

3. ARBITRARY DETENTION IN THE UNITED STATES AND THE UNITED KINGDOM – SOME POST-9/11 DEVELOPMENTS

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I. Introduction

One of the most fundamental human rights is the prohibition against arbitrary detention. Since its codification in the Magna Carta, the prohibition against arbitrary detention has become a recognized and integral component of due process. It affirms an individual’s right to liberty and restricts the government’s ability to infringe on that liberty. The prohibition against arbitrary detention is one of the core features of the United States Constitution. Indeed, it has been affirmed in national constitutions throughout the world. Equally significant, it has also been recognized by virtually every multilateral and regional human rights instrument.

Despite such consensus, many countries have sought to derogate from this fundamental norm in recent years.¹ In some cases, individuals are detained without charge. In other cases, they are held without access to counsel or with no right to seek judicial review of their detention. Foreign nationals are often victims of arbitrary detention.

This Essay examines the international prohibition against arbitrary detention and the limited right of derogation under international law. It also reviews how two democracies – the United States and the United Kingdom – have adopted mandatory detention procedures against suspected terrorists.² Specifically, both countries

have authorized the indefinite detention of foreign nationals who are deemed to pose threats to national security.³

II. Arbitrary Detention under International Law

Few concepts are more fundamental to ordered liberty than the right to be free from detention in the absence of incarceration pending trial or other disposition of a criminal charge. This basic principle of human rights can be traced to the seminal document on personal liberty and civil governance – the Magna Carta.

Drafted in 1215 to check the abuse of power manifested by the English monarchy, the Magna Carta proclaimed that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”⁴ Since its affirmation in the Magna Carta, the prohibition against arbitrary detention has limited the unfettered power of governments to detain individuals. It has been affirmed in national constitutions throughout the world, including the United States Constitution.

Equally significant, the prohibition against arbitrary detention has been recognized by virtually every multilateral and regional human rights instrument of the twentieth century. Numerous sources of international law – multilateral and regional treaties, U.N. General Assembly resolutions, statements of U.N. agencies, and decisions of international and regional tribunals – are uniform in their condemnation of arbitrary detention.

The Universal Declaration of Human Rights (“UDHR”) is the most well-recognized and respected elaboration of international human rights norms. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). It is acknowledged to embody the rules of customary international law in the realm of human rights.⁵ Article 9 of the UDHR provides that “[n]o one shall be

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subjected to arbitrary arrest, detention or exile.” According to the *travaux préparatoires*, the term “arbitrary” was meant to protect individuals against both illegal and unjust laws.⁶ Therefore, even an arrest or detention implemented pursuant to an existing but unjust law could be categorized as “arbitrary.”

The International Covenant on Civil and Political Rights (“ICCPR”) formally codifies the prohibition against arbitrary detention. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Article 9(1) provides that “[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” According to the *travaux préparatoires*, the term “arbitrary” meant far more than “illegal.” Cases of deprivation of liberty provided for by law must not be disproportionate, unjust, or unpredictable. Thus, “[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.” MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 172 (1993).

Several other human rights bodies have affirmed the prohibition against arbitrary detention. These include the U.N. Human Rights Committee, the Working Group on Arbitrary Detention, and the United Nations High Commissioner for Refugees.

The prohibition against arbitrary detention is also recognized in each of the regional human rights agreements, which further affirms the universality of this fundamental norm. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) provides that “[e]veryone has the right to liberty and security of person.” European Convention for the Protection of

Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221. It adds that no one should be deprived of their liberty except in the following cases:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Id. at 5(1). *See also* American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, at art. 7(3) (“No one shall be subject to arbitrary arrest or imprisonment.”); African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, at art. 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons

and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”).

Despite the international consensus against arbitrary detention, there is an important qualification to this norm. Specifically, international law recognizes a limited right of derogation. In times of public emergency, a state may derogate from the prohibition against arbitrary detention.

For example, the International Covenant on Civil and Political Rights provides that a state may derogate from certain obligations in times of public emergency. Article 4 provides:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

ICCPR, *supra*, at art. 4.

The European Convention on Human Rights contains a similar provision on derogation. Article 15 provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

European Convention, *supra*, at art. 15.

While derogation is authorized under both the International Covenant of Civil and Political Rights and the European Convention on Human Rights, it is subject to numerous safeguards.⁷ First, the right of derogation is limited to times of “public emergency” that threaten “the life of the nation.” Second, such derogation must be strictly required by the exigencies of the situation. Third, any measures taken in derogation must not be inconsistent with other obligations under international law. Fourth, there is an explicit notice requirement. A state seeking to derogate from any of its treaty obligations must notify the appropriate

actors, both at the commencement and conclusion of such derogation. These provisions have been strictly construed to ensure that states do not engage in the “cynical and calculated destruction” of fundamental rights.⁸ P.R. Gandhi, *The Human Rights Committee and Derogation in Public Emergencies*, 32 GERMAN Y.B. INT’L L. 323 (1989). Thus, the failure to comply with these procedural safeguards may void an otherwise valid claim of derogation.

III. United States

On October 26, 2001, President Bush signed the USA PATRIOT Act. *See* The United and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-56, 115 Stat. 272 (2001). The Act made numerous changes to federal law.⁹ It expanded the surveillance powers of law enforcement and extended the authority of the Foreign Intelligence Surveillance Act Court. It authorized the disclosure of private information – from financial files to educational records. It imposed criminal liability for a broad variety of activity. In addition, the Act allocated greater resources to law enforcement and border control operations.

The USA PATRIOT Act also authorized the indefinite detention of certain aliens.¹⁰ Pursuant to 8 U.S.C. § 1226a, the Attorney General is authorized to “certify” upon “reasonable grounds” that a foreign national is involved in terrorism “or is engaged in any other activity that endangers the national security of the United States.” 8 U.S.C. § 1226a(a)(3). Once the Attorney General makes the certification, the foreign national is subject to immediate detention. Following certification, the Attorney General must take the following action within seven days: (1) charge such individuals with a criminal offense; or (2) place such individuals in removal

proceedings. 8 U.S.C. § 1226a(a)(5). However, an alien who is not removed and whose removal is unlikely in the reasonably foreseeable future “may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.” 8 U.S.C. § 1226a(a)(6).

These detention procedures are subject to two safeguards. First, the Attorney General is obligated to review the certification every six months. 8 U.S.C. § 1226a(a)(7). The alien who is subject to detention may submit documents or other evidence to the Attorney General in support of his request for reconsideration of the initial certification. Second, judicial review through *habeas corpus* proceedings is authorized, albeit in limited fashion. 8 U.S.C. § 1226a(b).

This provision on the mandatory detention of suspected terrorists has not yet been interpreted by the courts. There is, however, case law that suggests the manner in which the Supreme Court would view the detention mechanisms set forth in the USA Patriot Act.¹¹

In *Zadvydas v. Davis*, the Supreme Court considered whether the INS could indefinitely detain aliens who could not be deported. *See Zadvydas v. Davis*, 533 U.S. 678 (2000). Under the Immigration and Nationality Act, the INS was authorized to detain an alien during a 90-day statutory removal period, during which the INS would seek to secure the alien’s removal. A second statute authorized detention beyond this 90-day removal period. 8 U.S.C. § 1231(a)(6). However, the statute was silent on the length of detention.

The *Zadvydas* case involved two foreign nationals – Kestutis Zadvydas and Kim Ho Ma – who challenged their detention beyond the 90-day removal period. Both cases were consolidated by the Supreme Court for argument.

Kestutis Zadvydas was born to Lithuanian parents in a displaced persons camp in Germany after World War II. He immigrated

to the United States when he was eight years old. After multiple convictions for various criminal offenses, the INS sought to deport Zadvydas as a removable alien. Despite its efforts, no country was willing to accept him. Neither Lithuania nor Germany considered Zadvydas to be a citizen, eligible for repatriation. By all accounts, Zadvydas was a stateless person. As a result, the INS kept Zadvydas in custody after the expiration of the 90-day removal period as it sought his removal from the United States.

Kim Ho Ma was born in Cambodia and immigrated to the United States with his parents. Ma was subsequently convicted of manslaughter in the United States and served several years in prison. Upon completing his sentence, he was transferred to the custody of the INS for purposes of deportation. Efforts to acquire travel documents from Cambodia were unsuccessful. Like Zadvydas, the INS kept Zadvydas in custody after the expiration of the 90-day removal period.

In both cases, the Supreme Court framed the issue in the following manner: “We must decide whether this post-removal statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien’s removal.” Zadvydas, *supra*, at 682 (emphasis in original).

The Court did not find the statute unconstitutional. Rather, it relied on principles of statutory construction, which called for interpreting the statute to avoid a serious constitutional threat. In its decision, the Supreme Court held that the INS could not detain a removable alien indefinitely beyond the 90-day removal period but rather only for a period reasonably necessary to secure his release. “In our view, the statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.” *Id.* at 689.

Significantly, the Court recognized that aliens who have entered the United States, whether their presence is lawful, unlawful, temporary, or permanent, are entitled to the full protections of the Due Process Clause of the U.S. Constitution. Indeed, the Court held that the Due Process Clause even applies to aliens who are subject to final orders of deportation, “though the nature of that protection may vary depending upon status and circumstance.” *Id.* at 694. The Court then noted that freedom from imprisonment lies at the heart of the liberty protected by the Due Process Clause. Thus, a statute permitting indefinite detention of an alien would raise a serious constitutional problem.

The *Zadvydas* case did not involve allegations of terrorism or threats to national security. Indeed, the Court acknowledges that the case did not involve any such special circumstances. “Hence we leave no unprotected spot in the Nation’s armor.” *Id.* at 695-696. In dicta, however, the majority opinion alludes to how the Court might approach indefinite detention in terrorism-related cases. It suggests that some form of detention might be justified in these special cases.

Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security. The sole foreign policy consideration the Government mentions here is the concern lest courts interfere with “sensitive” repatriation negotiations. But neither the Government nor the dissents explain how a habeas court’s efforts to determine the likelihood of repatriation, in handled with appropriate sensitivity, could make a significant difference in this respect.

Id. at 696.

The *Zadvydas* decision has been referenced in several post-9/11 cases. None of these cases considered the mandatory detention provisions for suspected terrorists set forth in the USA Patriot Act.¹² However, these cases have addressed (and upheld) other forms of detention – from detention of foreign nationals at Guantanamo Bay to detention of U.S. citizens who have been labeled enemy combatants.¹³ These cases suggest that courts will likely be receptive to arguments calling for the detention of suspected terrorists in the United States.

IV. United Kingdom

Following September 11, 2001, Parliament adopted the Anti-Terrorism, Crime and Security Act of 2001.¹⁴ *See* Anti-Terrorism, Crime and Security Act of 2001, c.24, 21-23 (Eng.). The Act authorizes the detention without charge or trial of foreign nationals who are suspected of terrorism-related activity and who cannot be returned to their country of origin or to another country. This power applies when the Secretary of State issues a certificate indicating his belief that the foreign national's presence in the United Kingdom is a risk to national security and that he suspects the person of being a terrorist. *Id.* at s.21. Detention can be either temporary or indefinite. *Id.* at s.23. A detainee can lodge an appeal challenging the certification with the Special Immigration Appeals Commission (SIAC). Decisions of the SIAC are appealable to the Court of Appeal, but only on points of law.

In addition, the United Kingdom announced its intention to derogate from certain provisions of the European Convention on Human Rights.¹⁵ Pursuant to its derogation statement, the United Kingdom sought to derogate from Article 5(1) of the European Convention, which concerns the right to liberty and security.¹⁶ The basis for such derogation was the public emergency posed by the events

of September 11th and the continuing threat from international terrorism.

As a result of the public emergency, provision is made in the Anti-Terrorism, Crime and Security [Act 2001], *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers.

The Human Rights Act 1998 (Designated Derogation) Order 2001.

Unlike the mandatory detention provisions of the USA PATRIOT Act, the detention provisions in the Anti-Terrorism, Crime and Security Act have been reviewed by British courts.

In *A and Others v. Secretary of State for the Home Department*, eleven foreign nationals were detained pursuant to the Anti-Terrorism, Crime and Security Act. *See A and Others v. Secretary of State for the Home Department*, [2002] EWCA Civ 1502. All the detainees challenged their detention (and the Act). The Special Immigration Appeals Commission found that the indefinite detention provisions were discriminatory in effect because they did not apply to British nationals suspected of terrorist links. Thus, the SIAC held that the law was contrary to the European Convention on Human Rights, which prohibits discrimination on any grounds. *See* European Convention, *supra*, at art. 14. The Secretary of State appealed the ruling to the Court of Appeals.

On October 25, 2002, the Court of Appeals reversed the ruling of the SIAC. According to the Court, British nationals who cannot be removed from the country are not in an analogous situation to foreign nationals who currently cannot be deported. These foreign

nationals do not have a right to remain in the United Kingdom. According to the Court, “aliens who cannot be deported have, unlike nationals, no more right to remain, only a right not to be removed, which means legally that they come into a different class from those who have a right of abode.” *A and Others, supra*, at para. 47.

The Court of Appeals also noted that the detention policy was not inconsistent with the European Convention on Human Rights. According to the Court, international law recognizes that it is permissible for states to distinguish between nationals and non-nationals in times of national emergency. Indeed, the European Convention allows for a right of derogation in such times. Under the terms of the European Convention, Parliament was entitled to reach the conclusion that detention of a limited class of foreign nationals was “strictly required” under the circumstances.

The Court of Appeals added that it was strongly mindful of its duty to scrutinize legislation and government action in light of the rights set forth in the Human Rights Act (which codified many of the obligations set forth in the European Convention). When doing so, however, the Court indicated that the Executive is in a better position than a court to assess potential threats to the nation as well as any actions that are necessary to address such threats. Thus, the Court found it should accord a degree of deference to the views of the Executive.

V. Conclusion

Throughout history, the need to protect national security has been used as a justification for restricting human rights and civil liberties.¹⁷ Indeed, some of the most serious violations of human rights have been committed by states seeking to defend themselves against opposition, both foreign and domestic.¹⁸

While the right of derogation is recognized under international law, it is a right

that must be carefully regulated. Unlike the United Kingdom, the United States has given no indication that it seeks to comply with the rigid derogation provisions set forth in the International Covenant on Civil and Political Rights. Accordingly, the United States may be in violation of its obligations under the ICCPR, a treaty it has signed and ratified. Apart from the serious constitutional challenges posed by the mandatory detention provisions of the USA Patriot Act, the failure of the United States to comply with international law further undermines the legality of these draconian measures.

Endnotes

¹ See, e.g., Jonathan L. Hafetz, *Pretrial Detention, Human Rights, and Judicial Reform in Latin America*, 26 FORDHAM INT’L L.J. 1754 (2003); Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia’s Internal Security Act*, 26 FORDHAM INT’L L.J. 1345 (2003).

² See also Sir David Williams, *The United Kingdom’s Response to International Terrorism*, 13 IND. INT’L & COMP. L. REV. 683 (2003); Philip A. Thomas, *Emergency and Anti-Terrorist Power: 9/11: USA and UK*, 26 FORDHAM INT’L L.J. 1193 (2003); Inna Nazarova, *Alienating “Human” From “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 FORDHAM INT’L L.J. 1335 (2002).

³ Of course, many other countries have adopted legislation in response to the attacks of September 11th. See, e.g., Terrorism Project: The World Responds, at <http://www.cdi.org/terrorism/world-responds.cfm>.

⁴ As noted by Blackstone in his Commentaries on the Laws of England, this provision alone merited the title of the Great Charter. WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 424 (photo reprint. 1978) (1783).

⁵ See generally LOUIS HENKIN ET AL., HUMAN RIGHTS 286 (1999).

⁶ See generally Parvez Hassan, *The Word ‘Arbitrary’ As Used in the Universal Declaration of Human Rights: ‘Illegal’ Or ‘Unjust?’*, 10 HARV. INT’L L. J. 225 (1969).

⁷ See generally JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994).

⁸ See generally PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 190-193 (2001); SARAH JOSEPH, ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 624 (2000).

⁹ See generally Kathryn Martin, *The USA Patriot’s Application to Library Patron Records*, 29 J. LEGIS. 283 (2003); Michael T. McCarthy, *Recent Developments: USA Patriot Act*, 39 HARV. J. LEGIS. 435 (2002); John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” For “Homeland Security:” A Constitutional Overview of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002).

¹⁰ See generally Shirin Sinnar, *Patriotic or Unconstitutional: The Mandatory Detention Provisions of the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003). See also Lawrence M. Leibowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices after the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 U. PITT. L. REV. 873 (2002).

¹¹ See generally Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?* 116 HARV. L. REV. 1868 (2003); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIG. L.J. 365 (2002).

¹² See, e.g., *Xi v. INS*, 298 F.32d 832, 839 (9th Cir. 2002) (“[I]t is important to emphasize a point made by the Supreme Court in *Zadvydas* – we do not now confront a situation presenting any national security ‘or other special circumstances where special arguments might be made for forms of preventive

detention.’ *Zadvydas*, 533 U.S. at 696. Indeed, the Supreme Court’s reference was almost prescient since just months after *Zadvydas* was handed down, Congress passed legislation providing for the mandatory detention of suspected terrorists. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT), Pub. L. No. (codified as 8 U.S.C. § 1226a(a)(2)). We express no view on this legislation but note it simply to underscore the scope of our holding.”).

¹³ See, e.g., *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003); *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003).

¹⁴ See generally Virginia Helen Henning, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation From the European Convention on Human Rights?* 17 AM. U. INT’L L. REV. 1263 (2002).

¹⁵ See Jimmy Burns, *Suspected Islamic Extremists Jailed Under New Anti-Terrorism Legislation*, FINANCIAL TIMES, December 20, 2001, at 2.

¹⁶ The United Kingdom also indicated that derogation was consistent with the International Covenant on Civil and Political Rights. See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/CO/73/UK/Add.2 (2002); Concluding Observations of the Human Rights Committee: United Kingdom, U.N. Doc. CCPR/CO/73/UK (2001).

¹⁷ See generally RIGHTS VS. PUBLIC SAFETY AFTER 9/11: AMERICA IN THE AGE OF TERRORISM (Amitai Etzioni and Jason H. Marsh eds., 2003); THE SECURITY OF FREEDOM: ESSAYS ON CANADA’S ANTI-TERRORISM BILL (Ronald J. Daniels, et al., eds., 2001).

¹⁸ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011 (2003).