out we are ill prepared. I began to work on that matter and it turns out that my friend Norm Ornstein over at the American Enterprise Institute was doing much the same and he then published an editorial. He and I worked together and we were successful in getting a working group established within the Congress and a separate independent group established by the AEI and the Brooking Institute with Tom Mann, co-chaired by Lloyd Cutler and Alan Simpson. If ever there was a blue ribbon panel, this was it.

They did some outstanding work, which was published in this document, which if you’ve yet to read, I’d just commend it to you highly. And fortunately, actually, on the House side we had some great people. Chris Cox chaired a working group along with Martin Frost, David Vitter, Jim Langevin, were involved, Jerry Nadler, myself, some outstanding staff including John Williams and Matt Pincus, John Larson, Jim Langevin, looking at various aspects of continuity.

The unfortunate part is we couldn’t get much done in Congress. The leadership to the judiciary committee and the rules committee were dead set against not only our proposal, but in my judgment any feasible proposal. They offered up, as Dr. Ackerman will probably mention, I think a very quite unconstitutional rules change that would allow

as few as four or five people to constitute the House of Representatives, which was an oxymoron: four and five people representing an entire nation. The logic went, it is so sacrosanct that everybody who serves in the House be elected, that we would rather have no one in the House than someone appointed or temporarily chosen through alternative means.

I see John Williams is here by the way, he's got a very interesting law review paper coming out. What is the date on that John if I may ask?

REP. BAIRD: Sometime in the fall. I commend you to it. It's outstanding.

But the upshot is, here we are today and I just learned last week that the administration has nominated I think the fourteenth person in line for succession for the archives. So we know of a fourteen-person-long succession plan for the administration of archives, which is good because someone will have to be around to document the abuses of power that will occur in the absence of checks and balances, so I'm actually pleased that the archivists have continuity. (Laughter.) But I am not pleased that we do not, in the House, and that we have no, to my knowledge, plan for the Supreme Court.

What Dr. Ackerman has done so eloquently in this book is propose a fix to all three branches, and I may disagree a little bit on some of the fixes, but that why the debate is had. But what is so impressive is that he has looked at international ramifications and at all three branches of government and proposed, I think, some innovative ideas for how we can address that.

Dr. Ackerman has a very impressive biography. I want to just read you briefly a sterling – I called him Dr. Ackerman. It should be Professor Ackerman. I am corrected. Sorry. Professor of law and political science at Yale University, the author or coauthor of more than 15 books on political philosophy, constitutional law, public policy, including *The Stakeholder Society*, *Voting With Dollars*, and *Deliberation Day* – all published by Yale University Press. It is a privilege to introduce Dr. Ackerman.

I want to just underscore the importance of this topic by reading a very brief quote by Mr. Steve Chabot, the Constitution Subcommittee of the Judiciary Committee Chair, who said when asked if we needed a continuity plan in the Congress, Mr. Chabot said “No because the country is going to be under martial law anyway until we have elections.” (Laughter.) So who needs a Congress? Professor Ackerman and I see it a bit differently and I look very much forward to his remarks and am very grateful for his contribution to our society with this book. Professor Ackerman, thank you very much for being here.

(Applause.)

PROF. BRUCE ACKERMAN: Thank you very much. We panicked the last time terrorists struck and we will panic the next time. September 11th 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 tens of thousands of innocents, dwarfing the personal anguish suffered by those who lost family and friends on September 11th.

The political tidal wave threatens to leave behind a wave of repressive legislation far more drastic than anything imagined by the Patriot Act. A downward cycle threatens. After each successful attack, politicians will come up with a new raft of repressive laws that ease our anxiety by promising greater security, only to find that a different terrorist band manages to strike a few years later. This new disaster, in turn, will create a demand for more repression and on and on. Even if the next half-century sees only three or four attacks on a scale that dwarf September 11th, the pathological political cycle will prove devastating to civil liberties by 2050.

The root of the problem is democracy itself. A Stalinist regime might respond to an attack by a travel blockade and a media blackout, leaving most of the country in the dark; going on as if everything is normal. This can't happen here. The shock waves will ripple through the populace with blinding speed. Competitive elections will tempt politicians to exploit the spreading panic to partisan advantage, challenging their rivals as insufficiently tough on terrorism and depicting civil libertarians as softies or virtually laying out the welcome mat for our enemies. And so the cycle of repression moves endlessly forward with the blessing of our duly elected representatives.

Our traditional defense against such pathologies has been the courts. No matter how large the event, no matter how great the panic, they will protect our basic rights against our baser impulses, or so we tell ourselves. But it just isn't true. The courts haven't protected us sufficiently in the past, and they will not do a better job in the future. We need a strong and independent judiciary, but we need something more. We require an emergency constitution that allows for effective, short-term measures that will do everything plausible to stop a second strike, but which firmly draws the line against permanent restrictions. Above all else we must prevent politicians from exploiting momentary panic to impose long lasting limitations on liberty. Given the clear and present danger, it makes sense to tie ourselves to the mast as a precaution against deadly enticements.

In speaking of emergency constitution, I don't mean to be taken too literally. Almost nothing I propose will require formal constitutional amendment. The emergency constitution could be enacted by Congress as a framework statute governing responses to terrorist attacks. But this won't happen unless we conduct a constitutional conversation in the spirit of our eighteenth-century framers. As James Madison cautioned, "Enlightened statesmen will not always be at the helm."

To check the descent into despotism the framers created a system of checks and balances and I continue this tradition. My emergency constitution adapts our inherited system to meet the distinctive challenges of the twenty-first century. First and foremost, it imposes strict limits on unilateral presidential power. Presidents will not be authorized to declare an emergency on their own authority except for a week or two, while Congress is considering the matter. Emergency power should then lapse unless a majority of both

Houses votes to continue them, but even this vote is valid for only two months. The president must then return to Congress every two months and achieve an escalating majority. The next time around he has to get sixty percent of both houses, the next time seventy percent of both houses, the next time eighty percent, and eighty percent for every two months thereafter.

Except for the worst terrorist onslaughts, this super majoritarian escalator will terminate the use of emergency powers within a relatively short period. It will also force the president to think twice before requesting additional extensions, since he doesn't want to lose the votes. Defining the scope of emergency power is a serious and sensitive business and certainly not something to be resolved in a short conversation, but at its core it involves the short-term detention of suspected terrorists to prevent a second strike. Nobody will be detained for more than 45 days, and then only on reasonable suspicion. Once the 45 days have elapsed, the government must satisfy the higher evidentiary standards that apply in ordinary criminal prosecutions. And even during the period of preventive detention, judges will be authorized to intervene to protect against torture and other abuses.

My new book discusses these and many other matters at tedious length, but now I want to focus in on the basic concerns that actually motivated me in the first place. Words are the lifeblood of our constitutional life and we are off to a bad start in describing our current disease. The war on terror has paid enormous political dividends for President Bush, but it sends all the wrong signals for purposes of panic control. Calling the terrorist challenge a war tilts the constitutional scales in favor of unilateral executive action and against our tradition of checks and balances. There is something about the presidency that loves war talk. Almost two centuries ago, Andrew Jackson was already declaring war on the bank of the United States and more recent presidents have declared war on poverty, crime, and drugs. 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.

The war on terrorism isn't as obvious of rhetorical stretch as the war on poverty. Classical wars involved a battle against sovereign states and it may seem a smallish matter to expand the paradigm to cover struggles with terrorist groups, but appearances are misleading. Classic wars come to an end. Some decisive act of capitulation, armistice, or treaty signals the moment of termination and in a way that all of the world can see. This won't happen with the war on terror. If and when bin Laden is caught, tried, and convicted, it still won't be clear whether al Qaeda has survived. At best it will morph into countless other terrorist groups.

There are more than six billion people in the world; more than enough to supply terrorist networks with haters, even if the west did nothing – did nothing to stir the pot. So if we choose to call this a war, it will be endless. Here is where the emergency constitution provides a crucial alternative. If left to their own devices, presidents of both parties will predictably exploit future terrorist attacks by calling upon us to sacrifice more and more of our freedom if we ever hope to win this war.

But with an emergency constitution in place, collective anxiety can be channeled into more constructive forms. If I'm successful, a shocked nation will no longer turn on the TV to see the president pound the table and rededicate himself to winning the war on terror. It will hear a different message. And this is my first and last effort to be the president of the United States:

My fellow Americans, as we grieve together at our terrible loss, you should know that your government will not be intimidated by this terrorist outrage. This is no time for business as usual. It is a time for urgent action. I'm asking Congress to declare a temporary state of emergency that will enable us to take aggressive measures to prevent a second strike and seek a speedy return to a normal life with all our rights and freedoms intact.

I'm under no illusions. It will take a lot of work before we can construct an emergency constitution that will induce the presidency to forego the pleasures of war talk, especially given President Bush's initial success in persuading Americans to buy into this rhetoric. Thanks to the media's uncritical repetition of the president's mantra, everybody thinks it is obvious that we are in the middle of a war on terrorism. Many people disagree with the president's conduct of the war, but no serious politician denies that we are fighting one. This certainly wasn't John Kerry's message in the last election. And it's unreasonable to ask serious politicians to move beyond misplaced war talk without providing them with an alternative, and that's what I'm trying to do.

In offering up a constitutional alternative I'm not building from the ground up, I'm seeking to develop ideas and practices that are already in common use. As the Katrina episode reminds us, governors and presidents are frequently issuing declarations of emergency. Though this is less familiar, American presidents regularly declare emergencies in response to foreign crises and terrorist threats. My aim is to develop these well established practices into a credible bulwark against the presidentialist war dynamic. This is the best way of assuring that the morning after the next attack or the one after that, we will wake up free.

The success of this enterprise depends in part on the Supreme Court. If it decisively rejected extraordinary presidential actions in the name of the war on terror, it might help us, but the courts first encounters with this subject – and I'll talk a bit more about the (unintelligible) at the end – are not encouraging. We may be lucky; perhaps there will be no repetition of September 11th, or when the next strike occurs perhaps the sitting president will be a heroic defender of civil liberties and refuse to succumb to the political dynamics of fear and repression. But things might turn out worse the next time around.

Perhaps this sitting president will combine the simplistic beliefs of George Bush, the rhetorical skills of Ronald Reagan, the political wiles of Lyndon Johnson, and the sheer ruthlessness of Richard Nixon into a single toxic bundle. No constitutional design can guarantee against the very worst case and no constitutional design is needed for the

best of all possible worlds, but there is plenty of room in the middle and this is where human being tends to live their lives, and this is where the emergency constitution can make a big difference.

Consider that the war on terror will not only be endless, but is framed in a fashion that positively invites abuse. Terrorism is simply the name of a technique: intentional attacks on innocent civilians. But war isn't merely a technical matter; it's a life and death struggle with a particular enemy. We made war against Nazi Germany, not against the U2 rocket. Once we allow ourselves to declare war on a technique, we open up a dangerous rhetorical path. During times of panic, indiscriminate war talk encourages a shocked public to lash out at amorphous threats without the need to define them. Who knows who will be swept into the net?

There is another big flaw, by calling it a war we frame our problem as if it involved a struggle with massively armed major powers, people threatening our very existence as a free country, but terrorism is not the product of overweening state power; it is a product of the free market in a world of high technology. There have always been millions of haters in the world, but their destructive ambitions have been checked by the state's monopoly over truly overwhelming force. They might assassinate a nation's leader or blow up a building, but they could not devastate a great city or poison a region. These are things that only states could do. With the proliferation of destructive technologies, the state is losing this monopoly.

This is a world historical transformation – nothing else. This is where the free market logic enters. Once a technology has escaped a state monopoly, it's almost impossible for government to suppress the lucrative trade completely. Think of drugs and guns. Even the most puritanical regimes learn to live with vice on the fringes. But when a fringe group obtains a technology of mass destruction, it won't stay on the fringe for long. The root of our problem is not Islam or any ideology, but a fundamental change in the relationship between the state, the market, and technologies of destruction. If the Middle East were magically transformed into a vast oasis of peace and democracy, fringe groups from other places would rise to fill the gap in the market. We won't need to look far to find them. If a tiny band of extremists blasted the Federal Building in Oklahoma City, others will want to detonate suitcase A bombs when they become available.

Preventive measures will sometimes fail. Once the state no longer monopolizes the technology of destruction, the laws of supply and demand will inexorably put weapons in the hands of the richest and best organized terrorists in the world market place and government will be playing catch up. The only question – the only real question is how often the government will drop the ball. One out of ten threats? One out of a hundred? One out of a thousand?

These basic points are obscured by the fog of war talk. Real wars don't come out of nowhere because the government has dropped the ball, they arise after years of highly visible tension between sovereign states and after years of failed diplomacy. They occur only after the public has reluctantly recognized that the awesome powers of war making

might be justified. Even sneak attacks as in Pearl Harbor, are preceded by years of escalating tension that put the public on notice that a powerful nation state with an aggressive military force threatened overwhelming harm to all we love.

But when terrorists strike, all we really know is that they have managed to slip through a crack that the government failed to close. That's it. Given the free market in destructive technologies, we don't know whether we face a tiny group of terrorists – of fanatics who happen to have gotten lucky, or a more serious organization with real staying power. We just don't know. By lapsing into war talk, we trigger a set of associations that pretend that we do know, but they are often false and they invariably encourage the worst of public reactions.

We head down a misleading path, suggesting that not only the “terrorists,” numerous and well organized, but that they are somehow capable of wielding the earth-shattering forces mobilized by major nation states. This is very unlikely. Osama in his cave doesn't remotely represent the totalizing threat of Hitler and his chancellery. And yet in the aftermath of a terrorist attack, our expansive war talk invites us to suppose that we should confide to government the awesome powers that might well be appropriate in a totalizing third world war.

The emergency constitution is predicated on a more accurate description of our situation. We are reeling after a surprising blow and we just don't know whether the terrorists were just plain lucky, whether they have the capacity to organize a second strike, whether they are really seriously organized. So let's do what is necessary in the short run and buy some time to figure out what is appropriate in the longer run.

The short-term problem is the second strike. Though the government may be deeply embarrassed – will be deeply embarrassed by the initial attack, it's the only government we have. The terrorist strike will predictably generate bureaucratic chaos, but we should grant the security services extraordinary powers needed to preempt the second strike that may or may not be coming. This is the real danger at the moment, and we should focus all our collective energies on preventing it from happening, rather than launching a never-ending war on terror.

The war on terror not only invites and arouses the public to support an endless struggle against an amorphous enemy, it also makes it easier for the president to fight real wars against real countries. Although the Constitution grants Congress the power to declare war, the Supreme Court has ostentatiously refused to tell the president what a war is and when the consent of Congress is required.

This means that a president pondering an old-fashioned, classical war against a sovereign state has to prepare a political campaign on two domestic fronts. It isn't enough for him to convince ordinary Americans that it is right to fight one or another rogue state, he must also battle Congress for the right to make the final decision on whether to go to war. If it proves politically impossible for him to go to war without

gaining the consent of congress, he must try to squeeze the House and Senate into a political corner, giving them no choice but to rubber stamp his decision.

Transforming the problem of terrorism into a war helps the president on both domestic fronts. Under the traditional understanding, each war against a sovereign has to be justified on its own merit. The war against Afghanistan is different from the war against Iraq and so forth. But once the public is convinced that a larger war on terrorism is going on, these old-fashioned wars can be repackaged as mere battles, as in President Bush's famous description of Iraq as the central front on the war on terrorism.

Rhetorical repackaging also makes it easier for the president to win on his second front, enabling him to take unilateral action without the consent of Congress. Everybody knows that the president as commander-in-chief has the constitutional authority to initiate battles, the only question is whether he can start a new war, but if the war on terrorism is going on, then the invasion of a foreign rogue state is just a battle. In the absence of a Supreme Court intervention, this living constitutional discourse matters.

In contrast, an emergency constitution invites the public to discriminate between the domestic and foreign aspects of a terrorist threat – invites; doesn't require. It authorizes the president and Congress to take aggressive steps domestically to stop the second attack, but it does not provide any authorization for a foreign invasion. If such a thing is justified, it has to be considered separately in a different resolution – not much, but something.

No less important, the emergency constitution permits a far more modulated domestic response than the one invited by war talk. Once judges and lawyers allow themselves to describe our challenge as a war on terror, they are in grave danger of treating a terrorist attack as if it raised the same constitutional stakes as our life and death struggle against Germany and Japan. This is a fatal mistake. I do not minimize this terrorist threat, but we shouldn't lose all sense of historical perspective. Terrorism is a very serious problem, but it doesn't remotely – doesn't remotely suggest a return to the darkest times of the Civil War or the Second World War.

In confronting terrorism, we need to distinguish between two different dangers: the physical threat to the population and the political threat to our constitutional system. Future attacks undoubtedly pose a severe physical threat. Terrorist strikes may kill tens of thousands at a single blow, but they won't pose a clear and present danger to our political system. Even if Washington or New York were decimated, al Qaeda could not displace the surviving remnants of political authority with its own rival government and military force, but that is what the Axis powers wanted to do during the Second World War. The terrorists would remain underground threatening a second strike and it will be up to us to decide to see whether our panic overwhelms the Constitution of the United States; not them.

Our most terrible wars not only involved mass slaughter, but presented a genuine threat to the very existence of our government. Imagine that the Second World War

turned out differently. Rather than suffering a defeat at Stalingrad, Germans had conquered Moscow and invaded Britain while the Japanese had won the Battle at Midway and later landed on the West Coast. At that point, our future as an independent Republic would have been at stake. Call this an existential threat to the nation. It occurred then and it occurred during the Civil War, and it was precisely this existential threat that Lincoln invoked to justify suspending habeas corpus.

I'm going to quote a very famous line: "Are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?" The one being the habeas corpus. Lincoln was acting to sustain political survival, not to reduce the tragic loss of life. His efforts to save the Union certainly increased the loss of life, not diminished it. If he had been interested in saving lives, he would have let the South go, as Buchanan wanted.

This fundamental point is erased by the remorseless repetition of the war on terror to describe our present situation. If the struggle with terrorism counts as a war, it is all too easy for lawyers and judges to cite the real war precedents of Lincoln and Roosevelt as if they were germane to our present predicament.

The legal mind understands one thing: war is war. If it's a war, then all the precedents in war apply to war. How could it be refuted? This is not a war. The Supreme Court, though, is already on the verge of making this mistake. I won't go through a tedious recitation of the decisions, but just emphasize the last and really very serious decision or non-decision in the Padilla case this week by the Supreme Court. Padilla, as you recall, is the American who was detained at O'Hara Airport. He had no weapons. He was in civilian clothes. And then he was confined for more than three years – three years as an American citizen without any hearing, without any notice of the charges. Attorney General Ashcroft went on television and accused him of being in a conspiracy to use a dirty bomb against the American city, which – a charge which was very soon retreated from and eliminated and – but this was – nothing was told to Padilla.

All we know about Padilla is he changed his religion and went to Islamic countries. Well, the Constitution permits people to change their religion. And you know, free people can go to countries. Of course, the president thinks he knows many other things, but he didn't say what they were to Padilla and then finally after more than three years, the case is about to go before the Supreme Court and finally the – Padilla is passed on to the civilian courts for criminal charges unrelated – entirely unrelated to the television show that the attorney general presented to the American people. This is incredible. This is martial law on one person.

And now because the Supreme Court of the United States has refused to hear this case, it will stand as a precedent after the next attack. The *Washington Post* in last August announced – reported that for the first time in our history, the Pentagon has a martial law plan for the United States. When the legal justifications for this martial law plan were asked of the Pentagon, the senior person in the judge advocate general's corps invoked the commander-in-chief power. This single precedent left standing by the

Supreme Court – we’ll see whether it will be vacated in the Fourth Circuit, but it’s been left standing in the Supreme Court – does open up the prospect of a legal order worthy of Stalinist Russia.

Suppose in contrast that Congress had glimpsed miraculously the tragic possibility of September 11th and had adopted a framework statute that – of a kind that I’m suggesting that required escalating supermajoritarian approval for emergency detentions. Can there be any doubt that three years after September 11th, the required 80 percent supermajority with long since have vanished? Even if Congress had rejected my proposal to limit individual detentions to 45 days, the termination of the emergency would have put the government to the test: either convict Padilla of a crime before a jury of his peers, or set him free.

Under the system of political checks and balances established by an emergency Constitution, Padilla would have received due process long ago. So here we are. We have a serious problem, but it makes no sense to call it a war and ask the commander-in-chief to make war against his fellow citizens. We must invite our fellow Americans and encourage Congress to build a new system of checks and balances that will withstand the tragic attacks and predictable panics of the 21st century. This is a promise of the emergency Constitution and if we fail to fulfill this promise, our children may live to see the end of a constitutional government in America.

Thank you.

(Applause.)

MR. ACKERMAN: Not a happy talk. (Laughter.)

MS. TANDEN: Questions?

MR. ACKERMAN: Yes? David?

Q: Hi, Bruce. My question is really why you think the emergency Constitution would be an alternative to war talk? And I ask that for two – sort of for two – from two perspectives. First, sort of as a – you know, much of what you talked about was the power of the rhetoric of war talk and that’s certainly been in evidence, but much of what – of course, much of what the administration has done has not been through the literal exercise of war powers. The Patriot Act – nothing the Patriot Act turns on whether it’s a war or not. The freezing of charities’ assets, the designation of terrorists is under an emergency framework statute, much like you identified, called the National Emergencies Act. And the International Emergency Economic Powers Act doesn’t turn on a war; it turns on declaration of emergency. The material witness detentions turned on a criminal statute. The roundups after 9/11 of over 5,000 foreign nationals turned on the use of immigration law; not in any way turned on any legal status of a war.

So it seems to me that there's plenty of legal mechanisms out there that are not tied to war and nonetheless rhetorically we see the war talk. You would add an emergency – some further emergency provisions, but we'd still hear – it seems to me, hear the war talk as rhetorical matter and it doesn't – it's not apparent why that would go away.

The second sort of perspective from which you could ask this question is, well, it could well be that it's an emergency and it justifies war.

MR. ACKERMAN: Yes.

Q: Right? And so for example, the attack on us on 9/11 was recognized by the world as an armed attack. The UN recognizes an armed attack. NATO recognizes an armed attack justifying a military response. We had 120 countries that signed on to the military response. It was authorized by Congress in the way the Congress today declares wars – by authorizing military force. And so, yes, it was an emergency, but it was also a war and it is – you know, in a sense, it's not a war on terror but it's a war on al Qaeda. So it seems to me that having a domestic emergency mechanism in place, number one, doesn't stop the war talk rhetoric, which is much of what you talked about, and number two, doesn't displace the possibility that a war would be justified in addition to emergency powers. So how does creating an emergency Constitution actually help respond to the concern? I agree with the sort of temptation to use war talk rhetorically to amass tremendous executive power.

MR. ACKERMAN: Well, we have to look to the future, David. I mean, these are very thoughtful questions. We have to look to the future. We're just at the beginning of this problem and we have to ask ourselves what this country is going to look like and respond to after the terrorist attacks of 2013, 2021, 2035 coming from places as diverse as Montana and other places, not only the Middle East. We should look at what's happening right now in a diagnostic spirit, however, and I'm not optimistic that any set of institutional structures of checks and balances trying to reassert them will succeed. I'm not optimistic that they will be adopted and I can't tell you that I'm optimistic if they will succeed. It's what will happen if they don't succeed here and that's the question.

First, it's true that we have Emergency Acts of the 1970s in response to the Church Commission and all of this, and I am building on this. I'm building on this. I'm not – there were some very serious defects in the Emergency Act, which my kind of supermajoritarian escalator, forcing the president to go back to the Congress rather than forcing Congress to take actions, are intended to respond to.

Moreover, if some hardy politicians say, "Yes. We should be tough on the terrorists through an emergency Constitution," there create – I'm giving them – maybe no one will take it – a different way of talking to the American people about this problem, which says, "I understand your concerns, you know, but let's not call it a war." Whether they're responsible politicians who will stand up and do that is a fine question, but if everyone keeps on the opposition as well as the administration – and mind you, we're

talking about the dynamics of war talk which have a long history. You know, talking about George Bush here. If everybody is saying, “Yes. There is this war on terror. We have to be tough on this war on terror. I’m really criticizing the present administration for not being tough enough on this war on terror.” Well, that has consequences to the political life of the country.

Second, what can legal form accomplish? And you know, the Framers thought quite a lot. Checks and balances; quite a lot. A new effort to have – could the president – and mind you, this – I don’t want to talk about George Bush here, I’m talking about 2017. We don’t know who’s going to be president of the United States. The will – if we actually had a way of talking to the American people in 2017, which evidences serious concerns, but it’s accommodated within this new structure of the emergency Constitution, will a president so cavalierly violate the law? Well, I ask the question.

You know, I had some matters – you know, my little paragraph about “if men were angels, we wouldn’t need the Constitution; if they were devils, well, we’re in bad shape.” But they really are normal human beings most of the time, you know. So I do think that legal form matters in a self-conscious debate of the kind that Congressman Baird tried, but hadn’t succeeded in promoting, which – I mean, Congressman Baird’s problem is part of this larger problem. Well, you know, I think that a new rhetoric is more than rhetoric.

Finally, if we have these two institutional forms, since the Supreme Court is not going to help us out, and we have one debate on should we extend the domestic state of emergency and then there’s another debate on should we authorize the invasion of X country. Well, that’s all that a legal form can promise. We see in the use of force resolution after Afghanistan how easy it is for the president to project something which was an authorization of a foreign invasion into an authorization of a domestic one, and this legal form would separate the two out.

But, you know, reasonable people can defer as to how important this is even if we were under propitious political conditions, but I have a very negative view as to if we don’t do something – it’s a relatively good time to think about this. Four-and-a-half years out of the – after the trauma and before the next one and hopefully it will be, you know, in the next decade rather than the next few years. This is as good as it’s going to get, however odd and terrible that might sound.

Yes? Yes, you.

Q: Bruce, a couple of questions – short questions. First, you seem to have articulated two different rationales – two different rationales. One is to prevent a second strike, which certainly seems like a short-term objective. The second that you started talking about later in your talk was to save the government – that there is a sort of imminent threat to the continuation of democratic or constitutional government. I wonder if you could talk a bit more about that. That, though, does seem to me to be

much more open-ended and potentially could justify a much broader range of martial law-like restraints.

And so I wanted to ask you, just following up on David's question, he enumerated a whole series existing emergency powers that the president can deploy, both with respect to detention and many other areas, freezing assets and so I won't repeat all of them, but quite a panoply of available presidential emergency powers now. So I guess my question is what would you add to those? You mentioned a reasonable suspicion requirement for detentions, although presumably that would be on the president's say-so and it's not a very high standard, of course, for making arrests. But would you also authorize – well, first, will that be a kind of constructive suspension of habeas corpus –

MR. ACKERMAN: Yes.

Q: – in which case does that not look like an attempt to override the congressional requirement that or the constitutional requirement that only Congress can suspend habeas corpus? But also would it extend to other powers? Could the president take over the television and radio stations? Could the president occupy neighborhoods, order curfews, and the whole range of militaristic limitations?

MR. ACKERMAN: I imagine that after this election, perhaps we'll be in a political context in which we could have some kind of Church examination of these issues. Just as happened in the 1970s, old state of emergency provisions and we reconsidered what ones make sense. I'm not in position to say – you know, I'm not an expert on all these issues and no one is. You'd actually have to have a serious conversation. I should emphasize though that by – I mean, in the positive scenario, of course, the exercise of writing an emergency Constitution could lead to a disaster. It's saying something very serious. I mean, you know, our Constitution from the – is an enlightenment Constitution. It's premised on the idea that people, by self-consciously thinking ahead, can make things better. That's the spirit of the enlightenment and I – you know, like I'm not a post-modernist, people, from Yale University; I am a proud citizen of the enlightenment. I think we can still do that, but I could be wrong. That's up to us.

So maybe – and that's why civil libertarians would have to be in there really fighting if we actually did this, but all these issues that you're raising would be, you know, serious issues and we'd have to think about it and we would repeal some of the emergency authorities which don't have this supermajoritarian escalator into them. And at the present time, the president can just do it on his own really and challenge Congress to protest. That's basically what the structure is. I don't want to go into details.

Now, on habeas corpus: yes. I conceive this emergency Constitution as a limited suspension of habeas corpus. That's what it is. That's why the supermajority rule which is central is constitutional. I do not believe that the Congress of the United States has the constitutional right to create a supermajority any time it wants to on any issue it wants to. I think the baseline is majority rule except in the seven, I think it is, express stipulated conditions: two-thirds to override a veto, that kind of thing.

However, precisely because the U.S. Constitution puts its face against the suspension of habeas corpus and limit it only to cases of rebellion and invasion, and a terrorist attack isn't clearly any either of those, especially one attack, you know, is an ongoing invasion, et cetera. At the very best, Congress is exploring the borderland of its Constitutional authority and that's why it's right for Congress to say, "Okay. We'll suspend it for two months, but if you want to suspend it for four months, the case has to be more compelling." And that's the rationale for – my rationale for the supermajoritarian escalator.

Then I am not – you see, I am a person who wants bring in political checks and balances on executive authority, not that I don't want to have also judicial checks. It would be much easier if, for example, Congress refuses to authorize two more months and the president gets on television and says, "The nation needs me," et cetera and so forth, my emergency Constitution says the Supreme Court shall issue immediately writs of habeas corpus because there is no constitutional authority to suspend it anymore.

So I want to bring back the political checks and balances system in a self-conscious way and I think it also would make it easier to have effective judicial intervention as the Padilla – you see, I want to emphasize: Padilla is a tragedy. This is the best possible time for the Supreme Court to have said, "No. You cannot do what you did to Padilla." Three years without even telling him what the charges are. This is – and, you know, the trauma is gone, the president isn't very strong. This was the moment to put down something and they didn't do it. Well, how much more courageous are they going to be after the next attack? You know, I hope more courageous, but, you know, this is optimism of the will, but pessimism of the intellect, I'm afraid.

MR. : Last question?

MR. ACKERMAN: Whichever. I'm sorry I'll answer your question now.

Q: What would your emergency Constitution do to Posse Comitatus?

MR. ACKERMAN: Revise it. It would revise it.

Q: In what way?

MR. ACKERMAN: Well, I don't know. I mean, you see – but for sure the Posse Comitatus provision at the present time is both archaic and inadequate. The president at the present time – in the sort of Homesian, bad man, predictive mode, you know, of what's going to happen after a massive attack. What's going to happen is the president of the United States will take advantage of the explicit except vague exception to the Posse Comitatus Act to say that he has legal authority under Article II as commander-in-chief to order the military into action and that the Supreme Court decision in Milligan after the Civil War is not apposite. And then the good guys will sue for two or three years while the president exercises martial law. That's what will happen under the Posse Comitatus

Act. It's not what I want to happen, but – and I believe that a self-conscious thought about the conditions of the use of the military should be integrated into it.

Now, I should emphasize that if we look around the world, emergency provisions are of basic part of modern constitutions – more elaborate emergency provisions are basic part of modern constitutions. It's rather our antiquated Constitution – you know, the Framers – God bless them – did not think about the terrorism problem in its modern guise and, you know, people, these antiquarians say, “Oh, well, you know, there were Indian raids.” Listen, we have our own problem. It's a Republic if you can keep it. The Framers did not design a sort of automatic eternal motion machine. We have to renovate it and adapt it in the spirit of checks and balances in our tradition. That's all that I'm really arguing for.

Well, thank you.

(END)