I. "NEITHER GENIUS NOR SAINT"

Earl Warren was not a man of commanding intellect or compelling style. In many ways, he was no match for the notorious personalities that surrounded him at the United States Supreme Court: forceful men who displayed the elegant brilliance of Robert Jackson, the driving bravado of Felix Frankfurter, the caustic ego of William O. Douglas, the firebrand spirit of Hugo Black, the patrician intellect of John Harlan, the feisty liberalism of William Brennan. Earl Warren was the colourless member of this cast; avuncular and understated in demeanour, Warren was so lacking in distinction he did not have a middle name. Yet he managed the cacophonous clashes which erupted between men who were gifted but impossible. When he retired as Chief Justice of the United States, Senator Edward Kennedy observed in simple but accurate terms that "[a]s Earl Warren led the Court, the Court led the Nation." One paradox of his legacy is that a man of such modest ability attained singular achievement; an earlier biographer described it as a case of "low gear greatness." Warren's genius lay in what he did, not who he was.

1. Irving Stone, Earl Warren, A Great American Story (New Jersey: Prentice-Hall, 1948) at 169. Writing of Warren as Governor of California, Stone went on to say that "I like all active men he has made his quota of mistakes, but they are mistakes of the head and never of the heart." He added that one of Warren's toughest Democratic opponents had admitted that "[y]ou can get Earl Warren in the ring, but at the end of fifteen rounds he comes out with his hair unmussed."


4. Pollack, supra note 2 at 338. In Chapter 1, titled "The Warren Paradox," Pollack, at 3, excerpts a passage from John Gunther's Inside USA, which states that Warren "has the limitations of all Americans of his type with little intellectual background, little genuine depth or coherent political philosophy." Gunther went on to describe Warren, in 1947, as "a man who has probably never bothered with an abstract thought twice in his life" and as "no more a statesman in the European sense than Typhoid Mary is Einstein."
Earl Warren’s public life can be neatly bisected into two periods: elected office in the state of California followed by appointment to the United States Supreme Court. As a young man Warren rose quickly in state politics and, after serving as Attorney General, became Governor of California. A master in the art of nonpartisan politics, he held office from 1943 to 1953 and would be the first person in state history to be elected to a third term in office. Ever a presidential hopeful at this time, Warren came closest in 1948, when the Dewey-Warren ticket nearly won the election. It was fateful that his bid for the Republican nomination failed in 1952, because it prompted Eisenhower—as the President-Elect—to make a rash promise that the next U.S. Supreme Court nomination would go to Warren.

When Chief Justice Fred Vinson died suddenly in September of 1953—between the Court’s two hearings in *Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas, et al.*—Warren ruthlessly held Eisenhower to the promise. Once sworn in as the fourteenth Chief Justice of the United States, he would preside over the Supreme Court from 1953 to 1969. Fear was the watchword of the 1950s, as the American public struggled with McCarthyism and the desegregation of institutions which had practised “separate but equal” for more than half a century. The 1950s gave way to the 1960s, the hopes and dreams of the civil rights movement, and the waves of protest caused by an unpopular war being fought abroad. As Chief Justice of the United States, Warren administered the oath of office to four presidents—Eisenhower, Kennedy, Johnson, and Nixon—and otherwise kept a high profile as head of the commission which investigated the assassination of President Kennedy and produced the report which bears his name. Meanwhile, he led the Supreme Court as no other Chief Justice ever has, either before or since his time, and was once dubbed “the Norman Rockwell” of the judicial system. His would be “the age of judicial heroism” and by the time Warren retired, the Court had engineered a judge-made revolution which transformed the meaning of the Constitution.

5. A Republican victory was so widely anticipated in 1948 that the Chicago Tribune carried the erroneous headline, “Dewey Defeats Truman” in its early edition election news. Newton, supra note 2 at 214.
6. Ibid. at 6–7. Eisenhower reportedly placed the call to Warren in December 1952 to let him know, “I am back here selecting my Cabinet, and I wanted to tell you I won’t have a place for you on it.” He continued by saying, “[b]ut I want you to know . . . that I intend to offer you the first vacancy on the Supreme Court.” When Warren acknowledged his generosity, Eisenhower replied: “That is my personal commitment to you.” See Bernard Schwartz, *Super Chief, Earl Warren and the Supreme Court—A Judicial Biography* (New York: New York University Press, 1983) at 2 [Schwartz, Super Chief].
8. *Plessy v. Ferguson*, 163 U.S. 537 (1896) was the United States Supreme Court’s infamous “separate but equal” decision, which legitimized segregated facilities until the Court declared the separate school system unconstitutional in *Brown I*, ibid.
9. Chapter 22 of Newton, supra note 2 at 409–50, entitled “The Longest Year,” covers the assassination of Kennedy, Warren’s eulogy to Kennedy, and his leadership of the President’s Commission on the Assassination of President John F. Kennedy (“the Warren Commission”).
Invariably, what is written of his life and legacy is admiring. Most of the biographies concentrate on the Supreme Court years, and certain decisions have generated a literature of their own. Against an extensive body of work, one wonders what another full-scale biography can add at this point in time. Unlike so many of Warren’s biographers, Jim Newton, the author of *Justice For All: Earl Warren and the Nation He Made*, is neither an academic nor a former law clerk; he is not even a lawyer. As a long-time reporter, editor and bureau chief at the *Los Angeles Times*, Newton writes from the perspective he knows—that of a journalist.

Whether serving as Governor of California or Chief Justice of the United States, politics was the driving force which seamlessly defined Earl Warren’s life. Attempts to shoehorn him into a more academic mold as a jurist come up short, because that is not who he was. Warren’s approach to law was informed by the ideas, values, and goals of his political career, and leadership skills that were forged in the world of politics enabled him to embed those values in the law of the Constitution. Under this interpretation of Warren’s character there is little discontinuity in his two careers: he was, first, foremost and always a politician. That is one reason why Newton’s approach, which understands the man in this way, suits the Warren legacy so well.

*Justice For All* is not an intellectual history of the Warren Court, nor is it a book about the philosophy of law or the legitimacy of review. Earl Warren, “the least abstract of men” and “in no way a man of theory,” did not fret about the dilemmas or boundaries of review. As an earlier biographer suggests, he was less complex and more consistent than some supposed. Far from being an enigma, Warren was simply “an old-fashioned American humanist who happened to believe with all his heart that ‘law floats in a sea of ethics,’” and who maintained—as Chief Justice of the United States—that “[t]he ordeal of judgment cannot be shirked.” It was a combination which, in the time, place, and manner of his life, would make him one of the most important Americans of his generation.

---


II. GREAT IDEAS WITH LITTLE MEANS

The Kern County High School Class of ’08 in Bakersfield, California wrote a will which included this entry from one of its graduates: “I, Earl Warren, will to Lorraine K. Stoner my ability to slide through, doing as little work as possible.” If Warren was often or easily underestimated he did not mind, because he knew it gave him a strategic advantage. Though as Newton reveals, the man who was considered intellectually ordinary harboured a lifelong interest in poetry and, as a septuagenarian, was willing to read Eldridge Cleaver’s Soul on Ice—albeit at his grandson’s request. Whatever his academic limits may have been, Warren understood the power of words, and he knew how to speak from the heart. The essence of the man, his ideals, and his humanity are captured in this well-known passage from Warren’s book, A Republic. If You Can Keep It:

Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouse of treasures.

Warren’s family was a haven of stability for a young boy growing up in Bakersfield, California, a frontier town which Newton describes as “chaotic and free-wheeling.” As a child, Earl Warren saw and felt what it was like to be less privileged, and that background was the template for the humanity which would be constant throughout his public life. Though the source of Warren’s ambition was less clear, Newton points to one event in his young life that made a formidable impression. One day his father, Methias, took Earl to hear Acres of Diamonds, an inspirational lecture by the well-known platform orator, Russell H. Conwell. Newton describes Conwell’s delivery as “[r]eligious in fervor, moral in tone, and yet practical in its advice.” His lesson to listeners was that “[g]reatness consists not in the holding of some future

20. Newton, supra note 2 at 499. As for Soul on Ice, Warren reportedly told his grandson that “I understand the man’s anger” and added, “W]hat a shame that our generation and past generations have created a world that promotes such rage.” Warren, who took great pride in being “square,” earnestly asked his grandson, “[h]ow can you respect a man who uses such bad language?” Newton also notes, at 37–38, that as a university student at Berkeley, Warren founded a poetry society.
21. Ibid. at 516–17.
22. Ibid. at 19.
23. Conwell was the founder of Temple University, a lawyer, a Baptist minister and an orator whose “Acres of Diamonds” lecture was delivered more than 6000 times in towns and cities across the United States. See ibid. at 22.
24. Ibid.
offic e, but . . . in doing great deeds with little means." In the case of at least one member of that audience, the message was prescient. Conwell maintained that "[h]e who can give to [his] city better streets and better sidewalks, better schools and more colleges, more happiness and more civilization, more of God, he will be great anywhere." Of all the lectures I heard in my youth," Earl Warren would declare many years later, "this one made the greatest impression on my young mind."

III. "Out-new Dealing The New Deal"

Readers who are anxious to reach the Supreme Court years should not skim the chapters on Warren’s career in state politics. The roles may have been different, but whether as Governor of California or Chief Justice of the United States, Earl Warren was much the same man. In state politics he implemented policies that were so progressive at times he seemed Republican in name only. At his first inaugural address, on January 4, 1943, Governor Warren stated his "adherence . . . to a policy in all government activities which reflects a sincere desire to help men, women and children and to unfold the best that is within them." He highlighted the nonpartisan approach he would take by pronouncing that "[n]o clique, no faction and party holds priority on all the rights of helping the common man." Newton reports that no member of the majority Republican legislature applauded a single line in his speech. The same year, in describing Warren to Franklin Delano Roosevelt, Robert Kenny boasted that "[e]verything we have in California is better than it is anywhere else" and added—in reference to Warren—that "[e]ven our Republicans are better than Republicans anywhere else."

Warren was unquestionably a great ameliorator, but he was also a man of unrequited political ambitions. He was on the Republican ticket in 1948 and ran an unsuccessful campaign for the party nomination in 1952. Toward the end of Eisenhower’s first term when it was unclear whether the president would seek re-

25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid. at 185. Assemblyman George Collins stated, "[W]arren is] trying to out-New Deal the New Deal."
29. Harvey, supra note 12 at 23–24 states, "[p]erhaps his major objective was to ameliorate, by the most appropriate means, those everyday concerns facing the California populace, such as health insurance, higher old age pensions, improved protection for workingmen, and education; in short, he believed in "moderate but steady improvement for persons of modest means through state action."
30. Newton, supra note 2 at 168.
31. Ibid.
32. Ibid.
33. Weaver, supra note 18 at 95. Newton, supra note 2 at 195–97 notes that Kenny later ran against Warren for the Democrats, in 1946, and was clobbered.
election, he toyed briefly with the thought of running in 1956. But by then, he had become Chief Justice of the United States, some say, by sheer force of will. As noted above, after passing him over for the cabinet late in 1952, Eisenhower promised Warren the next vacancy on the Supreme Court. It was fortuitous that Warren had already announced his decision not to seek re-election in California and was preparing for a move to Washington, where he had agreed to serve as Eisenhower’s solicitor general, when Fred Vinson died. It is part of the legend around Warren’s appointment that Eisenhower never contemplated or intended that Warren be named Chief Justice. Undeterred, the Governor let it be known, through determined lobbying carried out on his behalf, that “[t]he first vacancy means the first vacancy.” If it overstates the point to say that Warren bullied the president, at the least it is clear that Eisenhower resented being held to the bargain. The president was “stuck” with a Chief Justice whose decisions were a constant irritant during the years of the Eisenhower administration.

While looking after his own ambitions, Warren took pleasure in the failures of others, most notably Richard Nixon. Though the two men detested one another, their careers were intertwined, first in state politics and then in Washington, where Nixon served as vice-president in the Eisenhower administration before being elected president of the United States, some years later, in 1968. From Nixon’s first bid for congressional office in 1946 to the day Warren died—which, ironically, was the same day Warren learned that the Supreme Court had voted to decide against Nixon in the Watergate tape case—the relationship between the two men was characterized by “Nixon’s resentment of Warren and Warren’s contempt for Nixon.” In documenting the details over the years, Justice For All shows the depth and extent of the animosity between these men. A telling example is the moment of camaraderie and schadenfraude Kennedy and Warren shared aboard Air Force One while travelling to Eleanor Roosevelt’s funeral. Nixon had just lost the gubernatorial election in California and made a speech which blamed the press for his loss. The Chief Justice pulled a handful of press clippings from his pocket, showed them to Kennedy, and the two laughed “like schoolboys” about Nixon’s defeat.

34. *Newton*, *ibid.* at 9.
35. Two examples are *Brown I*, *supra* note 7, and the Court’s “Red Monday” decisions, as noted by Newton. See *ibid.* at 314–15 and 354–55.
36. Justices Brennan and Douglas paid Warren a visit in the hospital on the day the case was heard. After Warren stated to Douglas that “[t]he old Court you and I served so long will not be worthy of its traditions if Nixon can twist, turn, and fashion the law as he sees fit,” the two men assured him that he would not be disappointed in the Court. *Ibid.* at 514. Warren died later that day, on July 9th, 1974. The Court rendered its historic decision on August 5th and Richard Nixon resigned the presidency four days later, on August 9th 1974. See *United States v. Nixon*, 418 U.S. 683 (1974).
37. *Newton*, *supra* note 2 at 199.
Justice William Brennan, Jr., reportedly enjoyed baiting his law clerks by asking them to name the most important law and then listening, for a moment, as they ventured their guesses. At a certain point he would raise his "tiny hand" and exclaim, in triumph, "[f]ive! The law of five." With five votes you "can do anything around here." 39 Perhaps in part because Warren was truly a master of Supreme Court realpolitik, Brennan coined the nickname "Super Chief" for him. 40 If it was unimaginable that all members of the Court would sign the desegregation opinion in Brown I, 41 it was hardly less remarkable that the Warren Court rendered so many landmark decisions, across so many controversial issues. In doing so, the Court was often divided, but Warren—like Brennan—knew exactly how "the law of five" worked.

Felix Frankfurter was known to disparage Warren as "[t]hat Dumb Swede," and once complained that reading one of the Chief Justice's opinions was akin to "eating rancid butter." 42 In kinder terms, an outside observer described each Warren opinion as "a morn made new—a bland, square presentation of the particular problem in that case almost as if it were unencumbered by precedents or conflicting theories." 43 Newton agrees that "nontechnical justice" might be the best way to describe Warren's approach to decision-making. 44 The craftsmanship was not as important to Warren as the result, and "[o]pposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic value approach." 45

Warren's was the age of judicial heroism, and to read Justice For All is to be reminded how many landmark decisions there were, and how much they changed the law of the Constitution. 46 Never one to overcomplicate matters, Earl Warren had lit-

41. Supra note 7.
42. Newton, supra note 2 at 347, adding that the opinion in question amounted to "crude, heavy-handed, repetitive moralizing."
43. White, supra note 12 at 217 (quoting commentator Anthony Lewis).
44. Newton, supra note 2 at 476, describing Warren's dissenting opinion in Time, Inc. v. Hill, 385 U.S. 374 (1967), and rhapsodizing that Warren was "always in search of 'nontechnical justice,' always touched by the real lives of those whose conflicts brought them to his Court, the real struggles of parents, the real consequences of law; his strong intuition for people, honed in his years of politics, allowed Warren to appreciate the underlying human consequences" of the litigants' struggle, in Hill, against Life magazine.
tle difficulty naming his own favourites. His choices, in order, were Reynolds, Brown I, and Gideon. Though each case spoke to values that were especially important to Warren—egalitarianism, democratic inclusion, equality and fairness—Warren was particularly fond of the voting rights cases and his own line in Reynolds that “[l]egislatures represent people, not trees or acres.”

On retiring from the Court, Warren described his conception of the Court’s role in simple and compelling terms. “[W]e have no constituency,” he said. “We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences.” To that, he added, “[a]nd conscience is sometimes a very severe taskmaster.”

When asked what his major frustration had been during his time on the Court, Warren replied that he could not think of any, because it had not been a frustrating experience. When asked how he would like his Court to be remembered, he replied “[a]s the People’s Court.”

Though much of the terrain in Justice For All is familiar, Newton brings the dynamics of the era straight into the story. In retelling the stories of how major cases were decided he consulted all available sources. These accounts typically portray Warren as calm and even “Gibraltorlike” in the fray of a fractious and obstinate brethren. Nor does Warren lose his humanity and his compassion for those not treated fairly or equally. Newton tells the story of an overnight retreat Warren took into Virginia while the segregation cases were pending. When his chauffeur returned to the hotel the next day to pick him up Warren realized that the man had spent the night in the car. The Chief Justice was embarrassed and ashamed when he realized that his driver could not get a room because of segregation.

Newton leaves arid debates about judicial review to the scholars and relies, instead, on his instincts and training as a reporter. In doing so, he allows readers to see Warren and his Court as a force in the sweep of history. He juxtaposes key decisions, like Gideon, with key events like Martin Luther King Jr.’s Letter From the


47. Reynolds, ibid. Newton, supra note 2 at 425, states, “Reynolds stood on its own, and it, along with Baker v. Carr, came to be the opinions that Warren valued above all others.”

48. Gideon, supra note 46. See Newton, supra note 2 at 493.

49. Reynolds, supra note 46 at 562, cited in Newton, ibid. at 424.

50. Pollack, supra note 2 at 294.

51. Ibid.

52. Ibid. at 295.

53. Ibid.

54. Newton, supra note 2 at 391 (quoting Brennan’s description of Warren’s support for him during internal debate about Baker, supra note 46).

55. Ibid. at 315.

56. Supra note 46.
Far from being an onlooker, Warren’s Supreme Court is on the front lines in this book; it has immediacy and presence, and it plays a role in shaping the events of its time, many of which unfolded from the Court’s own decisions.

**V. WE ARE ALL YOUR STUDENTS**

John F. Kennedy admired Earl Warren and the two men had a short, but intimate, relationship before Kennedy was killed. On Warren’s birthday in 1963, months before he was assassinated, the President sent a fond birthday message to the Chief Justice: “Although [it is] not possible for all of us to be your clerks,” he wrote, “in a very real sense we are all your students.” Justice For All also recognizes that there is much to admire in Warren’s life, but gamely draws attention to some of the man’s lesser moments.

Newton emphasizes that despite being Attorney General at the time, Warren was never held accountable for the wartime internment of Japanese Americans. Nor did he consider it imperative, despite being asked repeatedly to do so, that he apologize or even comment. Newton also chronicles the controversy and resistance that accompanied the Warren Court’s jurisprudence, which prompted movements to impeach the Chief Justice, and found expression in a nasty cross-burning episode. Still, he presents the reaction to Warren as part of the current of history, and not in the service of deeper reflections on how he used his powers as Chief Justice to promote the values he held dear. Newton cites with approval the words of Warren himself, who once said, “[i]t is the spirit and not the form of law that keeps justice alive.”

An earlier biographer suggested that if Warren “took occasional liberties with his judicial prerogatives, as some detractors contend, this criticism will fade in time.” Yet as subsequent events show, it was optimistic to predict that opposition to the Warren Court’s activism would fade over time. Jeffrey Toobin’s recent book, The Nine, chronicles the rise of a conservative majority at the Court and its power, at this moment, to undermine or overrule the iconic precedents of liberal constitutionalism. While some of the precedents at risk are Warren Court decisions, others, such as Roe v. Wade, were decided by the Burger Court but are anchored in the work of

---

57. Newton, supra note 2 at 397–400.
58. Ibid. at 405.
59. Ibid. at 385–87 (describing the John Birch Society’s efforts to impeach Warren). At 342, Newton reports that crosses were burned at the Warrens’ residential hotel and the home of Felix Frankfurter, among others, in protest of the Court’s decisions.
60. Ibid. at 516.
61. Pollack, supra note 2 at 368.
62. Supra note 39.
63. 410 U.S. 113 (1973) [Roe]. Roe was based on Griswold, supra note 46, a key decision of the Warren Court on privacy rights.
the Warren Court. It may be no accident that Newton has written uncritically, and with a certain longing, of Earl Warren and the Warren Court legacy. *Justice For All* brings that legacy back to the present, at a time when its values are being threatened.

The larger point is that what many celebrated as an age of judicial heroism with Earl Warren at the helm has evolved, according to some, into an era of judicial villainy under his successors. From this vantage it appears that each generation of American constitutional history is destined to re-learn the lesson that a Chief Justice and his or her court can exercise their powers for liberal or not-so-liberal reasons. President Kennedy was correct in declaring that we are all Warren's students and we continue to this day to be students of his Court's work. But we are students, not only of the liberalism for which his Court is so famous and so greatly admired, but more importantly of the power of review itself. In that regard, *The Nine* concludes with the compelling observation that the Court is a product of U.S. democracy and it represents, “with sometimes chilling precision, the best and worst of the people.”64 That, it seems, is as true of his predecessors and his successors as it was of Chief Justice Earl Warren.

*Jamie B. Cameron*
Professor
Osgoode Hall Law School
York University

64. *Supra* note 39 at 340.
Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism

by Bruce Ackerman


Franklin Delano Roosevelt famously warned his compatriots during the Great Depression that "the only thing we have to fear is fear itself." Few would argue that the perils confronting liberal democracies today are strictly psychosomatic. Terrorism, weapons of mass destruction, pandemics and ecological crises supplement the habitual cacophony of economic uncertainty, regional conflict and (with the re-emergence of an assertive Russia and the ascendency of economically buoyant China and India) great power rivalry. All of these menaces risk real harm to those in their path. Nevertheless, as in Roosevelt’s day, their greatest destructive capacity may come from the self-immolation that fear of these possibilities prompts liberal democracies to inflict on themselves.

Fear, mixed in some cases with a healthy dose of hubris, may precipitate blunders like the Iraq War, a conflict that by credible estimates has enhanced the risk of terrorism and the prospect of regional conflict. Fear (and the need to be seen to act) may galvanize responses to the terrorism threat that significantly erode the civil liberties differentiating democratic states from the terrorist ideologues they oppose. A case in point: the sucker-punch dealt by White House lawyers to the prohibition on torture and cruel, inhuman and degrading treatment—once among the firmest of international rules—will likely redound to the detriment of the rule of law far into the future.2

These, and other events cast up by the events of 9/11, are evidence for the need to act in response to perceived or real emergencies without overreacting. Accomplishing this objective requires ground rules set firmly in law—a law that is flexible enough to allow appropriate and measured responses to uncertainty, but not


2. See e.g. the US government legal memos on torture reproduced in Karen J. Greenberg & Joshua L. Dratel, eds., The Torture Papers: The Road to Abu Ghraib (New York: Cambridge University Press, 2005).
so pliable that it is no law at all. Yale Law Professor Bruce Ackerman’s thought experiment, *Before the Next Attack*, strives to provide a template for such a law. In a nutshell, his project is to design a legal framework that permits dramatic action in the face of immediate terrorist emergencies, but snaps back to something close to the pre-emergency civil liberties *status quo* with the passage of time.

I. Emergencies and the Rule of Law

The challenge of designing such a law is acute. Democracies are built on a system of checks and balances that constrain the exercise of power. Yet, emergencies often, if not usually, require the exercise of power. Moreover, this power must be implemented swiftly and with resolution. While law applicable in normal situations diffuses power, emergencies concentrate it.

Canada has lived this experience. In the 1970 October Crisis, the federal Cabinet debated whether to rely on executive powers under the *War Measures Act* to authorize the detention of suspects in Quebec or to enact special legislation. Then Justice Minister John Turner urged recourse to Parliament, but noted that with letters from the political and police authorities in Quebec, the government could proclaim the *War Measures Act*, rendering unusual police raids and detentions legal. The government could then go to Parliament asking it to approve further, more specialized legislation. In other words, the executive branch could exercise powers immediately, leaving the potential delays associated with the parliamentary process to another day. In the end, Cabinet chose to rely on the *War Measures Act*, authorizing extraordinary police powers.

Canada learned from the October Crisis that during political emergencies, the executive branch is typically strengthened at the expense of the legislative and judicial branches. Urgency tends to trump sober second thought, and the rule of law may be suspended for a perceived greater good. "[S]ociety," argued Prime Minister Pierre Trudeau three days before the *War Measures Act* was invoked, "must take every means at its disposal to defend itself against the emergence of a parallel power which defies the elected power in this country..."

---

5. "The FLQ Situation" in Cabinet Conclusion of the Privy Council Office (15 October 1970, afternoon), Ottawa, (RG2, Series A-5-a, vol. 6359) at 5, online: Library and Archives Canada <http://data2.collectionscanada.ca/e/e001/e000002984.gif> ["The FLQ Situation"].
7. In fact, these fears of delays explain in part the government’s ultimate decision to invoke the *War Measures Act*. "The FLQ Situation," *supra* note 5 at 6 (Prime Minister Trudeau explaining that there was no way legislation could be put through all its stages to authorize action before the next morning).
II. THE FOG OF EMERGENCIES

Emergencies also create confusion. As Prime Minister Trudeau observed in the course of Cabinet discussions prior to the invocation of the War Measures Act, one only knows after the fact whether one is facing an insurrection or not. The level of uncertainty prompted by an emergency is not, however, the same in every case. On one end of the spectrum are "clear" emergencies. In recent Canadian history, these are usually natural disasters, such as the Manitoba flood of 1997 or the central Canadian ice storm of 1998. Other such clear emergencies are unexpected, but non-catastrophic systems failures, like the blackout of 2003 in central Canada and the eastern US.

The course of action to be followed in responding to natural or accidental disaster emergencies is usually uncomplicated. If a sizeable portion of a region is flooded, flood interdiction, search and rescue, and financial, medical and material assistance are the order of the day. If power supplies are disrupted, restoring electricity and accommodating essential services pending the return of power are the priorities. Further, with these sorts of crises, the duration of the emergency is reasonably certain: floodwaters recede, electrical supplies return. Emergencies like these may require the assistance of the military or the deployment of extra policing resources to deter civil unrest. Nevertheless, although a truly catastrophic natural or artificial disaster could undermine Canadian democracy, calamities like these have not historically disrupted democratic practices or institutions. Whether this pattern will remain true in the face of global threats of climate change or infectious diseases remain unknown at the time of this writing.

More problematic to any democracy, historically, are political emergencies: a state of war, an insurrection, a terrorist threat or strike, or the like. Citizens can turn on their televisions or even glance out their windows to have a clear sense of the gravity and immediacy of a flood or ice storm. The scope of political emergencies is more difficult to assess. In this respect, political crises are less "empirical" than natural or artificial disasters. Perhaps most troubling, the uncertainty prompted by this "fog of war" may be motivated by other concerns. Thus, emergencies are most corrosive of democracy where, as Michael Ignatieff puts it, they are "proclaimed on grounds that involve bad faith, manipulation of evidence, exaggeration of risk, or the prospect of political advantage." Democracies may be particularly prone to overreaction and the politicization of emergencies. As Ackerman notes:

A Stalinist regime might respond to a terrorist attack by a travel blockade and a media blackout... This can’t happen here [in the United States]. The shock waves will ripple through the populace with blinding speed. Competitive elections will tempt politicians to exploit the spreading panic to partisan advantage... And so the cycle of repression moves relentlessly forward, with the blessing of our duly elected representatives. 11

Ultimately, a government’s assessment of the scope of a political emergency, and the propriety of the government response to it, are difficult to second-guess. This uncertainty is particularly problematic where, as is usually the case, political emergencies require that those constituting the threat be interdicted quickly, before they compound the danger. Moreover, deciding whether political emergencies have abated is also tremendously difficult. As Ignatieff has noted, the problem with these sorts of emergencies is that “only the executive has sufficient information to know whether they remain justified. Hence the speedy termination of emergencies remains a recurrent problem. Electorates and legislators are invariably told by their leaders, ‘If you only knew what we know...’ in justification of the continued suspension of civil liberties.” 12 The result may be a prolonged state of emergency, and measures designed to give the executive branch extraordinary and temporary powers may persist.

All told, therefore, emergencies—particularly political emergencies—may constitute a serious threat to democracy. Discussing the current “war on terror,” Ignatieff proposes that “[i]n a long twilight war, largely fought by secret means, the key issue is maintaining as much legal and legislative oversight as is compatible with the necessity for decisive action.” 13 To this end, any assessment of emergency action obliges three questions: first, is the action authorized by law; second, are the extraordinary measures authorized by this law proportional and adequately linked to reasonable assessments of the threat; and, third, does the law contain provisions for the review and termination of these extraordinary powers.

III. WAR, CRIME AND EMERGENCIES

How well does Ackerman’s “emergency constitution” stand up to this three question test? Before the Next Attack is divided into two main sections: the first a diagnostic of the terrorist peril confronted in the post-9/11 era and the second, a prescription spelling out the contours of a responsive legal regime.

In his diagnosis, Ackerman heaps contempt on the “war on terror” concept, a rhetorical device that has sat uneasily with conventional understandings of armed conflict in international law. Certainly, modern terrorism has slipped past constraints

11. Supra note 3 at 2.
12. Supra note 10 at 51.
13. Ibid. at 39.
on the use of destructive force once monopolized by states alone. Fringe groups are now potentially the possessors of weapons of mass destruction, able to wreak horrific destruction even if nine times out of ten they are unsuccessful in deploying these weapons. And a single use of these weapons would change the paradigm forever, inalterably affecting the political landscape. Nevertheless, a single blow, no matter how extreme, would not constitute an existential crisis to the US analogous to that posed by the American Civil or the Second World War. In Ackerman’s words, “[e]ven 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.”

There is a danger, therefore, in invoking the war meme to describe the current struggle against terrorism: that metaphor may drive government and policy makers to look to precedents devised in the dark days of the American Civil War and the Second World War to justify significant erosions of civil liberties. To drive home his point, Ackerman traces the uncertain path of the US courts in two terrorism proceedings, *Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*, to demonstrate the problematic power-grab engineered by the executive under the banner of the President’s powers as commander-in-chief. Hamdi was a US citizen detained at Guantanamo after being captured in Afghanistan. Padilla is a US citizen seized in a Chicago airport. Both were initially declared enemy combatants by the Bush administration, sparking a series of court decisions with ambiguous holdings on the propriety of the government’s action. In Ackerman’s assessment, “[t]hese cases present a unique threat to the survival of the republic. If the president can throw citizens into solitary confinement for years on end, our democracy is in very deep trouble.” Aliens are even more vulnerable in times of war than citizens. Ackerman traces the troubling history of repressive measures directed at foreign nationals during times of war in American history, warning that the focus in combating terrorism must not be on nationality but on likely terrorists, irrespective of their national origin.

The war paradigm, for this and other reasons, is not the appropriate lens through which to view the terrorist threat. Nor, argues Ackerman, does the conventional criminal law supply a useful analytical tool. The criminal law model addresses crimes that do not undermine what Ackerman calls the “effective sovereignty” of the state—that is, the state’s promise to its citizenry to keep the basic security situation in check. Terrorism attacks that effective sovereignty. Moreover, it creates a fog of uncertainty—will the first attack be followed by another and how can that second attack be pre-empted? The criminal law flounders in this atmosphere of doubt.

17. *Supra* note 3 at 35.
The proper response to a large-scale terrorist attack is, therefore, a state of emergency; one that allows the "usual suspects" to be rounded up on standards of evidence much lower than the conventional probable cause employed in conventional criminal proceedings. In Ackerman's proposal, persons could then be detained for a one-time period of up to forty-five days as the government pursues its investigations to develop conventional cases against detainees, with those innocents captured in this dragnet ultimately compensated financially for their hardship.

IV. Political Checks and Balances

At first blush, this system bears similarities to that actually now in use in the UK, a jurisdiction that permits extended detention without trial in terrorism matters while the police conduct investigations. At the time of this writing, the maximum duration of this preventive detention stood at 28 days, with new proposals afoot to double this period. Ackerman is scathing, however, in his assessment of UK anti-terrorism measures. His model imagines extraordinary detention powers existing only for a finite period of time, in response to an emergency. The UK system constitutes a standing system, normalizing extraordinary limitations on liberty.

Indeed, the better part of Ackerman's second section entitled "Prescription" is directed at staving off this normalization and confining emergency limitations on liberty to true emergencies. Here, he develops the formidable idea of a "supermajoritarian escalator" as the key check on normalization of the extraordinary. An emergency can be declared unilaterally by the executive, but only for a brief period while the legislature reassembles. That emergency can only be declared in response to an actual and not simply an anticipated attack, to minimize the risk of political manipulation of threats. Moreover, this attack must be massive, with an event of the magnitude of 9/11 constituting the minimum threshold for triggering an emergency.

Subsequently, the state of emergency "should expire unless it gains majority approval. But, this is only the beginning. Majority support should serve to sustain the emergency for a short time—two or three months. Continuation should require an escalating cascade of supermajorities: 60 percent for the next two months, 70 for the next, and 80 for each subsequent period." This escalator blunts the possibility of semi-permanent states of emergency, carried by bare majorities while thousands are rounded up and detained on flimsy grounds. By the time the escalator reaches 80 percent, a modest minority controls the persistence of the emergency measures. As

19. Supra note 3 at 92.
20. Ibid. at 80.
Ackerman urges, "[m]odern pluralist societies are simply too fragmented to sustain such broad levels of support [for continuing an emergency]—unless, of course, the terrorists succeed in striking repeatedly with devastating effect." Put another way, absent legitimate reasons for prolonging the emergency, most democratic states will revert to the regular law. Moreover, the looming prospect of the escalator will curb the executive, leaving it wary of invoking emergencies too readily or abusing its powers during that emergency, only to be shut down in reasonably quick order by the legislature. In this fashion, "[t]he supermajoritarian escalator will shorten the state of emergency and soften its administration . . . ."

V. The Role of the Judiciary

Courts would also have a role in this emergency constitution. The judicial function is attenuated in the immediate aftermath of an attack triggering the emergency declaration. At best, the courts should be charged with insuring that the executive is responding to an event that properly triggers the emergency powers. However, the courts are in no position to truly second-guess the situation in its immediate aftermath, and should show caution in this role.

Still, courts would play a supervisory function in relation to detentions during the state of emergency, albeit of a rudimentary nature. Thus, detainees would be taken promptly in front of a judge, not for a full judicial hearing, but in a sort of arraignment in which the government is obliged to put the grounds for their suspicion on the record.

This limited judicial oversight derogates from the traditional habeas corpus remedy, a limitation discussed further below. However, Ackerman urges that this perfunctory judicial involvement at least precludes truly arbitrary detention, especially because manufactured justifications for detention could then be penalized in a lawsuit further down the road. At the same time, Ackerman also underscores the need for firm prohibitions on torture as a tool of interrogation and an abiding right to counsel, even during the emergency period.

The most critical role for courts is, however, to preserve the emergency constitution itself. An obvious dodge around the supermajoritarian escalator is the passage of new legislation, by simple majority, that accords the executive extraordinary powers without the close legislative oversight and reconsideration anticipated by Ackerman's plan. This possibility is an acute one. Although Ackerman speaks of an emergency constitution in the US context, what he in fact describes is a legislative

21. Ibid. at 81.
22. Ibid. at 83.
23. Ibid. at 108.
apparatus that does not require constitutional amendment. As such, it is vulnerable to repeal, revamping or outflanking.

Ackerman envisages the courts as guardians of the emergency constitution, empowered to “strike down any legislation that significantly erodes the need to obtain supermajoritarian approval for extraordinary powers.” Certainly, there is no firm constitutional provision in the US or in Canada that would allow courts to respond in this manner to the otherwise unassailable rights of legislators to adjust laws passed by prior legislators. Nevertheless, Ackerman urges that even if courts cannot step in the path of repeal, they should be particularly assertive in reviewing the emergency measures introduced by the legislature (or by the executive, through executive fiat) in lieu of the emergency constitution. In the US context, emergency legislation permitting detention without trial would require a suspension of the writ of habeas corpus, a derogation permissible in the US constitution only in times of “Rebellion or Invasion [when] the public Safety may require it.” Courts should be deferential to suspension of this habeas protection when that suspension is part of an emergency constitution with a supermajoritarian escalator. Confronted with laws stripped of this check, however, Ackerman proposes that courts review claims of rebellion or invasion strictly and sceptically.

VI. ASSESSING THE “EMERGENCY CONSTITUTION”

Ackerman’s final chapter proposes means of insuring the continuity of government in the event that Washington itself and the key figures in the executive, legislature and judiciary are incapacitated. However, it is his proposals for time-limited states of emergency permitting important derogations from civil liberties, curbed by a supermajoritarian escalator, that have sparked animated discussion. These critiques are not rehearsed here. Rather, the focus in this penultimate section is to assess Ackerman’s emergency constitution against the three question test posed above: first, is the action authorized by law; second, are the extraordinary measures authorized by this law proportional and adequately linked to reasonable assessments of the threat; and third, does the law contain provisions for the review and termination of these extraordinary powers?

As the discussion above suggests, Ackerman’s proposal is geared almost exclusively at addressing the first and third questions. His emergency constitution is law,

24. Ibid. at 105.
25. U.S. Const. art. 1, § 9, cl. 2.
satisfying the first requirement, but law that is focused on framing the circumstances in which an emergency may exist and endure. It does little to flesh out in much detail what can happen during that emergency. As noted, Ackerman develops the idea of preventive detention during an emergency and precludes the prospect of torture. He also acknowledges (in passing) that emergencies might necessitate other measures, including curfews, evacuations, compulsory medical treatment, search and seizure powers, surveillance, asset freezing and seizure, federal intrusion into state powers, domestic deployment of the military and arms control. He does not spell out, however, the circumstances in which any of these measures might be necessary or justified. Put another way, once the emergency constitution is in place and so long as the supermajoritarian escalator is honoured, the executive has virtual carte blanche.

For this reason, Ackerman does not grapple meaningfully with the second question in the three-part assessment of emergency law: are the extraordinary measures authorized by this law proportional and adequately linked to reasonable assessments of the threat? He essentially hopes that excesses will be held in check, not by active judicial scrutiny during emergency, but by the prospect of ex post facto exposure and liability.

However, neither of these constraints on abuse during the emergency is particularly satisfactory. Exposure and democratic sanction may be well and good if the measures taken offend a majority of electors. Where they instead target a minority—Japanese in the Second World War and perhaps Muslims in the modern context—disgust may not be so widespread as to chasten elected officials preoccupied with majority and not minority sentiments. No elected official, for example, has paid the price for the abuse of prisoners at Iraq’s Abu Ghraib prison. There has been no ground surge of disgust among the electorate. Accountability has stopped in the lower ranks of the US military, with perpetrators of maltreatment of detainees labelled a “few bad apples.”

This same experience casts substantial doubt on ex post facto legal liability as an effective check. Creative use of firewalls and tactics of plausible deniability might insulate elected officials from legal liability for the actions of their underlings, and remove the incentive for close supervision of the extraordinary powers unleashed by the emergency constitution. In other circumstances, the constraints of legal liability may be more overt. Witness the recent promulgation of laws in the US expressly immunizing executive officials from liability for abusive interrogation techniques employed post-9/11.28

27. supra note 3 at 96.
In sum, Ackerman's emergency constitution creates a legal doughnut: a regime with a robust exterior circumscribing the zone in which the law works differently, but missing a middle describing in sufficient detail just what that *sui generis* law should permit. Ackerman's idea does not preclude the "black hole" often invoked to describe post-9/11 legal inventions (such as Guantanamo Bay), but instead carefully traces its contours.\(^{29}\)

VII. LESSONS FOR CANADA

Ackerman's emergency constitution might usefully be contrasted in this final section against the state of the law in Canada.

A. Canada's Emergency Law

Canada's key emergency instrument is the 1988 *Emergencies Act*\(^{30}\) [the Act]. The Act anticipates four categories of emergencies that can be triggered by the executive: public welfare emergency, public order emergency, international emergency and war emergency. Each of these concepts is carefully defined, and the Act describes the circumstances in which the emergency can be invoked, the extraordinary government powers it extends and how these states of emergency may be terminated. Moreover, while the Act is silent on the role of the courts, silence on this issue likely leaves intact conventional court review powers under administrative law and the *Canadian Charter of Rights and Freedoms*\(^ {31}\), even during a declared emergency. Indeed, when the law was enacted, the government clearly contemplated judicial review of emergency measures.\(^ {32}\)

In these manners, the Act measures up well against the first and second questions in the three-part test of emergency law discussed above. In relation to the third question, rules on terminating emergencies, the Act also fares well. Firstly, each of the different sorts of emergency expire automatically after varying periods of time, unless renewed in Parliament. Secondly, Parliament can proactively quash an emergency declaration and measure through simplified procedures. A motion for confirmation of any declaration of emergency must be tabled in Parliament within seven sitting days after the governor-in-council issues an emergency declaration. If either chamber votes down the motion, the declaration of emergency is revoked.\(^ {33}\) Even when a declaration of emergency is


\(^{32}\) See *House of Commons Debates*, vol. 12 (25 April 1988) at 14765 (Bud Bradley).

\(^{33}\) *Emergencies Act*, supra note 30, s. 58 (In section 60, the Act sets out similar provisions for the continuance or amendment of a declaration of emergency, although without the requirement that Parliament be summoned if the continuance or amendment occurs when Parliament is not sitting).
affirmed, Parliament may act subsequently to revoke it.\textsuperscript{34} Meanwhile, every order or regulation made by the governor-in-council pursuant to its powers under the Act must generally be tabled in Parliament within two sitting days, where it may then be revoked.\textsuperscript{35} As a final accountability mechanism, the governor-in-council must call an inquiry into the circumstances resulting in the declaration of emergency with 60 days of its termination. The report of this inquiry must be tabled in Parliament within 360 days after the end of the declaration.\textsuperscript{36}

All told, these rules ensure Parliament may intervene and quickly annul an emergency declaration it judges inappropriate. The law does not include a supermajoritarian escalator, a fact that Ackerman signals out as a criticism of the Canadian system.\textsuperscript{37} But unlike Ackerman's emergency constitution, the Act does not purport to suspend constitutional rights. Instead, the legitimacy of any such curtailment of constitutional rights would be decided in the courts and perhaps measured against section 1 of the \textit{Charter}.

Section 1 obviously permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."\textsuperscript{38} It seems likely that courts would be prepared to endorse some abridgment of rights under section 1 in a good faith emergency.\textsuperscript{39} Section 1 is best viewed, however, as a justification for a constitutional violation, not an \textit{ex ante} authorization. Its applicability would be assessed in adjudication after a crisis has passed, if ever. Notably, much that appears necessary at the time of an emergency may be deemed excessive in the cool after-gaze of constitutional adjudication. The constitutionality of a government action in a time of crisis could not, therefore, be predicted with certainty in advance. This uncertainty would counsel caution by the executive.

\begin{itemize}
\item \textsuperscript{34} \textit{Ibid.}, s. 59 (If ten Senators or 20 MPs file a motion with the Speaker seeking revocation, this motion is taken up within three sitting days after it is filed. Debate may continue for no more than ten hours, at which point the vote is called. If adopted by the relevant chamber of Parliament, the declaration of emergency is revoked).
\item \textsuperscript{35} \textit{Ibid.}, s. 61. See \textit{ibid.}, s. 61(2) (A motion may be brought by no fewer than ten Senators or 20 MPs calling for the revocation or amendment of a given order or regulation. This motion must be considered within three sitting days, and debated without interruption until the House is ready for the question. If one chamber adopts the motion, and if the other concurs, the order or regulation is revoked or amended. The Act also provides for a Parliamentary Review Committee, comprising members from each official party in the Commons and at least one counterpart Senator. An order or regulation is referred to this committee within two days). See \textit{ibid.}, s. 62 (The committee may then adopt a motion revoking or amending the order within thirty days. The committee is also charged with reviewing "[t]he exercise of powers and the performance of duties and functions pursuant to a declaration of emergency." It is required to report to Parliament on the results of this review at least once every 60 days, and more frequently in specified cases).
\item \textsuperscript{36} \textit{Ibid.}, s. 63.
\item \textsuperscript{37} \textit{Supra} note 3 at 93.
\item \textsuperscript{38} \textit{Charter}, supra note 31, s. 1.
B. Canada's Emergency Constitution

For these reasons, Canada's Emergencies Act is, on balance, a much more satisfactory instrument than Ackerman's emergency constitution. It may not, however, be potent enough to deal with the emergency Ackerman anticipates. It is difficult to imagine that it would allow the dragnet arrest of suspects on dubious grounds witnessed during the October Crisis and contemplated by Ackerman, even with the application of section 1.

The evident risk, therefore, is that in a real emergency on the scale imagined by Ackerman, the Act would fall by the wayside in favour of a rapidly enacted statutory regime that does transgress constitutional rights. This possibility begs the question: does Canada have an emergency constitution, in the true sense of the term?

Canadian constitutional law generally does not expressly anticipate abridgment of rights in the event of emergencies. However, the “notwithstanding” clause in section 33 of the Charter allows Parliament or the provincial legislatures to remove a statute from Charter scrutiny by explicitly indicating that it operates “notwithstanding” the Charter. This immunity persists for five years, subject to any renewal.

Critically, this section applies to most, but not all, rights in the Charter. It does not authorize Parliament to negate the democratic rights in sections 3 to 5. These democratic rights affirm the right to vote (section 3), limit the duration of a House of Commons to five years (subsection 4(1)) and require annual sittings of Parliament (section 5).

As a result, subject to the following discussion of subsection 4(2) of the Charter, if Parliament were to rely on section 33 to negate the Charter's civil rights sections in response to an emergency, it could not also rely on section 33 to deny voting rights to citizens, or prolong its existence past the five years anticipated by subsection 4(1).

This pattern suggests that hanging over the head of any section 33 invoking Parliament is the possibility of electoral displeasure.

Subsection 4(2) of the Charter is the obvious Achilles' heel in this system. It provides that “[i]n time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament ... beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons ...” Since constitutionally “Parliament” consists of the Queen, usually in

40. Charter, supra note 31, s. 33.
41. Ibid., s. 3.
42. Ibid., s. 4(1).
43. Ibid., s. 5.
44. The importance of s. 4's immunity from s. 33 has been noted by the Supreme Court. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 65, 161 D.L.R. (4th) 385 [Secession of Quebec cited to S.C.R.] (Holding that the democratic principle said to reside in the Canadian Constitution "is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.").
45. Supra note 31, s. 4(2).
the person of the Governor General, the Senate and the Commons, subsection 4(2) should be read as authorizing the continuance of the Commons by a two-thirds vote of the Commons, a majority vote of the Senate, and assent by the Governor General. Once this continuance is obtained, the same House of Commons that employs section 33 to curb civil rights could also insulate itself from electoral pressure for the duration of a "real or apprehended war, invasion or insurrection."

Exactly how parliamentary reliance on subsection 4(2) could be policed is unclear. Presumably, the courts could review the existence of a "real or apprehended war, invasion or insurrection." How aggressively a court would query the judgment of the political branches of government on this issue is an open question, especially where the emergency justifying the invocation of subsection 4(2) is "apprehended" rather than real. There is a real possibility, in other words, that subsection 4(2) could inhibit efforts to hold the government accountable in times of emergency by rendering the Commons immune to electoral displeasure.

Given these possible weaknesses in the constitutional superstructure, it is here that Ackerman's supermajoritarian escalator might usefully be applied. A supermajoritarian escalator might and should be grafted onto any emergency law that suspends constitutional rights through invocation of section 33. The net effect would be to render it increasingly difficult for a government to transgress Charter guarantees with the passage of time.

VIII. CONCLUSION

The real world of national security has few of what former US Defense Secretary Donald Rumsfeld famously called "known knowns"—things we know we know. As Rumsfeld noted: "We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones."47

In making these statements in 2002, Rumsfeld was dismissing the absence of actual evidence linking Saddam's Iraq to terrorist organizations. The resulting Iraq war may be the proof of how a policy of action built on suspicion may precipitate its

own crises. Still, it is true that in the fog of war, a lawyerly requirement for evidence prior to action may mean no action at all.

US Vice President Richard Cheney reportedly sought to overcome this problem by pronouncing the so-called one percent solution, a doctrine in which US authorities act as if a threat of terrible attack is confirmed where there is a one percent chance of it occurring. This approach, if actually applied, would quickly drive otherwise even-handed officials to extreme responses.

The Cheney doctrine's emphasis on action even in the face of uncertainty does, however, underscore an important dimension of national security: preemptive action may have to be grounded in suspicions, rather than based on the probabilistic standards used to justify action in other areas of the law.

It is exactly this possibility, and the risk it poses to civil liberties and the rule of law, that Ackerman's emergency constitution seeks to address. The mechanism he proposes goes part way. It limits when and how precipitously action in the face of uncertainty may be taken. It does not, however, say enough about what cannot be done during this period, and makes too little of the role conventional judicial checks and balances might play in reigning in abuses. Canada's Emergencies Act answers some of these concerns, carefully categorizing and defining different gradations of emergency authorizing differential responses depending on the nature of the emergency and preserving a reviewing role for courts. Ackerman's chief contribution comes, however, in imagining what features an Emergencies Act on steroids—one that emphatically derogates from constitutional rights by invoking section 33—might usefully include. This "Emergencies Act plus" must preserve the careful definitions of emergencies and emergency measures and maintain a meaningful court role. In addition, however, grafting a supermajoritarian escalator onto this regime may well be the key ingredient in a system that facilitates government action while guarding against overreaction.

Craig Forcese
Associate Professor
Faculty of Law, Common Law Section
University of Ottawa