

## COMMENTS

### THE ENUMERATION OF VITAL CIVIL LIBERTIES WITHIN A CONSTITUTIONAL STATE OF EMERGENCY CLAUSE: LESSONS FROM THE UNITED STATES, THE NEW DEMOCRACY OF SOUTH AFRICA, AND INTERNATIONAL TREATIES AND SCHOLARSHIP

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#### I. INTRODUCTION

With the increased threat of terrorism and the associated disappearance of civil liberties, limitations on states of emergency are becoming increasingly vital to secure human rights. Specifically, limitations on which rights may be suspended during declared states of emergency are needed to guide our government and safeguard our liberties. Debates concerning the enumeration of rights that must be maintained during emergencies continue to rage. As the United States struggles with its emergency protocol, legislators should consider taking a drastic, but reasonable, step in a new direction: enumerating the nonderogable rights of its citizens.

When looking at the current jurisprudence and political situation of the United States, it is easy to conclude that detailing certain rights that must be maintained in an emergency could be a practical and important step for this country. The experiences of America's recent turmoil surrounding the erosion of civil liberties, combined with the purported effectiveness of these clauses in developing constitutions, like South Africa's, reveal the need to incorporate this new constitution-drafting trend into legislation protecting civil liberties.<sup>1</sup> The

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1 Recent turmoil would include the controversies surrounding warrantless domestic wire-tapping, newly formed military commissions originally created by the executive to try enemy combatants, the treatment of prisoners at Guantanamo Bay and the lack of due process provided to them, and the President's powers to designate prisoners as enemy combatants, among others. Each of these current issues faces at its core a question of

Constitution of the United States contains no clear emergency clause, though it does assert that in “Cases of Rebellion or Invasion,” the writ of habeas corpus may be suspended.<sup>2</sup> An emergency clause would delineate who can declare a state of emergency, the procedure for doing so, its time limitations, and the rights that *cannot* be suspended even during these most dire times.<sup>3</sup> The absence of a clause has led to endless confusion and debate, crystallized in the frenetic actions of the current administration surrounding what can be suspended and what is untouchable. In contrast, the Framers of the South African Constitution, wary of their recent dictatorial past, laid out a clear definition of emergency and specifically stated which rights must remain stalwart in the face of a declared emergency.<sup>4</sup> Similarly, leading human rights treaties contain emergency clauses with broad support for their necessity and effectiveness from signatory parties.<sup>5</sup>

To concretely examine this issue, this Comment will compare two dissimilar constitutions, that of the United States and that of South Africa, and then analyze the international scholarship that has developed around treaty writing to frame the conversation of civil liberty suspension. The American approach and the international approach stem from differing ideological perspectives and histories, but this Comment will argue that simply including nonderogable rights in these clauses would help to ensure fewer human rights breaches. Here, America’s struggle for a balance of “emergency” in present times and for the effectiveness of emergency clauses in constitutions of developing democracies sends the message that written and concrete protections are better than amorphous ones.

It is important to note that within the broader discussion of emergency clauses, many multifaceted components can impact their inception and use. These include regulations of how emergencies are

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whether the policies should be constitutionalized during emergencies, as the President has used the term “state of emergency” to justify the above actions.

<sup>2</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>3</sup> It is important to note that the powers of the government during states of emergency are separate from the war powers that are given to the executive by Congress during declared wars. Emergency powers refer to powers that could be undertaken by all three branches of the government. If certain civil liberties were listed as nonderogable under an emergency clause, the liberties could not be abrogated by the President, Congress, or the Judiciary.

<sup>4</sup> S. AFR. CONST. 1996, ch. 2, § 37 (detailing the rights that could not be suspended during “States of Emergency” and the mechanics of declaring a state of emergency).

<sup>5</sup> See JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 124 (1992) (noting the clear consensus of international treaties on the subject of derogable rights).

defined, who has the authority to declare the emergency, how long the emergency can persist without re-approval, and how emergencies are ended.<sup>6</sup> This discussion also clearly involves the debate surrounding the separation of powers within the three branches versus a judicial review mechanism within American jurisprudence.<sup>7</sup> Certainly each of these components have an impact on whether “unsuspendable” civil liberties should be enumerated, but contain multitudinous arguments that reach well outside the scope of this Comment. Hence, these characteristics of emergency clauses will be discussed only in the context of their relation to specific liberties.

Part II of this Comment examines the theory and history of the debate surrounding constitutional emergency. This Part ends with a discussion of the recent confusion regarding what rights are protected which has been created, in part, by the lack of an emergency clause within the Nation’s Constitution. Part III looks abroad to the recently developed Constitution of the Republic of South Africa for insight into contemporary constitutional drafting on the issue and as a formidable example of a constitutional emergency clause. Part IV explores the international treaties and scholarship that inform the debate. Finally, Part V concludes with recommendations for legislative action to ensure the protection of nonderogable rights during future emergencies.

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<sup>6</sup> See generally LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 271–273 (5th ed. rev., Univ. Press of Kansas 2007) (1978) (parsing out the interbranch tensions concerning delegated emergency powers); NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 1–33 (2003) (defining emergency as an elastic concept and dissecting emergency scholarship); Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (favoring short-term emergency measures such as an emergency statute that requires a supermajority to suspend habeas corpus); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004) (rejecting Ackerman’s proposals and articulating increased oversight by the courts in times of emergency to safeguard long-standing American constitutional protections); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) (prepared by Nicole Questiaux) (compiling the varied effects of the provisions and use of emergency clauses).

<sup>7</sup> For a full discussion of these competing models and the right model to use today, see William E. Scheuerman, *Time to Look Abroad? The Legal Regulation of Emergency Powers*, 40 GA. L. REV. 863, 865–66 (2006), and Mark V. Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2674 (2005). For a recent explication of the separation of powers paradigm, see generally HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE (2006).

## II. UNITED STATES: THE ABSENCE OF AN EMERGENCY CLAUSE AND ITS IMPACT ON MODERN CIVIL LIBERTIES

### A. Introduction

The United States has long struggled with defining what is permitted and what is forbidden by the Constitution in times of declared emergency. From Lincoln's suspension of habeas corpus to Japanese internment during World War II, the executive and the legislature have consistently tried to tap into powers that are ordinarily unavailable to them. During such times of emergency, civil liberties have been pushed back to allow for the concerns of national security, and generally, after the threat has ceased, the civil liberties have bounced back.<sup>8</sup> Currently, however, United States officials claim that the country is in a perpetual state of emergency in its attempt to prevent terrorism, and the debate surrounding what this extended "emergency" means for our liberties is raging.<sup>9</sup> This debate is clearly eating up both our national resources and the energy of our leaders and most prominent scholars. Each branch seems to feel that it can define emergency and can temper the powers of the executive, but there does not seem to be anyone at the reins with definitive control.

The United States's struggle to define the limits of emergency power has become a central debate within American jurisprudence, as well as in American politics. Memos from John Yoo<sup>10</sup> run counter to decisions of the Supreme Court, and Congress has become embittered against the Executive Branch for warrantless wiretapping. This discussion has perhaps extended beyond the scope of a "debate" and has left the branches of government in a virtual power struggle. This constant constitutional debate should serve as a lesson to those countries that are emerging as democracies and considering constitutional drafting. It would be difficult to believe that the people of any foreign nation would want this state of affairs for their nation, or desire such strife in their times of national emergency. Although the U.S.

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8 RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 22–25 (2006) (discussing the history of civil rights and how they have been suppressed at times and then recovered).

9 See Tribe & Gudridge, *supra* note 6, at 1869 (describing the current jurisprudential atmosphere of our country as vague and unknown).

10 See, e.g., Memorandum from John Yoo on The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>.

Constitution is believed by many Americans to be the pinnacle of constitutions, it is important to recognize that it is imperfect. Its shortcomings, and the political quagmire that they have created, can serve as a caution sign to new democracies and can indicate areas where our Constitution can be amended. Our mishandling of the amorphous nature of “emergency” should send such a message: we have encountered a “black hole” of political energy, and it would be wise to draft differently.<sup>11</sup>

*B. The Theory Behind Suspending Liberties During Times of Emergency*

Debates regarding the benefits and problems of adding an emergency clause to the United States Constitution have existed for decades. Many contend that even the mention of a specific emergency clause within a constitution provides an easy way for dictatorially minded politicians to suspend rights “legally” by declaring a state of emergency.<sup>12</sup> Specifically, they argue that naming the rights to be preserved during times of emergency would allow a government to suspend all other rights at the first sign of threat.<sup>13</sup> Claudio Grossman argues that a number of countries in South America have undergone this fate, suffering from dictators who are able to readily declare a state of emergency and take away liberties from the public.<sup>14</sup>

The converse argument contends that the United States Constitution ensures that all enumerated rights must be held steadfast in times of declared emergency, barring, of course, the potential for the suspension of habeas corpus.<sup>15</sup> Justice Jackson, in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>16</sup> noted that the Framers had only included a singular emergency power in the Constitution, that of suspending habeas corpus, and he refused to read in any

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<sup>11</sup> See Tribe & Gudridge, *supra* note 6, at 1868 (employing and explaining the metaphor of a black hole for this constitutional issue as a place of chaos and “sudden blindness”).

<sup>12</sup> See Linda Camp Keith & Steven C. Poe, *Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration*, 26 HUM. RTS. Q. 1071, 1077 (2004) (noting alternative views of state of emergency clauses). For concrete evidence of a competing argument, see generally Claudio Grossman, *States of Emergency: Latin America and the United States*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

<sup>13</sup> See Keith & Poe, *supra* note 12, at 1076–77 (describing the phenomena that could occur if a limited number of rights in the clause were concretely laid out and dictators seized the opportunity to then easily erase all rights not listed).

<sup>14</sup> See, e.g., Grossman, *supra* note 12.

<sup>15</sup> U.S. CONST., art. I, § 9, cl. 2.

<sup>16</sup> 343 U.S. 579 (1952).

other powers of suspension.<sup>17</sup> In this sense, our Constitution can be held to be a constitution of peace and of war. The argument then follows that by not setting out nonderogable rights, the government is held to a higher standard, and human rights will be suspended only when absolutely necessary. While perhaps philosophically convincing, this perspective has led to a continued encroachment upon civil liberties and an ultimate balancing of government interests and fundamental freedoms. Certainly, the question of whether enumeration would restrain a leader's powers is an empirical one that may depend on the psychology of a leader. However, while there is certainly a risk of leaders announcing emergencies and disregarding nonenumerated rights, the continual erosion and mystery surrounding civil liberties in a system without enumeration illustrates the real dangers of an originalist approach. The original interpretation of the Constitution as one of extreme preservation has not held true over the course of our history, conflicting with other interpretations of executive power.

Executives and legislators have frequently identified rights that could possibly be suspended during emergencies. As will be shown, rights, including those of freedom and property, have been viewed as fair game, even when the emergency clearly did not require such suspension in retrospect.<sup>18</sup> Without clear guidance, the three branches of government have, in these times of emergency, relegated the Constitution to a document that enumerates rights that may be honored or disregarded according to a balancing test.<sup>19</sup> Today, it seems readily accepted by scholars and the public alike that civil liberties will ebb and flow depending on our state of security.<sup>20</sup> Chief Justice Rehnquist himself wrote on the last page of his work on civil liberties during wartime that, "It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in

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17 See BRUFF, *supra* note 7, at 109 (deconstructing Justice Jackson's concurrence).

18 See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing the detention of Japanese-Americans during World War II under emergency and war powers justifications even though Japanese-Americans' freedom from illegal detention was clearly protected under the "peace time" Constitution); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1914) (holding that it was within the executive's power to seize land that was given to the public by Congress).

19 See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1278 (2004) (arguing that the balancing of liberties against the necessities of protection has existed for much of our past constitutional history).

20 See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224-25 (1998) (outlining the balance that is reached by the Supreme Court between liberties and security); Paulsen, *supra* note 19, at 1283 (outlining President Lincoln's views on emergency powers).

peacetime.<sup>21</sup> Yet, the Constitution provides little guidance as to which liberties should remain favored in all times.

### C. *The History of the Suspension Clause in the United States*

The Framers themselves held slightly vague points of view on the matter, perhaps explaining the Suspension Clause's ambiguity. Quotations from Edmund Randolph, Alexander Hamilton, and James Madison indicate their acceptance of the "law of necessity," though it is unclear from the sources how they would have defined emergency and its limitations.<sup>22</sup> Many of the Framers followed John Locke's philosophy, allowing the executive wider powers in emergencies, but only vindicating the use of such powers if, in retrospect, the legislature and the voters would approve.<sup>23</sup> Madison writes in *Federalist No. 41*:

It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.<sup>24</sup>

While it seems clear that the majority of the drafters would have advocated emergency powers and temporary suspensions of civil liberties, little suggests any detailed opinion. This is also evidenced by the almost complete omission of these concerns from the Constitution itself, save the lone possibility of suspending habeas corpus. Joan Fitzpatrick, in her broad and illuminating study of human rights during crisis, concludes that two attitudes have emerged: either that the Constitution, as it was drafted, is able to deal with emergency through executive powers and judicial review,<sup>25</sup> or that, following Locke, the executive can act as he sees fit, hoping for public vindication.<sup>26</sup>

<sup>21</sup> REHNQUIST, *supra* note 20, at 225.

<sup>22</sup> See Sanford Levinson, *Constitutional Norms in a State of Emergency*, 40 GA. L. REV. 699, 712–13 (2006) (noting the various opinions of the drafters concerning the controversy).

<sup>23</sup> See Michael Cairo, *The "Imperial Presidency" Triumphant: War Powers in the Clinton and Bush Administrations*, in EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION 199, 202 (Christopher S. Kelley ed., 2006) (expanding on how Locke's views mirrored those of the Framers).

<sup>24</sup> THE FEDERALIST NO. 41, at 40 (James Madison) (E.H. Scott ed., 1898).

<sup>25</sup> See Joan Fitzpatrick, *Protection Against Abuse of the Concept of "Emergency"*, 26 STUD. TRANSNAT'L LEGAL POL'Y 203, 209 (1994) (fully discussing the need for nonderogable rights and the principles that will help identify them); see also CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 212 (1948) (arguing that the "traditional theory of the Constitution is clearly hostile to the establishment of crisis institutions and procedures").

<sup>26</sup> See JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 27–28 (1994) (explicating theories behind government action in emergency and tracing the American approach to the

Since the Founding, the emergency powers of the Executive and the Legislature have stretched the Constitution and have certainly allowed for suspension of civil liberties. Rakish debate has accompanied these suspensions and, whether justified or not, it has now become readily accepted that civil liberties will bend with the need to protect the country. As touted by scholars years ago and today, Richard Posner affirmatively maintains that the Constitution is not a suicide pact which requires all liberties to be maintained at the expense of necessary security.<sup>27</sup> Hence, Presidents and Congresses have taken steps forward and steps back in a dance with emergency powers to gain some sort of balance. In the end, it is this balance between emergency and security that rules, and not specific tenets of our Constitution.<sup>28</sup>

Largely beginning with Lincoln's executive suspension of habeas corpus during the Civil War, the Constitution has been molded to follow the exigencies of our times. Lincoln, in particular, was a vocal advocate of emergency powers:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in the absence of rebellion or invasion, the public safety does not require them; in other words, that the Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security. The Constitution itself makes the distinction; and I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one.<sup>29</sup>

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United Kingdom); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1390 (1989) (espousing the philosophy that the executive can act constitutionally even if it would seem that he is acting illegally in his efforts to prevent disaster).

27 See POSNER, *supra* note 8 (exploring the Constitution during the new age of terrorism, Posner proclaims that many of the recent incursions on civil liberties, such as suspensions of rights for detainees and domestic wiretaps, are necessary to protect the country and are not objectionable under our constitutional jurisprudence).

28 See Paulsen, *supra* note 19, at 1282 (providing that each step must be a balance between liberty and security, reaching inevitable conclusions of ambiguity regarding the nature of our liberties).

29 Letter from Abraham Lincoln, President of the United States, to Erastus Corning and Others (June 12, 1863), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 454 (Don E. Fehrenbacher ed., 1989) (emphasis omitted), *quoted in* Paulsen, *supra* note 19, at 1277. Paulsen also notes Lincoln's crafty constitutional interpretation, highlighting

The basic premise of Lincoln's argument rests upon the notion that the Constitution is not static in its rights preservation. As in this historical scenario, the rights that we, as Americans, do have will be dictated by the present circumstances our country faces, as perceived by the executive or legislative branch. This prospect has become more unsettling as threats have changed and as the protection of civil liberties often stands in the way of some defense tactics.

The next one hundred years witnessed the continued use of emergency powers to suspend or contract individual liberties. The Judiciary did not enforce a strict reading of civil liberties, but one that met the exigencies of the time. Instances of severe suspensions occurred most notably during both World War I and World War II, and dealt mainly with the Executive's power. In *Debs v. United States*,<sup>30</sup> anti-war speech by union leaders was criminalized "for obstructing and attempting to obstruct the recruiting service."<sup>31</sup> Several men were imprisoned without authorization from Congress.<sup>32</sup> The Supreme Court, supposedly exercising its power of judicial review, upheld their arrest and punishment, justifying the suspension by references to emergency and the need to be obedient during these times.<sup>33</sup> In 1919, in the case of *Schenck v. United States*,<sup>34</sup> two men were arrested for encouraging others to avoid the draft using pamphlets found in their possession. The Court forcefully upheld their convictions under the Espionage Act,<sup>35</sup> creating confusion about what written material one could lawfully possess during times of heightened emergency.<sup>36</sup> Finally, in the case of *Korematsu v. United States*,<sup>37</sup> the Supreme Court denied Fred Korematsu's constitutional claim seeking his release from an internment camp where Japanese-Americans were being held during World War II.<sup>38</sup> The Court specifically re-

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Lincoln's apparently strong feelings concerning the flexibility of civil liberties enumerated in the Constitution during times of emergency.

<sup>30</sup> 249 U.S. 211 (1919).

<sup>31</sup> *Id.* at 216.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 216-17 (holding that the speech was indeed inciting and in violation of the Espionage Act).

<sup>34</sup> 249 U.S. 47 (1919).

<sup>35</sup> 18 U.S.C. § 793 (1917) (criminalizing "obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation").

<sup>36</sup> See *Schenck*, 249 U.S. at 52-53 (affirming the lower court's ruling in a relatively short and unanimous opinion).

<sup>37</sup> 323 U.S. 214 (1944).

<sup>38</sup> *Id.* at 323-24.

fused to declare the treatment unconstitutional because it comprised part of the wartime powers of the Executive, and the Judiciary deferred to the Executive in times of emergency.<sup>39</sup> Three Justices dissented, but thousands of Japanese-Americans were ultimately detained indefinitely without any concrete rights to hold on to.<sup>40</sup> Each of these cases seems to be a historical lesson, showcasing America's need for a specific clause to guide its actions and highlighting the liberties that should be barred from suspension.

In a number of cases, the Executive has attempted to suspend liberties, which Congress has suggested are "unsuspendable" in times of crisis, by using other constitutional provisions.<sup>41</sup> This can be viewed as a separation-of-powers paradigm, but it also implicates constitutional liberties. If the Constitution clearly stated that individuals would maintain their due process rights during times of emergency, then Congress and the President would not be challenging each other over whether either could do so. For instance, in the pinnacle case of *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>42</sup> the conflict, according to Justice Black, revolved around whether Congress had expressly prohibited the President from seizing and operating several steel mills when union strikes threatened to affect steel production.<sup>43</sup> While this case certainly concerns a debate about separation of powers, it also subtly implicates emergency clause procedure. If certain actions or liberties were off limits by virtue of constitutional or statutory mandate, the nation could decide on the legality of many actions without a power grab during even the most dire of times. This confrontation again represents a situation that could be clarified by specific enumerations of nonderogable civil liberties.

These cases represent a few of the more pronounced instances of the very basic conflicts that have arisen. Without firm guidance on these matters, decisions have been inconsistent and confusing. Alan Bigel, in a history of emergency powers, concludes that the judiciary

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<sup>39</sup> *Id.* at 322–23.

<sup>40</sup> See also FISHER, *supra* note 6, at 262 (providing a concise background on *Korematsu* and recognizing other wartime cases that resulted in extended executive power over domestic affairs). Notably, some of these cases occurred during wartime, a period given a different constitutional construction. However, they were also often justified as uses of emergency power and seemingly similar standards would apply whether physical invasion or grand crisis.

<sup>41</sup> For a standard example, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952), where the Justices extensively discuss the discretion that Congress either gave to or withheld from the President.

<sup>42</sup> 343 U.S. 579 (1952).

<sup>43</sup> *Id.* at 637.

now must decide on a “case-by-case basis” which constitutional claim will reign supreme; the Court provides little constitutional guidance for the Executive Branch about what liberties can and cannot be curtailed.<sup>44</sup> However, these cases do provide examples of nonderogable rights that should be considered when drafting legislation concerning emergency.

Undoubtedly this glaring issue has not gone unnoticed by Congress. In an effort to more clearly define this amorphous law, Congress has passed a number of acts attempting to address emergency powers issues. Each piece of legislation has, however, backed away from aligning itself with current human rights treaties or the majority of nations that are beginning to spell out nonderogable rights. The legislature itself has struggled to define emergency and to decide what can be abandoned in the name of security.<sup>45</sup> In 1974, Congress finally noticed that the United States had been technically in a state of emergency since 1933.<sup>46</sup> In assessing this oversight, a Senate committee found that the power conferred to the Executive Branch during these times could completely subvert constitutional procedures.<sup>47</sup> Apparently, the Executive had the power to “seize property, limit travel or communications, declare martial law, . . . nationalize various industries[,] . . . suspend publication of their own orders in the Federal Register[,] . . . [and] order the detention of suspect groups.”<sup>48</sup> It was at this point that Congress passed the National Emergencies Act of 1974<sup>49</sup> in an attempt to corral and define emergency and the pow-

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44 See ALAN I. BIGEL, *THE SUPREME COURT ON EMERGENCY POWERS, FOREIGN AFFAIRS, AND PROTECTION OF CIVIL LIBERTIES, 1935–1975*, at 162 (1986) (arguing that when examining the Supreme Court cases of emergency power, no clear precedent emerges as to which civil liberties are sacrosanct and which ones can be suspended by the Executive Branch in certain circumstances).

45 Further contention has also erupted in the Judiciary’s efforts to ascertain which powers Congress was in fact delegating to the President. For the authoritative discussion on the matter, see *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, J., concurring).

46 See ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 113 (2005) (chronicling the actions taken by Congress in relation to emergency and wartime powers).

47 *Id.*

48 *Id.* at 113–14.

49 National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976). The Act is composed of five sections named as follows: “Terminating Existing Declared Emergencies” (Tit. I) (codified at 50 U.S.C. § 1601); “Declarations of Future National Emergencies” (Tit. II) (codified at 50 U.S.C. § 1621); “Exercise of Emergency Powers and Authorities” (Tit. III) (codified at 50 U.S.C. § 1631); “Accountability and Reporting Requirements of the President” (Tit. IV) (codified at 50 U.S.C. § 1641); and “Repeal and Continuation of Certain Emergency Power and Other Statutes” (Tit. V) (codified at 50 U.S.C. § 1651).

ers that came along with it.<sup>50</sup> Notably, there is no mention of core human rights or domestic policies during suspension within the Act. Similarly, the controversial War Powers Resolution,<sup>51</sup> in an attempt by Congress to recapture authority after executive missteps in Vietnam, drew lines around the President's powers to make war but neglected to draw any lines around liberties that should be maintained.<sup>52</sup> Outside of these acts, the Legislature has done little to limit the emergency powers of the Executive or of itself. Conversely, since September 11, 2001, they have offered the Executive Branch more powers and, debatably, the right to tap phones or hold detainees indefinitely through the USA PATRIOT Act of 2001.<sup>53</sup>

#### *D. The Current Confusion Surrounding the Suspension of Civil Liberties*

This historical backdrop of chaos during emergency has foreshadowed our nation's more recent confrontations with this "black hole."<sup>54</sup> It is in this era that constitutional battles have reached some of their most heated points. For example, the Executive and Legislative Branches have disagreed over whether the President or any branch has the power to wiretap the phones of citizens without a warrant.<sup>55</sup> In 1978, the Foreign Intelligence Surveillance Act (FISA)<sup>56</sup> was passed in order to prevent executive overstepping of civil rights.<sup>57</sup> In effect, a "wall" was set up between FISA investigations and regular

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50 See FISHER, *supra* note 6, at 273 (detailing the history of congressional action around national emergency). The use of concurrent jurisdiction in the executive action was later declared invalid under the Supreme Court's decision regarding the delegation of power in *INS v. Chadha*, 462 U.S. 919 (1983). In response, the National Emergencies Act was rewritten to include provisions for a "joint" resolution between Congress and the Executive.

51 50 U.S.C. §§ 1541–1548 (1973).

52 See FISHER, *supra* note 6, at 274 (analyzing the history and politics behind the War Powers Resolution and its unintended consequences).

53 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

54 See Tribe & Gudridge, *supra* note 6, at 1868 (defining this black hole to be one of constitutional blindness). Tribe and Gudridge's description seems most apt in current politics as emergency powers operate in an area unchecked by the Constitution.

55 See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 99–127* (2006) (detailing the sequence of events related to the executive wiretapping and the rationalizations behind claims that the Executive has the power to tap the phones of citizens during times of emergency).

56 Pub. L. No. 95-511, 92 Stat. 1783 (1978).

57 See RUDALEVIGE, *supra* note 46, at 112 (explaining the background and political climate surrounding passage of the Act and its implications for today's debate).

criminal investigations by the establishment of a FISA court to review possible warrants.<sup>58</sup> At the time, this was heralded as a new way to ensure protections under the Fourth Amendment of the Constitution and provide warrants even in the most sensitive situations.<sup>59</sup> However, in late 2005 the *New York Times* reported that the White House had been using domestic wiretaps without obtaining FISA warrants.<sup>60</sup> The White House defended the wiretaps, justifying them under the emergency powers that had been conferred upon the Executive by Congress. The White House further argued that the Executive would have these powers even without congressional acquiescence—the powers were sourced from a state of emergency rather than congressional consent.<sup>61</sup> In a reversal many months later, the White House decided that it would, after all, go through the warrant process for wiretaps.<sup>62</sup> The White House maintains that the National Security Association program had operated within the bounds of the Constitution, but that they decided to ensure that all wiretaps would first be cleared by the court set up for this purpose.<sup>63</sup> This dramatic back and forth has left the country confused about which of their liberties can be taken or must be taken to defend the country. Even judicial decisions have done little to clear the constitutional smoke around the issue.<sup>64</sup> The basic message is clear: without any words defining what can and cannot be suspended in times of emergency, even the government seems unsure.

The very public confusion about warrantless wiretapping has led to confusion about what rights could technically be suspended. It has left open the question of which rights can justifiably be suspended

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58 *Id.*

59 *See id.* at 113 (describing the moods and attitudes of politicians in initial response to the FISA court reviews).

60 *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (breaking the story about domestic wiretapping and claiming to have obtained a secret memo written by John Yoo that rationalized wiretapping and declared it constitutional within the President's emergency powers).

61 *See* YOO, *supra* note 55, at 100 (discussing the allegations of the *New York Times*, but claiming that he cannot outwardly discuss the memo due to security concerns of the Department of Justice).

62 *See* Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1 (reporting that, although the White House still claimed that it had never been mistaken about the President's rights during emergency, soon after Democrats took control of the Congress the President decided to submit all future warrants to the FISA court).

63 *Id.*

64 *See, e.g.*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (vacating a lower court decision finding NSA wiretapping unconstitutional for want of standing).

during emergency, and which ones are so crucial to the core of the United States that their suspension would rob this country of its identity. In these times of high terror alerts, it is time for all countries to concretely define which rights shall be inviolable.

### III. SOUTH AFRICA'S CONSTITUTION AS A PROGRESSIVE CASE STUDY

#### A. Introduction

In stark contrast with American constitutional history, developing democracies and leading international legal bodies have advocated for the inclusion of statements setting out nonderogable rights. While the enumeration of rights was once thought to be detrimental to human rights, more recent scholarship has suggested that, in fact, the clear subdivision of these rights is beneficial in national governance and preservation of civil liberties.<sup>65</sup> Empirically, Linda Camp Keith and Steven Poe recently conducted a broad study of the effectiveness of including nonderogable rights within constitutions.<sup>66</sup> Their early research showed little change in suppression of rights at low and mid-level emergencies, but a clear positive effect in severe emergency situations such as civil wars.<sup>67</sup> Simply not listing the rights in hopes that all rights will be upheld as much as possible, as American constitutional theory suggests, has not proven to be a strong mechanism for preventing derogation. In fact, as noted above, it has led to significant infringements in basic rights and a large amount of national confusion as to fundamental freedoms. At this point in our international legal environment, recent constitutional developers and international policy makers have indicated that listing nonderogable rights within constitutions aids in the preservation of liberty.<sup>68</sup> Clear

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<sup>65</sup> See generally INTERNATIONAL COMMISSION OF JURISTS (ICJ), STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1983) [hereinafter ICJ, STATES OF EMERGENCY] (commenting broadly on how rights preservation during states of emergency can be aided when the rights are specifically preserved); INTERNATIONAL LAW ASSOCIATION (ILA), MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY (1984) (reporting on the body of work surrounding civil liberties assurances during an emergency state and making direct recommendations).

<sup>66</sup> See Keith & Poe, *supra* note 12, at 1076–97 (performing a statistical analysis of the impact of emergency clauses on the suspension of human rights based on the level of emergency).

<sup>67</sup> See *id.* at 1095 (citing that the effect of a list of nonderogable rights during a time of civil war is “associated with” a statistically significant decrease on the human rights abuse scale).

<sup>68</sup> See generally Fitzpatrick, *supra* note 25, at 204 (supporting the claim that specific rights are internationally agreed upon to protect human rights).

examples of constitutional development in domestic and international laws have advanced the study and indicate liberties that should remain nonderogable in the United States.

*B. The South African Constitution: The Drafting of an Emergency Clause*

The Constitution of South Africa is a modern and rich example of emergency clause drafting. Article 37 of the South African Constitution lays out, in clear terms, the limits of states of emergency and specifically what may not be suspended during these times.<sup>69</sup> In line with the international treaties of the time, the South African Constitution attempts to fully flesh out the nonderogable rights that are considered so vital to the country that they should remain protected even during times of emergency. The clause, of course, also defines who has the authority to declare an emergency and how long it may be in place.<sup>70</sup>

Leading up to its constitutional drafting, South Africa had undergone a number of states of emergency that severely hampered the liberties of South Africans. In the late 1980s, the government simply declared one state of emergency after another in an attempt to control and stifle the black population, and in particular, to silence the African National Congress (ANC).<sup>71</sup> Rights, particularly those of expression and due process, were summarily ignored. When drafting the new constitution, the constituencies were looking for a way to

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<sup>69</sup> S. AFR. CONST. 1996 § 37.

<sup>70</sup> Section 37 states, in part:

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

(a) prospectively; and

(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

S. AFR. CONST. 1996 §§ 37(1)–(2).

<sup>71</sup> See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 293 (2000) (providing a concise history of the politics of South Africa during the late 1990s, just previous to the change in government).

avoid any future abuses. Notably, American lawyers consulting with constitutional drafters discouraged an emergency clause, arguing theoretically that a clause would encourage future states of emergency.<sup>72</sup> However, the two main parties, the ANC and the National Party (NP), as well as other stakeholder parties, agreed early on that an emergency clause was necessary. Because the ANC had been suppressed under the past states of emergency issued by the NP government, their proposal was much broader, covering more “unsuspendable” rights, while the NP’s plan was more conservative.<sup>73</sup>

The evolution of drafting informs possible avenues for both the United States and those countries that will draft democratic constitutions in future years. At the beginning of the process, nonderogable rights were never assured to be included in the suspension clause of South Africa’s Constitution and were met with some opposition.<sup>74</sup> Illustratively, the nonderogable rights, once written in an early draft, were removed from the suspension clause in a later draft.<sup>75</sup> The ANC then lobbied to have the nonderogable rights reinstated into the Constitution, and also greatly expanded them to include “equality, dignity, language, culture, education and labor relations.”<sup>76</sup> A Technical Committee acted as a final drafting body to moderate between the contributing parties. The discussions concerning the need for core rights eventually changed the minds of some members of the Technical Committee, and ultimately even more rights than had been originally proposed were incorporated.<sup>77</sup> These rights include: application, equality, life, human dignity, prohibitions on servitude and forced labor, religion, belief and opinion, labor relations, and children.<sup>78</sup> In addition, Section 34(6) specifically protects the rights of those detained under a state of emergency. Subclauses (a) through (g) detail procedures for detainees ranging from notification to medical care. At this stage of drafting, Section 37(5)(c) was a table that listed the rights and the extent to which each was pro-

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<sup>72</sup> *Id.* at 294.

<sup>73</sup> *See id.* (outlining the slightly differing stances and plans of the stakeholders).

<sup>74</sup> *See id.* (describing the various tensions surrounding the inclusion of rights in the State of Emergency Clause).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 298.

<sup>77</sup> The Technical Committee officially organized and drafted the Constitution. The Committee issued numerous drafts, some of which contained enumerated rights and some of which did not. Originally, the Committee was opposed to their inclusion, but ultimately it became a large ally of the rights. *See id.* at 298.

<sup>78</sup> *Id.*

tected.<sup>79</sup> Though the parties themselves compromised and came to rest on the rights above, growing pains regarding developmental measures soon followed.

In the constitutional certification by the Constitutional Court (following a public hearing), the Court declared that while it accepted that such rights should be listed separately in accordance with international human rights norms, it was puzzled as to the specific rights chosen.<sup>80</sup> To the Court, the rights seemed in some ways “arbitrary.”<sup>81</sup> The Framers returned again to the clause and opted to create a broader clause that eliminated the limitations that had originally been imposed on the covered rights.<sup>82</sup> By way of contrast, the final provision is wide in scope, but specific in its application.<sup>83</sup> Notably,

<sup>79</sup> The table in Section 37 originally read:

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to race and sex only
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subsection (1) (d), and (e) and (2) (c) only
13	Slavery, servitude and forced labour	With respect to slavery and servitude only
28	Children	With respect to subsection (1) (d), (1) (e) and to the rights in subparagraphs (1) (g) (i) and (ii) only
35	Arrested, detained and accused persons	With respect to the following subsections only: (1) (a), (b) and (c) (2) (d) (3) (a), (b), (c), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (o) (4)

<sup>80</sup> *In re* Certification of Constitution of S. Afr. 1996 (4) SA 744 (CC) at 804 (S. Afr.).

<sup>81</sup> *Id.*

<sup>82</sup> For a discussion of how the differing opinions were combined, see Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 75 (1999) (commenting broadly on the varying opinions and contributions of the main political parties and persons that drafted the South African Constitution).

<sup>83</sup> Section 37(5)–(8) states:

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

TABLE OF NON-DEROGABLE RIGHTS

1 Section number	2 Section title	3 Extent to which the right is non-derogable
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subsections (1)(d) and (e) and (2)(c)
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: <ul style="list-style-type: none"> <li>• subsection (1)(d) and (e);</li> <li>• the rights in subparagraphs (i) and (ii) of subsection (1)(g); and</li> <li>• subsection 1(i) in respect of children of 15 years and younger.</li> </ul>
35	Arrested, detained and accused persons	With respect to: <ul style="list-style-type: none"> <li>• subsections (1)(a), (b) and (c) and (2)(d);</li> <li>• the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d);</li> <li>• subsection (4); and</li> <li>• subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.</li> </ul>

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national *Government Gazette* within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the de-

the rights of detainees were thoroughly fleshed out and concretely developed in Subsections 37(6) through 37(8). This specific category of rights was considered to be among the most important when looking to their recent history. From the vantage point of today's post-9/11 world, the clause does not appear overly romanticized, as Section 37(8) revokes the privileges of the preceding subsections from those who are not South African citizens. However, broader rights of equality were added, and, most importantly, the rights of detainees became more nuanced. These actions can serve to further guide the United States in search of the right combination of realism and preservation.

It must be noted that South Africa's Constitution has not yet been tested; it was only adopted in 1996 and the country has not yet had occasion to declare a state of emergency. Such an occasion would of course provide concrete empirical evidence of the efficacies of the clause.<sup>84</sup> For the purposes of this Comment, the drafting process and ultimate language of South Africa's Constitution provide the most recent and advanced thinking about the issue. Hence, the clause serves as perhaps the greatest counter-example to America's lack of emergency protection.

#### IV. INTERNATIONAL TREATY SCHOLARSHIP SUPPORTING ENUMERATION

##### A. *Introduction*

Other sources adding to the conversation about the enumeration of these rights are international human rights treaties and the scholarship of communities of jurists. The European Convention of Hu-

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taineé unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

S. AFR. CONST. 1996 §§ 37(5)–(8).

84 The South African Constitution provides perhaps the most extensive emergency clause, which is more in line with current international treaties because of the drafting process.

man Rights (European Convention),<sup>85</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>86</sup> and the American Convention of Human Rights (American Convention)<sup>87</sup> each contain derogation clauses with specific limitations on the suspension of rights. Although they are not necessarily clear indicators of the philosophies or regulations of signatory countries, the international covenants portray the most recent thinking on universal rights that should be preserved by all countries in all circumstances. Joan Hartman, in analyzing these derogation clauses, compellingly argues that the treaties themselves do not effectively “police” a country’s suspension of civil liberties during emergencies.<sup>88</sup> Hence, the clauses within such treaties cannot themselves independently act to govern the signatory countries’ actions, but the substance of the clauses should be examined in order to survey international consensus. These treaties provide further counterpoints to the silence of the U.S. Constitution on the topic of states of emergency. While the United States hesitates to look outside its borders, adequate attention to both the recently drafted Constitution of South Africa and the prevalent international treaty scholarship on the issue provides clear suggestions for reform in our system.

*B. Looking to Three Core Human Rights Treaties for Guidance Concerning Nonderogable Rights*

Beginning with the European Convention for the Protection of Human Rights in 1950, enumeration of civil rights in suspension clauses has become increasingly accepted as an international human rights norm. This movement began conservatively with the enumera-

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85 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

86 International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

87 Organization of American States, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

88 See Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT’L L.J. 1, 2–3 (1981) (asserting that the derogation clauses do not provide realistic checks on signatory governments for the following reasons: (1) derogation situations are politically sensitive, (2) derogation crises have complex causes, (3) there is a lack of a concrete standard of review in treaties, (4) the bodies do not make sua sponte reviews even when crises are occurring, and (5) no effective sanctions exist to punish states for breaking their obligations to not derogate from treaties during times of emergency).

tion of only the rights to life, to a fair trial, and to be free from torture and slavery.<sup>89</sup> Those that advocated for even these rights had to fight hard for them. However, the United Kingdom had pressed for their enumeration since the beginning. Once in the Convention, the clause was never removed.<sup>90</sup> Even in 1950, countries that had experienced severe limitations of minority rights, as had occurred in Northern Ireland, were steadfast in their commitment to this clause.<sup>91</sup> This persistence indicates the clause's perceived potential for providing safety and protection by those most affected.

Similarly, the ICCPR faced barriers in the adoption of enumerated rights within its emergency clause.<sup>92</sup> The main opposition in this instance was the United States. Ultimately, two drafts were sent to the Commission on Human Rights, one with enumerated rights and one without. The Commission not only accepted the nonderogable rights in the clause but slightly widened them, believing that to truly ensure rights and erase confusion the rights should be listed.<sup>93</sup> The rights included in the draft were similar to those contained within the European Convention.<sup>94</sup> In addition to those, the Commission added a "ban on imprisonment for failure to fulfill a contractual obligation; right to recognition as a person; and freedom of thought, conscience and religion," and later a nondiscrimination clause.<sup>95</sup> This list of

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<sup>89</sup> Article 15 of the European Convention states:

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 [sic]. 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* note 85, art. 15.

<sup>90</sup> See Hartman, *supra* note 88, at 4–7 (detailing the allies and opponents of the clause).

<sup>91</sup> *Id.* at 5.

<sup>92</sup> *Id.* at 8–10.

<sup>93</sup> *Id.* at 9–10.

<sup>94</sup> "The United Kingdom draft exempted only the articles on life, torture, involuntary experimentation, slavery and retroactive criminal penalties." *Id.* at 10 n.53. See U.N. Human Rts. Comm., *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles*, at 19, U.N. Doc. E/CN.4/365 (1950).

<sup>95</sup> Hartman, *supra* note 88, at 10. Article 4 of the ICCPR states:

rights is not as broad as those contemplated in South Africa's Constitution, but the opinion of the International Commission on Human Rights creates an ever-developing model of the changing body of these rights. The trend towards broadening certain personal rights, such as the freedom of religion, indicates a move to preserve rights of human dignity and to progress slightly past more established norms.

The International Commission of Jurists (ICJ)<sup>96</sup> reviewed the clause and created a working paper to analyze Article 4.<sup>97</sup> In its analysis, the ICJ identified a question that has come to signify the core of the debate in selecting rights to be included:

The basic choice with regard to identification and elaboration of non-derogable rights is whether these rights should include only those which are fundamental, absolute, well-recognized, and indispensable to human dignity, or whether it is appropriate to include all those rights whose suspension would not be justifiable in any conceivable emergency.<sup>98</sup>

The ICJ concludes that the first option probably reflects the current aim of the drafters; however, the question is one that will continue to be posed as emergency jurisprudence takes shape.<sup>99</sup> In later general recommendations for implementation of safeguards at a national lev-

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* note 86, art. 4; see Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 112-18 (1985) (recounting in minute detail the proposals of various countries that are party to the treaty, notably those of the United States, United Kingdom, France, and Lebanon, concerning the rights to be included).

<sup>96</sup> For more information on the mission and reports of the ICJ, see International Commission of Jurists: Legal Resource Center, [http://www.icj.org/news\\_multi.php3?lang=en](http://www.icj.org/news_multi.php3?lang=en) (last visited Feb. 10, 2008).

<sup>97</sup> See Hartman, *supra* note 95, at 113 (analyzing Article 4 in the context of other international human rights treaties and norms).

<sup>98</sup> *Id.*; see also ORAÁ, *supra* note 5, at 124 (identifying the same underlying question for drafters on nonderogable rights provisions and expounding on the importance of the question as a starting point in thinking about rights enumeration).

<sup>99</sup> *Id.*

el, the ICJ fully endorsed comprehensive rights enumeration for detainees.<sup>100</sup> In fact, twenty-three out of thirty-seven domestic recommendations detail specifically their opinions of the correct and humane due process owed to detainees during an emergency, zeroing in on potentially one of the most controversial, but important, elements of nonderogable rights.<sup>101</sup> These recommendations also reach out to even more encompassing rights, aligning themselves with the American Convention.

The American Convention laid out a much broader set of rights to be considered “emergency-proof.”<sup>102</sup> Namely, the Convention added the rights of jurisdictional personality, the rights of the family, the right to a name, the rights of the child, the right to nationality, and the right to participate in government on top of those observed in the ICCPR.<sup>103</sup> Currently only twenty-one of the thirty-four eligible countries have signed the Convention.<sup>104</sup> Although the United States signed the treaty in the late 1970s, it has not ratified it and has no plans to do so, providing insight into the mindset of U.S. lawmakers.<sup>105</sup> This Convention presently seems to be as “far” as any interna-

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100 See ICJ, STATES OF EMERGENCY, *supra* note 65, at 459–49 (creating very complete and thorough recommendations concerning detention during emergency, as it should be regarded on a national level).

101 The number of provisions clearly indicates the importance of this right. *Id.* at 460–63.

102 The American Convention, Article 27, “Suspension of Guarantees,” states:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

American Convention, *supra* note 87, art. 27.

103 *Id.*

104 See *id.* for the section titled, “Signatories and Ratifications,” which lists the countries that have signed and ratified the Convention.

105 *Id.*

tional instrument has gone in the preservation of rights in that it has the longest list of nonderogable rights. In addition, its lack of regional support and its comparisons with other international treaties lead one to conclude that it represents the very edge of nonderogable rights legislation. This is especially helpful because it provides a clear example of what might be “too far” for the United States in considering an emergency clause.

As a final body of relevant experts, the International Law Association (ILA)<sup>106</sup> has a long history of interest in emergency suspensions and has made a significant contribution to the scholarship surrounding nonderogable rights.<sup>107</sup> Specifically, their report, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, chaired by Subrata Roy Chowdhury, extensively analyzes each of the sixteen draft rights that have been included in the final ILA recommendation.<sup>108</sup> Tellingly, the included rights draw from the three main treaties and serve as perhaps the most comprehensive list of rights to be suggested. This report, like the American Convention, is indicative of a new wave that seemingly seeks to cover all rights that cannot be conceivably suspended. While this serves as an ideal, our world has changed drastically in terms of what is now “conceivable.” This litany of rights, while comprehensive, may reach too far. In assessing which rights are to be included, a delicate balancing of internationally accepted norms, values taken from the Constitution, and a contemplation of the assurances necessary during emergency is essential.

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<sup>106</sup> For more information on the mission, activities, and scholarly contributions of the International Law Association, see International Law Association Home Page, <http://www.ila-hq.org> (last visited Feb. 10, 2008).

<sup>107</sup> See FITZPATRICK, *supra* note 26, at 3 (discussing the contributions that the ILA has made to the field of emergency rights).

<sup>108</sup> See generally SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY* (1989) (exploring the full background, policy and implications of each of the following sixteen draft rights: (1) right to legal personality, (2) freedom from slavery and servitude, (3) freedom from discrimination, (4) right to life, (5) right to liberty, (6) freedom from torture, (7) right to a fair trial, (8) freedom of thought, conscience, and religion, (9) freedom from imprisonment for inability to fulfill a contractual obligation, (10) rights of minorities, (11) rights of the family, (12) right to a name, (13) rights of the child, (14) right to nationality, (15) right to participate in government, and (16) right to remedy).

## V. RECOMMENDATIONS FOR ADOPTION OF EMERGENCY NONDEROGABLE RIGHTS LEGISLATION

After taking into account the current confusion in the United States's emergency framework, the South African Constitution, and international recommendations, civil liberties are in a comparatively weak and precarious state within the United States. Historically, the President or the Congress has been able to suspend even the most basic of human rights under the guise of an emergency. These suspensions are indeed a large problem, but perhaps a larger problem is the lack of any coherent system to safeguard certain liberties and the needless and inefficient debate that this issue has caused. Arguments that the United States upholds more rights by refusing to name them has only led to more unanswerable questions, both for the public and the government. To make a clear statement concerning our devotion to protecting citizens and creating a more transparent form of government, nonderogable liberties should be institutionalized in the Constitution.

Admittedly, amending the Constitution to include an amendment for states of emergency would be ideal.<sup>109</sup> However, it is perhaps an illusion to believe that an amendment would be passed. Instead, the Legislature needs to take the first step in securing American liberties by creating an extended National Emergencies Act. Instead of simply identifying emergencies and limiting their authorization and procedure, the Act could finally codify those truly inalienable rights. Joan Fitzpatrick declares, "Given the weakness of the treaty-based and other international monitoring systems, the implementation of international standards in domestic law is vital, especially in the basic or constitutional law of each state."<sup>110</sup> She also reports that in 1990, the Special Rapporteur on States of Emergency was commissioned to begin drafting laws for certain nations to implement.<sup>111</sup> The international community has recognized the dire need for national reform in this area and the United States, due to its history and its role in the international forum, should respond.

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109 See Scheuerman, *supra* note 7, at 875 ("The general thrust of this scholarly genre is to push for properly designed *constitutional emergency clauses*: They alone can provide necessary prospective or *ex ante* legal guidelines, help create a clear separation of emergency from ordinary lawmaking, and outline strict legal requirements whereby we could better distinguish legal from illegal emergency government.").

110 FITZPATRICK, *supra* note 26, at 77-78.

111 See *id.* at 78 n.125 (stating the national drafting intentions of the Special Rapporteur).

Hence, the most essential rights to be included in the Act should be those that are informed from previous international conventions and the South African Constitution. This Act would recognize only those which are “fundamental, absolute, well-recognized, and indispensable to human dignity.”<sup>112</sup> To this end, the basic rights included in the European Convention that have since been recognized as *jus cogens* within international law, “the right to life, prohibition on torture and cruel and inhuman punishment, prohibition on slavery, and the ban on *ex post facto* laws,” must be included.<sup>113</sup> In addition, based upon the South African Constitution and the current debate concerning the treatment and legality of detainees, it is necessary to add a clear procedure for how detainees are to be treated during times of emergency. Hence, a right to a fair trial should be defined and provisions should be made for this procedure during detention.

Finally, attention must be paid to the last draft recommendations that the United States created when forming the ICCPR. Namely, the United States advocated, in addition to the stated *jus cogens*,

[A] proposal to preserve from derogation the right to life prohibition on torture; prohibition of slavery, servitude and compulsory labor; protections against arbitrary arrest and for prompt notice of charges; ban on imprisonment for contractual obligations; prohibition on expulsion of aliens; right to fair and public trial; prohibition on retroactive offenses; right to juridical personality and freedom of thought, conscience, and religion.<sup>114</sup>

This, of course, would be caveated by the possibility of suspending habeas corpus under the U.S. Constitution. Though each of these recommendations was advocated by the United States, the conference for this convention took place in 1985 and the world has since changed markedly. Security threats that were not conceivable at the time have undoubtedly made an impact on what the United States would consider nonderogable.

Notably missing in the following recommendations are ideal protections for aliens and for public hearings. Taking this criticism into account, the following recommendations remain possible in a world

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<sup>112</sup> Hartman, *supra* note 95, at 113.

<sup>113</sup> *See id.* at 114 (stating that the rights are *jus cogens*); *see also* CHOWDHURY, *supra* note 108, at 145 (noting the international consensus on these four rights and referring to them as “preemptory norms of international law within the meaning of article 53 of the Vienna Convention on the Law of Treaties”); Joan Fitzpatrick, *Protection Against Abuse of the Concept of “Emergency,”* in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 203–07 (Louis Henkin & John Lawrence Hargrove eds., 1994) (analyzing whether the norms have risen to the level of *jus cogens* in international law).

<sup>114</sup> Hartman, *supra* note 88, at 116.

that may require more sensitive courts systems and increased use of intelligence. The clause is meant to act as a floor because it has become obvious that the country is not able to maintain all constitutional rights for all citizens at all times. Contentious fights over foreign detainees and public trials that might compromise security have certainly changed the provisions that the United States would and should accept.

Finally, it is also granted that all of the debates and constitutional questions will march on in some shape. But, with rights explicitly laid out in the Constitution, advocates will have concrete knowledge of the rights that everyone knows cannot be taken away. Quandaries will remain over rights that could be taken away during emergency, but these deprivations would have to be authorized by Congress and would only last for as long as the emergency would last. Providing structure and substance to our emergency jurisprudence would allow some order in our chaos.

For all the proceeding reasons, the following nonderogable civil liberties should be preserved in national legislation:

- The right to life;
- A prohibition on torture and cruel and inhumane punishment;
- A prohibition on slavery;
- A ban on *ex post facto* laws;
- A ban on servitude and compulsory labor;
- Protections against arbitrary arrest and for prompt notice of charges (as specifically enumerated in terms of detainee protection);
- A ban on imprisonment for contractual obligations;
- The right to fair trial and due process; and
- The right to freedom of thought, conscience, and religion.

## VI. CONCLUSION

These recommendations are starkly more empty than those of the South African Constitution, the American Convention, and the ICCPR. This fact rests not only upon the changing nature of the world, but also upon emerging scholarship as to the impact of enumerated rights. Scholars, including Jaime Oraá, have argued that including liberties that are not generally at risk for suspension during

emergencies has the effect of “cheapening” the list.<sup>115</sup> The litany of rights should include only those that are most relevant and vulnerable during states of emergencies.<sup>116</sup> If the list is kept short, it will increase the strength of the enumerated rights and the United States would be much more likely to accept the clause into its fold.<sup>117</sup>

Legislators should heed the international call to introduce legislation to deal with this problem, which continues to plague our nation in this era of sustained emergencies. Though listing the rights will certainly not lay to rest many of the debates surrounding emergency, it provides a foothold for the Judiciary and for the public in assessing our government. These rights will provide a low-water mark for the public to use in holding their government accountable during the most trying of times.

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115 See ORAÁ, *supra* note 5, at 125 (explaining that simply enumerating rights for the sake of showcasing their importance may actually have negative consequences in the effectiveness of the clause).

116 See *id.* (explaining the theory that a short list of rights will have a great effect on the public).

117 *Id.*