Ensuring Government Accountability During Public Health Emergencies

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Introduction

Regardless of whether one agrees that it should have, 9/11 did transform our country. The opportunity to seize the moment and erect an "imperial" or "unitary" executive branch of government was clear. Right after the terror attacks on this country's financial and political centers, an unsettling daze afflicted the nation's capital. The unthinkable had just occurred. The concept of national security, about which most Americans had rarely given a second thought, was front and center on everyone's mind. Initially, the Bush Administration received broad praise for reassuring the public that it was safe and that a serious plan was in place to prevent further attacks.[1] Only later would we learn what this plan entailed—convincing the public that the federal government needed unchecked power to keep the nation safe. Yet immediately after the attacks, a President previously plagued by dismal public ratings and questionable legitimacy received the undivided support of his country.[2]

The sense of restored calm in D.C. quickly evaporated following an eerie bioterror attack that used the public mail system to deliver weaponized anthrax.[3] Federal workers flooded emergency rooms desperately seeking ciprofloxacin, a broad-spectrum antibiotic. Once again, the capital's psyche was unmoored from normalcy and set adrift on insecurity. Amidst these strange days, the Centers for Disease Control (CDC) commissioned the Centers for Law and the Public's Health at Georgetown and The Johns Hopkins Universities, headed by Lawrence Gostin, to draft the Model State Emer-

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[1] Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 Pub. Papers 1140 (Sept. 20, 2001); Elisabeth Bumiller, *Seeing is Believing; America as Reflected in its Leader*, N.Y. Times, Jan. 6, 2002, at C1.

[2] President Bush's job approval ratings skyrocketed from a pre-9/11 low of 51% on September 10, 2001 to his highest ever rating of 90% on September 21, 2001. Gallup, Presidential Job Approval Center, http://www.gallup.com/poll/124922/Presidential-Job-Approval-Center.aspx (click on Bush 2001–2009, then National Adults) (on file with the Harvard Law School Library); *see also* Bumiller, *supra* note 1.

[3] *See, e.g.*, John Lancaster & Susan Schmidt, *31 Exposed to Anthrax on Capitol Hill*, Wash. Post, Oct. 18, 2001, at A01; *see generally* Fed. Bureau of Investigation, Amerithrax Investigation, http://www.fbi.gov/anthrax/amerithraxlinks.htm (on file with the Harvard Law School Library).

gency Health Powers Act (MSEHPA).[4] As the MSEHPA's preamble explicitly acknowledges, its drafters were specifically reacting to 9/11 and self-consciously invoking a new paradigm of public health as national security:

> In the wake of the tragic events of September 11, 2001, our nation realizes that the government's foremost responsibility is to protect the health, safety, and well being of its citizens. . . . Emergency health threats, including those caused by bioterrorism and epidemics, require the exercise of essential government functions. Because each state is responsible for safeguarding the health, security, and well being of its people, state and local governments must be able to respond, rapidly and effectively, to public health emergencies. . . . [The Act] therefore grants specific emergency powers to state governors and public health authorities.[5]

The feverish urgency of this effort was apparent as the initial version of the MSEHPA was released publicly on October 23, 2001, at almost the same time as the USA PATRIOT Act[6] and while the Twin Towers were still smoldering.

Constitutionally, states have broad public health powers, including the ability to declare a public health emergency (PHE).[7] A state's declaration of a state of emergency has traditionally served several important functions, including triggering the release of monetary funds, the mobilization of personnel and equipment, the waiver of certain legal strictures, and the expansion of executive powers. Given this broad set of extant state emergency powers, many public health law scholars have questioned the underlying rationale of the MSEHPA and the extraordinary powers it sought to grant to states.

Critics singled out the following MSEHPA provisions, among others, as especially problematic. A state Governor can unilaterally declare a public health emergency with no judicial oversight.[8] The declaration allows the state to conscript health care providers and facilities indefinitely and against their will.[9] It permits public health officers to coerce individuals to submit to examinations and forced treatment on penalty of being quarantined or criminally punished.[10] It grants public health officials and those working

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[4] MODEL STATE EMERGENCY HEALTH POWERS ACT (Ctr. for Law & the Public's Health, Discussion Draft 2001) [hereinafter MSEHPA], *available at* http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf.

[5] *Id.* pmbl. at 6.

[6] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

[7] Jacobson v. Massachusetts, 197 U.S. 11, 25–26 (1905); *see, e.g.*, COLO. REV. STAT. § 24-32-2104 (2006).

[8] MSEHPA, *supra* note 4, § 401. The Governor can renew such a declaration every thirty days. Further, the state legislature can only overturn such a declaration by majority vote in both houses. *Id.* § 405(b)–(c).

[9] *Id.* § 502(b).

[10] *Id.* §§ 602(c), 604(a).

under their authority broad immunity from liability, even for actions that cause permanent injury or death.[11] Additionally, the MSEHPA authorizes the state public health authority to "waive any or all licensing requirements, permits, or fees as required by the State code and applicable orders, rules, or regulations for health care providers from other jurisdictions to practice in this State."[12]

In summary, critics have argued that the MSEHPA granted Governors and state public health officials dictatorial powers. In particular, George Annas, Wendy Parmet, and Wendy Mariner have stood out in their strong opposition to the MSEHPA. They have argued that the MSEHPA is a reactionary legislative proposal that is rooted in the fear and paranoia of an exceptional historical event, and not in sound public health law policy.[13] Further, they have noted that granting the states extraordinary powers to respond to bioterrorism or massive PHEs seems misguided when such events would clearly seem to be federal problems.[14]

When the Obama Administration took office in January 2009, some of the leading critics of the MSEHPA and the Bush Administration policies breathed a sigh of relief. They expressed optimism that President Obama's renewed commitment to the rule of law signaled that the time was ripe to move away from PHE policies based on a flawed national security paradigm.[15] This optimism was not unfounded. The Obama Administration explicitly declared that no government official was above the law, and it vowed to restore a culture of government transparency and accountability and not to overlook civil liberties in the name of security.[16] In other words, the country was going to regain a sense of normalcy, rejecting the paranoid stance of an emergency state. Yet after a year and a half in office, President Obama's actions regarding civil liberties and government accountability have not lived up to the substance and spirit of his initial rhetoric.

The main argument of this Article is that the gravest threat to civil liberties during a PHE stems from federal powers premised on post-9/11 na-

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[11] *Id.* § 804. This provision immunizes state actors from negligent tort liability, but not from gross negligence or willful misconduct.

[12] *Id.* § 608(b)(2).

[13] *See, e.g.*, GEORGE J. ANNAS ET AL., PANDEMIC PREPAREDNESS: THE NEED FOR A PUBLIC HEALTH—NOT A LAW ENFORCEMENT/NATIONAL SECURITY—APPROACH 11–12, 16 (2008), *available at* http://www.aclu.org/files/images/asset_upload_file399_33642.pdf; George J. Annas, *Puppy Love: Bioterrorism, Civil Rights, and Public Health*, 55 FLA. L. REV. 1171, 1178–79 (2003) [hereinafter Annas, *Puppy Love*]; Wendy K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 J. HEALTH L. 247, 283 (2005).

[14] *See* Annas, *Puppy Love*, *supra* note 13, at 1181–82; George J. Annas, *Bioterrorism, Public Health, and Civil Liberties*, 346 NEW ENG. J. MED. 1337, 1337, 1339 (2002) [hereinafter Annas, *Bioterrorism*].

[15] *See* Wendy K. Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law,* 1 DREXEL L. REV. 341, 341, 379 (2009).

[16] President Barack Obama, Inaugural Address (Jan. 20, 2009) (transcript available at http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html) ("And those of us who manage the public's dollars will be held to account, to spend wisely, reform bad habits, and do our business in the light of day, because only then can we restore the vital trust between a people and their government.").

tional security justifications, not putative state powers under the MSEHPA. While I concur with earlier assessments that the MSEHPA is seriously flawed and that PHEs should be construed as primarily federal issues, going forward, more critical attention needs to be focused on the federal role during PHEs as the initially alarming MSEHPA appears to be more of a paper tiger. First, as the responses to Hurricane Katrina and recent flu pandemic threats have demonstrated, the concept that the states' police power will remain the locus of power during future PHEs is outdated. Second, the federal government possesses core security capabilities that enable surveillance and detention measures unmatched by any state. Third, and most importantly, the Obama Administration appears to be normalizing a national security legal framework introduced by the previous Bush Administration that grants federal actors expansive powers to curtail the liberties of individuals with correspondingly little accountability.

This Article advocates for balanced public health emergency policies that both secure public safety and respect individual civil liberties. As President Obama indicated in his inauguration address, these goals are not mutually exclusive.[17] Arbitrary and abusive measures against individual and group liberty are grave harms in and of themselves and are much more likely to occur in the context of unaccountability. In turn, reasonable fear of such measures during an emergency will undermine trust and voluntary compliance, which will only worsen the public health crisis.

Part I of this Article describes conditions that will make greater federal involvement inevitable during future public health emergencies. Part II examines the lasting danger presented by the convergence of national security and public health emergency policies that occurred during the Bush Administration. Given this convergence, Part III analyzes the Obama Administration's position that official actions implicating national security matters are beyond judicial review and suggests this stance is a cause for serious concern in the context of public health emergencies.

I. Why Emerging Public Health Crises Will Inevitably Be Cast as Federal Issues

As a matter of constitutional law, public health has been construed as a state rather than a federal issue.[18] In this regard, states have significant power to regulate individuals, groups, and property to protect and secure the public's health. These powers include isolation (segregating individuals known to have an infectious disease), quarantine (segregating individuals with suspected or known exposure to an infectious disease), surveillance, property condemnation, and compulsory vaccinations.[19] One of the major

[17] *Id.* ("As for our common defense, we reject as false the choice between our safety and our ideals.").

[18] Jacobson v. Massachusetts, 197 U.S. 11, 24–26 (1905).

[19] *See generally* MSEHPA, *supra* note 4.

rationales given for drafting the MSEHPA was a need to "moderniz[e] public health law" in response to "[n]ew and emerging dangers."[20] The MSEHPA supporters presumed that existing public health laws were ill-equipped to deal with new types of PHEs that could be anticipated after 9/11, and that the drafters responded appropriately to these modern realities by greatly expanding the scope of state powers during a PHE. It is ironic that this "modernizing" effort was founded on a traditional understanding of the states as the primary locus of power during a PHE. While this view is consistent with traditional notions of federalism and state police powers, it is difficult to reconcile with the current realities of globalization, bioterrorism, and post-Katrina natural disaster response.

In 1905, the Supreme Court decided the seminal public health law case *Jacobson v. Massachusetts*, holding that the states' police powers inherently include broad public health powers:

> [T]his court . . . has distinctly recognized the authority of a state to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states.[21]

In *Jacobson*, the Court upheld a Massachusetts law that gave authority to local public health boards to order the compulsory vaccination of adults for smallpox.[22] Scholars have understood *Jacobson* as defining the maximal limits of state public health authority, establishing that the Court would uphold the constitutionality of any state public health regulation as long as it was not "arbitrary and oppressive."[23] The Court did not reach the issue of whether forced vaccination was legal because the Massachusetts high court had already determined that such government action was not permissible and that the only legal sanction for noncompliance was a statutory fine.[24]

Fast forward to a century after the *Jacobson* case and it is hard to imagine that an outbreak of smallpox would be construed as only a state, and not a federal, matter. In *Jacobson*, the Massachusetts statute provided that, "the board of a health of a city or town . . . [if necessary] shall require and enforce the vaccination."[25] Explicitly, this law incorporated the concept that infectious disease control is inherently local, even to the level of a city or town rather than the state or county. In the era of *Jacobson*, if a steamer bound for Boston left England with passengers infected with smallpox or bubonic plague, the symptoms of these diseases would manifest before the ship arrived. Public health officials at Boston Harbor could then issue a quarantine order for the ship, effectively dealing with the issue at the local

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[20] *Id.* pmbl. at 6–7.
[21] 197 U.S. at 26–27.
[22] *Id.* at 39.
[23] *Id.* at 38.
[24] Commonwealth v. Pear, 66 N.E. 719, 722 (Mass. 1903).
[25] Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

level. However, with the ability of individuals to travel across the world (let alone state lines) faster than the incubation periods of diseases, it is easy to see how an infectious disease can spread from Heathrow to Logan to LAX, and to all points in between, in only a matter of hours. The societal conditions that existed in *Jacobson* no longer exist; it is difficult to see how a potential outbreak identified at Logan Airport would not "affect the people of other states" and hence implicate federal public health authority.[26]

Even in public health crises where the risk of contagion is nonexistent, there is reason to think that the federal government would play a major role in responding to a biological incident. Imagine if the D.C. anthrax attack of 2001 instead occurred at a state capitol. Aerosolized anthrax is not communicable person-to-person, but instead one must inhale it from a local source of weaponized spores.[27] In other words, there would be little chance of such an attack infecting "people of other states." However, even under these localized circumstances, it seems illogical to expect that state officials would be the primary architects of a response to such an act of bioterrorism. Certainly, the involvement of local public health authorities and emergency responders would be vital in such a situation, just as the NYPD, NYFD, and Mayor Giuliani's office played a crucial role on 9/11. However, bioterrorism, like terrorism generally, categorically is a federal matter, regardless of its geographic scope or intended target, because it raises national security concerns.[28] The use of bioterror agents implicates weapons of mass destruction and frightening technical sophistication that would naturally put the federal government on alert. By contrast, a lone gunman attacking a state capitol would not necessarily raise the same national security concerns.

Similarly, large natural disasters, like bioterrorism, can be properly characterized as federal matters not only from a pragmatic standpoint, but also due to the normative public and political consensus that the federal government has an affirmative duty to respond to massive crises that are foreseeably too challenging for local and state authorities. This consensus began to build after 9/11 and was fortified during the aftermath of Hurricane Katrina. According to a bipartisan House investigative report on the response to Katrina, the federal government broadly failed during this emergency.[29] In particular, Secretary of Homeland Security Michael Chertoff "executed [the federal government's] responsibilities late, ineffectively, or

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[26] *Id.* at 25.

[27] Thomas V. Inglesby et al., *Anthrax as a Biological Weapon, 2002: Updated Recommendations for Management*, 287 JAMA 2236, 2248 (2002).

[28] Annas, *Puppy Love*, *supra* note 13, at 1181–82; Annas, *Bioterrorism*, *supra* note 14, at 1339 ("[B]ioterrorism is a matter of national security, not just of state police powers. The existing federal quarantine law is based on the commerce clause of the Constitution . . . and Congress could examine and update it to deal with bioterrorism.").

[29] SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H.R. REP. NO. 109-377, at 1–5 (2006), *available at* http://www.gpoaccess.gov/katrinareport/mainreport.pdf ("Our investigation revealed that Katrina was a national failure, an abdication of the most solemn obligation to provide for the common welfare.").

not at all."[30] Secretary Chertoff designated Katrina as "an incident of national significance" on the day after the hurricane made landfall despite advance warning of the storm's magnitude and path from the National Hurricane Center.[31] Compounding this delay, Chertoff did not choose to designate Katrina as a "catastrophic event," which would have automatically led to a more proactive federal response under the National Response Plan.[32]

In some sense, the federal government's forbearance during Katrina could be characterized as respect for the states' traditional police powers. But, in the aftermath of Katrina, such an argument is politically untenable. After being hammered by criticism that the federal response was slow and inadequate, President Bush stated that "[f]our years after the frightening experience of September 11th, Americans have every right to expect a more effective response in a time of emergency."[33] President Bush admitted that the federal government had failed to meet its obligation and that, as President, he was responsible.[34] Eventually the federal government established a very large footprint in post-Katrina New Orleans. As described below, the problem for many New Orleans residents then became not the lack of federal involvement, but the unaccountable nature of it.

II. The Confluence of 9/11 and Katrina: Merging National Security and Federal Public Health Emergency Power

The similar ordeals of Javaid Iqbal and Abdulrahman Zeitoun illustrate the danger of federal emergency powers that are applied in a context of unaccountability. Iqbal is a Pakistani immigrant who lived on Long Island and was detained shortly after 9/11 on immigration charges. Zeitoun is a naturalized U.S. citizen of Syrian origin who lives in New Orleans and was detained six days after Hurricane Katrina for "looting" a property that he owned.[35] While Iqbal awaited his trial, federal authorities placed him at the Metropolitan Detention Center (MDC), a prison that earned a reputation as "Brooklyn's Abu Ghraib."[36] Without charging Zeitoun with any crime nor allowing him to call his family who presumed he was dead, National Guardsmen and police acting under the authority of FEMA interned him and three of his acquaintances at a makeshift prison called "Camp Greyhound,"

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[30] *Id.* at 131.

[31] *Id.* at 131–34.

[32] *Id.* at 36, 137.

[33] President George W. Bush, Address at Jackson Square, New Orleans, La. (Sept. 16, 2005) (transcript available at http://www.nytimes.com/2005/09/16/national/nationalspecial/16bush-text.html).

[34] *Id.*

[35] Ed Pilkington, *The Amazing True Story of Zeitoun*, Guardian (London), Mar. 12, 2010, at 8.

[36] Adam Liptak, *Justices Turn Back Ex-Detainee's Suit*, N.Y. Times, May 18, 2009, at A16; Larry Cohler-Esses, *Brooklyn's Abu Ghraib*, Daily News (New York), Feb. 20, 2005, at 36.

which eerily resembled the fenced cage layout of "Camp X-Ray" at Guantanamo Bay.[37] Credible reports corroborate both men's claims that they were physically abused by their guards, subjected to repeated unnecessary strip and body cavity searches, refused medical care, and verbally taunted as being "terrorists," among other abuses.[38]

Commenting on the type of abuse suffered by Iqbal and many other Arab and Muslim immigrants, David Cole presciently argued prior to Hurricane Katrina that, "[m]easures initially targeted at noncitizens may well come back to haunt us all."[39] In the case of Zeitoun, one might counter that even though he is a U.S. citizen, as an Arab American, he still qualifies as an "outsider," so his ordeal does not suggest that "insiders" would experience the same violations. As Oren Gross explains, during emergencies "[a] bright-line separation between 'us' and 'them' allows for piercing the veil of ignorance. We allow for more repressive emergency measures when we believe that we are able to peek beyond the veil and ascertain that such powers will not be turned against us."[40]

Returning to Zeitoun's story, two of his acquaintances that were detained alongside him at Camp Greyhound were white U.S. citizens who spent six and eight months in prison while Zeitoun spent less than a month in prison.[41] Additionally, Camp Greyhound held over 1,200 detainees, mostly African Americans, and de facto denied their habeas corpus rights.[42] Thus, Camp Greyhound serves as a prime example of Cole's claim that civil liberties violations initially limited to "outsider" groups will eventually affect the general population as well.

The Iqbal and Zeitoun narratives also illustrate that the Bush Administration seamlessly applied abusive and repressive tactics developed for the War on Terror in the context of PHEs.[43] Further, President Bush did not limit the militaristic approach to PHEs to the particular context of a physically devastated New Orleans, where one could legitimately argue that society and government had ceased to function. A little more than a month after Katrina, President Bush stated at a press conference that he contemplated addressing the looming threat of avian (bird) flu in the same manner: "If we had an outbreak somewhere in the United States, do we not then quarantine that part of the country? . . . And who best to be able to effect a quarantine?

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[37] DAVE EGGERS, ZEITOUN 232 (2009) ("Looking at it Zeitoun realized that it was not one long cage, but a series of smaller, divided cages. . . . It looked precisely like the pictures he'd seen of Guantanamo Bay.").

[38] *See id.* at 226–30; Cohler-Esses, *supra* note 36.

[39] David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 959 (2002).

[40] Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1083 (2003).

[41] *See* Pilkington, *supra* note 35.

[42] *Id.*

[43] *See* ANNAS ET AL., *supra* note 13, at 5 ("[P]olicymakers . . . view[ ] public health policy through the prism of national security and law enforcement . . . [such that p]eople, rather than the disease, become the enemy.").

. . . [A] military that's able to plan and move."[44] Fortunately, such a military quarantine remained hypothetical as an avian flu epidemic never actually occurred in the United States.

As a consequence of the federal government taking on a larger role during PHEs and treating such events as part of national security, more attention must be focused on the developing legal precedent regarding the protection of constitutional rights and the accountability of federal actors during an emergency. The two obvious goals of a federal emergency response policy are the effectiveness of the response and the protection of civil liberties.[45] In balancing the security of the public with constitutional freedoms, one can anticipate policymakers struggling with issues of both over- and under-protection of civil liberties during a PHE. Political realists would argue that the only limits on government during an emergency "are those emanating from efficiency and limited resources."[46] At the other end of the spectrum are those who argue that it is important to uphold legal norms during times of emergency as a "check against arbitrary actions and unlimited discretion."[47] Certainly there is plenty of normative space between these poles. For instance, when a federal emergency is declared, the Secretary of Health and Human Services can issue administrative waivers to unburden healthcare providers from their duty to follow certain regulations such as patient privacy and facility certifications.[48] Such waivers strike the right balance between acknowledging that emergencies require more flexibility and not making any statement about derogating fundamental rights.

As the next section discusses, while the Obama Administration initially signaled a dramatic break with previous national security policies, it is continuing many troubling Bush-era policies, and it is obstructing judicial branch attempts to hold federal officials accountable for civil and human rights violations.

III. The Obama Administration and Prospects of Limited Accountability During Public Health Emergencies

An expanded federal role during PHEs is such cause for concern because of the confluence of three political dynamics: expansive executive power, lack of transparency, and lack of accountability. The abuse of government processes and attendant abuses of civil liberties stemming from this confluence during the George W. Bush Administration have been well docu-

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[44] David Brown, *Military's Role in a Flu Pandemic*, Wash. Post, Oct. 5, 2005, at A5.

[45] Even the MSEHPA purported to balance these two goals. *See* MSEHPA, *supra* note 4, pmbl. at 6.

[46] Gross, *supra* note 40, at 1042.

[47] *Id.* at 1043.

[48] 42 U.S.C. § 1320b-5 (Supp. I 2007).

mented.[49] On taking office, President Obama promised to bring transparency, accountability, and the rule of law back to the federal government. Obama underlined his commitment to these ideals by pledging to close Guantanamo within a year and halt military commissions, among other measures.[50] Yet, a year and a half later, the world is watching as the United States tries Omar Khadr, detained at age fifteen, in a military commission at Guantanamo while banning reporters from the trial for publishing information that was already public knowledge.[51]

The counterstory, as even strong critics of President Obama acknowledge, is that he "appears more reluctant to use these extraordinary powers than his predecessor."[52] For example, the current "law and order" approach to the cases of Umar Farouk Abdulmutallab, accused of attempting to blow up a Detroit-bound flight on Christmas Day 2009, and Faisal Shahzad, the Times Square bombing suspect, represents a significant departure from Bush-era practices regarding terrorism suspects.[53] In other words, there is reason to trust that President Obama will not arbitrarily invoke extraordinary powers even though "he is nonetheless asserting, enthusiastically at times, that he has such powers."[54]

Crediting that the Obama Administration has been more restrained in invoking extraordinary powers on national security grounds, what accounts for the grave concern from groups like the ACLU that the current Administration is "shielding Bush administration officials from civil liability, criminal investigation and even public scrutiny"?[55] Could this simply represent a political choice by Obama to look forward rather than backward?[56] The valid concern is that once the legal framework is put in place allowing federal officials to commit gross abuses with impunity, any future administration could abuse these latent powers. As Justice Robert Jackson's powerful dissent in the Japanese internment case *Korematsu* warns, "once a judicial

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[49] *See generally* JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE (2007) (cataloguing, reprinting, and analyzing documents obtained by the ACLU showing that the George W. Bush Administration prioritized security above civil liberties).

[50] William Glaberson et al., *Obama Will Shut Guantanamo Site and CIA Prisons*, N.Y. TIMES, Jan. 22, 2009, at A1.

[51] David McFadden, *Pentagon Bans 4 Gitmo Reporters for Naming Witness*, ASSOCIATED PRESS, May 6, 2010, *available at* http://www.nytimes.com/aponline/2010/05/07/world/AP-CB-Guantanamo-Reporters-Barred.html?partner=rss&emc=rss.

[52] Eli Lake, *The 9/14 Presidency: Barack Obama Is Operating With the War Powers Granted George W. Bush Three Days After the 9/11 Attacks*, REASON.COM, Apr. 6, 2010, http://reason.com/archives/2010/04/06/the-914-presidency (on file with the Harvard Law School Library).

[53] *See* Jeff Zeleny & Charlie Savage, *Officials Say Jet Plot Suspect Is Cooperating*, N.Y. TIMES, Feb. 3, 2010, at A11; Mark Mazzetti & Scott Shane, *Evidence Mounts for Taliban Role in Car Bomb Plot*, N.Y. TIMES, May 6, 2010, at A1.

[54] Lake, *supra* note 52.

[55] Dahlia Lithwick, *Torture Roulette*, SLATE, Dec. 14, 2009, http://www.slate.com/id/2238568/ (on file with the Harvard Law School Library).

[56] *See* Dahlia Lithwick, *See No Evil*, SLATE, Feb. 10, 2009, http://www.slate.com/id/2210915/ (on file with the Harvard Law School Library).

opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated [a] principle . . . [that] lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[57]

Given the reality that modern public health emergencies will be increasingly managed under federal authority, and after the Bush Administration's aggrandizement of federal power, it is important to carefully scrutinize how the Obama Administration is defining the standards for transparency and accountability for alleged violations committed in the name of public welfare and security. As explained below, the claim is not that the Obama Administration is necessarily seeking to expand its own emergency powers. Rather, the claim is that in advancing a legal framework of minimal or no accountability for actions that relate to national security, the Obama Administration runs the risk of creating "a loaded weapon" of exceptional powers that can be exploited during emergencies, including public health emergencies, in the future.

A. State Secrets Privilege as an Obstacle to Reviewing Government Actions

Providing government officials with tremendous power to control the liberty of individuals during a PHE is rational in order to secure public safety. The government's power to quarantine closely resembles its power to preventively detain terror suspects.[58] In both instances, the government physically restrains someone suspected but not actually proven to be a threat to public security before he can spread any harm. However, removing accountability from such power invites abuse, even from individuals who might otherwise have a good moral compass.[59] By advancing the "state secrets privilege" in a series of high profile cases involving allegations of torture and warrantless wiretapping, the Obama Administration is, in effect, trying to cloak such abuses from being judged in the light of day.

The case of detainee Binyam Mohamed illustrates the peril of a government having complete physical control over an individual with no external oversight. Mohamed was an alleged victim of the Bush Administration's

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[57] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); *see also* Mariner et al., *supra* note 15, at 366–67 ("It is important to get the law right, because policies governing civil rights become entrenched over time and shape judicial interpretation of the government's powers and individual's rights.").

[58] Mariner et al., *supra* note 15, at 369 (noting that both quarantines and detention of enemy combatants are marked by arbitrariness that invites abuse).

[59] In Plato's *Republic*, the philosopher recounts the parable of the magic ring of Gyges that could make its wearer invisible. The effect of this invisibility is that "the actions of the just would be as the actions of the unjust." Plato's parable further explains that with the power to act with absolute impunity, no man could resist stealing, raping, or murdering to fulfill his desires—that is simply human nature. Plato, THE REPUBLIC (Benjamin Jowett, trans.), *available at* http://classics.mit.edu/Plato/republic.3.ii.html.

extraordinary rendition program and was eventually released to the United Kingdom with all charges against him being dropped. According to press reports, Mohamed suffered horrific torture.[60] He and four other Guantanamo detainees have been attempting to sue a subsidiary of Boeing for arranging flights that were part of the extraordinary rendition program.[61] The ACLU originally filed this case in 2008, but Bush Administration lawyers blocked it from being heard by invoking the state secrets doctrine.[62] The state secrets doctrine simply instructs that a judge should not make certain evidence public if it threatens national security. This interpretation of the privilege has not been controversial.[63] However, the Bush Administration transformed this evidentiary privilege into a categorical bar to bringing a lawsuit under certain conditions, including when the subject matter of the claim is a state secret.

In the first months of the Obama Administration, to the surprise of even the Ninth Circuit panel hearing this case, the Department of Justice (DOJ) raised the state secrets privilege in order dismiss Mohamed's case.[64] This line of argument prompted legal commentator Dahlia Lithwick to ask, "How then, is it possible that Obama's Justice Department chose to stay the course on one of the most embarrassing legal theories advanced by the Bush administration—the . . . utterly bogus argument that courts are not fit to scrutinize government wrongdoing?"[65] The Ninth Circuit rejected the government's motion, allowing the case to proceed, stating, "According to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law."[66]

A day after the court's ruling, President Obama retreated slightly on the state secrets position advanced in the DOJ motion, stating, "I actually think that the state secret doctrine should be modified, . . . right now it's over broad."[67] Subsequently, Attorney General Eric Holder issued a memorandum, effective in October 2009, that outlined the Obama Administration's new policy on state secrets wherein a team of career prosecutors and the Attorney General must review and approve any assertion of the state secrets

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[60] *See* New York Times, Times Topics: Binyam Mohamed, http://topics.nytimes.com/top/reference/timestopics/people/m/binyam_mohamed/index.html?scp=1-spot&sq=Binyam%20Mohamed%20&st=cse (on file with the Harvard Law School Library).

[61] John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 9, 2009, at A12.

[62] Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

[63] Lithwick, *supra* note 56.

[64] Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009); *see* Schwarz, *supra* note 61 (recounting how the panel was startled when government lawyer Douglas N. Letter advanced the state secrets doctrine and argued that "[t]he change in administration has no bearing" on the government's position).

[65] Lithwick, *supra* note 56.

[66] *Mohamed*, 579 F.3d at 955.

[67] Helene Cooper & Jeff Zeleny, *Obama Voices Concern Over Pakistan and Defends Interrogation Memo Release*, N.Y. TIMES, Apr. 29, 2009, at A19.

privilege before government lawyers could advance this privilege in court.[68] By contrast, during the Bush Administration, a single government official could invoke the privilege.[69] However, it is implausible that under the Bush Administration a team of government lawyers did not actually vet every assertion of this privilege. Substantively, under both the Bush and revised Obama constructions of this privilege, the executive branch is claiming that it has the authority to remove certain claims from judicial review.

Going forward, it seems unlikely that the announced additional safeguards will have a major effect on pending cases where the Obama or Bush Administration has invoked this privilege. For example, in *In re National Security Agency Telecommunications Records Litigation*, a case involving the alleged warrantless wiretapping of a now-defunct Islamic charity by the Bush Administration, the Obama Administration still invoked the state secrets privilege following the Holder memorandum.[70] Therefore, even considering Obama's modified stance on the state secrets doctrine, Lithwick's earlier assessment that the Obama Administration has largely maintained the legal position of the Bush Administration still holds, and the courts could be left effectively incapable of scrutinizing government abuses.

B. National Security as a Shield to Bivens *Liability*

The Supreme Court case *Iqbal v. Ashcroft*[71] and the Second Circuit case *Arar v. Ashcroft*[72] were both heard prior to President Obama's taking office. Taken together, these two decisions greatly limit the possibility of *Bivens*[73] liability for federal officials engaging in conduct related to national security. Of course, any conduct by a federal official during an emergency, whether of the public health or military kind, could plausibly relate to national security. The Obama Administration had the opportunity to distance itself from the *Iqbal* and *Arar* precedents or even stay on the sidelines in the currently ongoing *Padilla v. Yoo* case.[74] However, the *Padilla* case illustrates that the Obama Administration has wholeheartedly embraced the logic of *Iqbal* and *Arar* in terms of immunizing federal officials. The danger of this position is its erection of a legal edifice that grants immunity for even the most extreme violations of constitutional rights by federal officials during the time of an emergency.

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[68] Carrie Johnson, *Obama to Set Higher Bar for Keeping State Secrets*, WASH. POST, Sept. 23, 2009, at A01.

[69] *Id.*

[70] *In re* Nat'l Sec. Agency Telecomms. Records Litig., No. 06-1791 VRW, 2010 WL 1244349, at *17 (N.D. Cal. Mar. 31, 2010) (rejecting the government's claim that the state secrets doctrine barred plaintiffs' claim, which made a prima facie case of warrantless spying without relying on classified evidence).

[71] 129 S. Ct. 1937 (2009).

[72] 585 F.3d 559 (2d Cir. 2009).

[73] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[74] 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

1. Iqbal v. Ashcroft

In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights."[75] Bivens was arrested following an unlawful, warrantless search of his home.[76] The Court allowed him to state a cause of action for money damages directly under the Fourth Amendment, in effect creating a judicial remedy stemming from the Constitution itself.[77] The rationale behind a *Bivens* remedy "is to deter individual federal officers from committing constitutional violations."[78] Recognizing the potential breadth of such claims, the Supreme Court has advised that courts should (1) rarely apply *Bivens* remedies in new contexts, (2) consider whether alternative remedial schemes are available to plaintiff, and (3) examine whether special factors counsel hesitation in creating such a remedy.[79]

Javaid Iqbal, whose plight was described above, filed a *Bivens* suit against numerous Bush Administration officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller, alleging that he was subjected to harsh conditions of confinement because of his religion and ethnic background.[80] The Supreme Court dismissed Iqbal's claim on non-*Bivens* grounds, namely that his complaint did not plead sufficient facts to demonstrate "that each Government-official defendant, though the official's own individual actions, has violated the Constitution."[81] Regarding the plaintiff's *Bivens* claim, the 5-4 majority opinion stunningly rejected the concept of "supervisory liability" for federal officials like Ashcroft and Mueller, reasoning that such liability is tantamount to respondeat superior, which cannot form the basis of a *Bivens* suit because "each Government official . . . is only liable for his or her own misconduct."[82]

Justice Souter's vigorous dissent warns, "Lest there be any mistake . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."[83] Souter contested that the majority's interpretation of *Bivens* was "uncalled for" since the defendants, Ashcroft and Mueller, actually conceded "that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability."[84] In other words, the defendants acknowledged that supervisory acquiescence to abuses by subordinates can constitute individual misconduct on the part of the supervisors. Procedur-

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[75] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).
[76] *Bivens*, 403 U.S. at 389.
[77] *Id.* at 397.
[78] *Corr Servs. Corp.*, 534 U.S. at 70.
[79] *Id.* at 67–69.
[80] Ashcroft v. Iqbal, 129 S.Ct. 1937, 1944 (2009).
[81] *Id.* at 1948.
[82] *Id.* at 1949.
[83] *Id.* at 1957 (Souter, J., dissenting).
[84] *Id.*

ally, because of the defendants' concession on supervisory liability, the Court "received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument [the Court] normally require[s]."[85] Further, citing a string of cases, Souter notes the obvious legal differences between supervisory liability and respondeat superior.[86]

Souter declined to state what the "precise contours of supervisory liability" should look like in a *Bivens* action,[87] but overall his strong opinion suggests that supervisors should be held liable for abuses that occur with their knowledge or approval. Although Souter did not specifically say so, he seems concerned that foreclosing supervisory liability, whether in the context of a *Bivens* action or some alternative scheme, opens the door for federal officials to arbitrarily and abusively exercise power with impunity as long as they have their subordinates do the actual dirty work. The advancement of such a norm is dangerous and clearly subverts well-established legal principles, effectively creating a reverse Nuremburg defense for federal officials who violate civil rights during public health or other emergencies by allowing them to use their subordinates' conduct to shield themselves from liability.

2. Arar v. Ashcroft

In *Arar v. Ashcroft*, the Second Circuit dismissed a *Bivens* action on the grounds that courts should not recognize suits that might interfere with executive branch decisions involving national security.[88] In particular, the court held that claims implicating national security matters present compelling "special factors" that strongly counsel against creating a judicial remedy. In this case, U.S. immigration officials detained Canadian citizen Maher Arar at JFK Airport based on erroneous Canadian intelligence linking him to terrorist activities. An internal Justice Department investigation demonstrated that, "after the [U.S.] immigration board concluded that Arar would likely be tortured in Syria, senior figures in the Justice Department had directed that he be sent there."[89] Through a process known as extraordinary rendition, the United States delivered Arar to Syria, along with interrogation questions, where Syrian authorities "brutally tortured" him for nearly a year.[90]

The *Arar* majority explicitly invokes a separation of powers argument when it explains that it cannot hear a *Bivens* suit that implicates national

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[85] *Id.*
[86] *Id.* at 1957–58.
[87] *Id.* at 1957.
[88] 585 F.3d 559, 574–76 (2d Cir. 2009).
[89] Scott Horton, *Second Circuit Affirms Dismissal of Arar*, HARPER'S MAG., Nov. 2, 2009, http://www.harpers.org/archive/2009/11/hbc-90006024 (on file with the Harvard Law School Library). The Canadian government issued Arar a formal apology and $11.5 million (Canadian) in compensation after an in-depth government investigation confirmed that he was completely innocent and suffered inhumane torture while being interrogated in Syria. *Id.*
[90] *Id.*

security concerns because such a claim "operates as a constitutional challenge to policies promulgated by the executive" and "unavoidably influences government policy."[91] Judge Sack responds that "*Bivens* by its nature authorizes courts to invalidate exercises in executive power" and that its ultimate point is to "influence executive policy" by making "it more costly for executive officers to violate the Constitution."[92] Judge Parker's separate dissenting opinion notes that the plaintiff did "not ask the Court to assume any executive functions—to dispatch diplomatic representatives, negotiate treaties, or oversee battlefield decisions," but asked the court to serve as an appropriate judicial check "to keep executive power within constitutional limits."[93] Furthermore, Parker argues, the majority's "deference to executive authority, especially in a time of national unrest, turmoil, or danger," has the effect of "dissolv[ing] the very protections and liberties that the separation of powers was intended to guarantee."[94]

In sum, *Arar* sets the dangerous precedent that federal officials can be immunized for even direct misconduct (as distinguished from the supervisory liability theory in *Iqbal*) by simply invoking the separation of powers and a plausible connection to national security issues. Extension of this precedent conceivably means that any conduct by federal officials during a PHE, which by definition implicates the executive's national security authority, may be beyond judicial oversight absent congressional authorization.

3. Padilla v. Yoo

The amicus brief filed by the DOJ in *Padilla v. Yoo*, currently being heard on appeal in the Ninth Circuit, provides a window into the Obama Administration's theory of *Bivens* liability for official conduct that implicates national security.[95] As discussed below, the DOJ amicus brief embraces both the Second Circuit's *Bivens* analysis in *Arar* and the defenses proffered by defendant John Yoo.

Jose Padilla was designated an "enemy combatant" by the Bush Administration and held in solitary confinement for nearly four years in a military brig.[96] Padilla alleges that during his confinement he suffered deprivation of fundamental due process rights and "gross physical and psychological abuse" tantamount to torture as a consequence of documents drafted by John Yoo, who was then Deputy Attorney General in the Office of Legal Counsel.[97] The district court ruled that Padilla does have a recogniza-

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[91] 585 F.3d at 573–74.
[92] *Id.* at 602–03 (Sack, J., dissenting).
[93] *Id.* at 613 (Parker, J., dissenting).
[94] *Id.* at 611, 613.
[95] Padilla v. Yoo, 633 F. Supp. 2d 1005 (9th Cir. 2009); Brief of the United States as Amicus Curiae, *Padilla v. Yoo*, on appeal from 633 F. Supp. 2d 1005 (9th Cir. 2009) (No. 09-16478), *available at* http://www.concurringopinions.com/wp-content/uploads/2009/12/DOJ-Amicus.pdf.
[96] 633 F. Supp 2d at 1012.
[97] *Id.* at 1013–15.

ble *Bivens* claim against Yoo because: (1) Neither Congress, President Obama, nor any professional forum has provided an alternative remedy for the damages alleged by Padilla.[98] (2) The circumstances presented in this case do not concern matters previously held to constitute "special factors" to counsel hesitation.[99] (3) Substantive areas of the law, including national security and foreign affairs do not counsel hesitation as "all of the documents drafted by Yoo mentioned in the complaint have become public record" and "[t]he treatment of an American citizen on American soil does not raise the same specter of issues relating to foreign relations" that existed in Arar's claims.[100]

The DOJ amicus brief claims that potential discipline by a state bar association, the DOJ's Office of Professional Responsibility, or the Office of Inspector General all constitute alternative remedies for the damages alleged by Padilla.[101] Setting the alternative remedies issue aside, the main thrust of the DOJ's amicus brief is that courts should not recognize *Bivens* claims that directly implicate national security matters, particularly suits that "intrude upon quintessential sovereign prerogatives" that should be left to the political branches.[102] Thus, the DOJ brief clearly adopts the Second Circuit's holding in *Arar* that a credible invocation of separation of powers and national security concerns should categorically bar any *Bivens* claims. Directly citing *Arar*, the DOJ brief further argues:

> The specter of a *Bivens* action . . . could distort the discussions [regarding matters of war and national security] and even deter some officials from partaking in such vital deliberations at all. Given these potential adverse consequences, such *Bivens* claims, which directly implicate matters of national security and the President's war powers, and which seek redress regarding important legal and policy discussion and choices, should not be permitted absent congressional action.[103]

Is it normatively wrong for federal officials to feel constrained by the Constitution, even when considering matters of national security? If such accountability would tend to deter official conduct that results in torture or

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[98] *Id.* at 1020.

[99] *Id.* at 1025.

[100] *Id.* at 1028, 1030.

[101] Amicus Brief, *supra* note 95, at 21. *But see* Scott Horton, *DOJ to the Rescue . . . of John Yoo*, HARPERS MAG., Dec. 4, 2009, http://www.harpers.org/archive/2009/12/hbc-90006184 (on file with the Harvard Law School Library) ("OPR rarely actually investigates even the most serious allegations of misconduct, and almost never actually recommends any form of discipline . . . . The brief's reference to the Inspector General's office is also absurd. As OIG notes, it does not even have jurisdiction to deal with legal professional staff at the Justice Department—that rests with OPR.").

[102] Amicus Brief, *supra* note 95, at 14.

[103] *Id.* at 19.

unconstitutional detentions, are these "potential adverse consequences" or fundamental reasons why *Bivens* claims are recognized?[104]

Again, through the Holder Justice Department's advancement of the *Arar* holding in the *Padilla* case, one can see validation of David Cole's argument that once the government starts denying accountability for harms inflicted upon non-citizens (Arar), that same logic will eventually be applied to citizens as well (Padilla). This gradual policy shift applies in the context of public health emergencies, too. The argument that federal officials need to be unfettered by the threat of judicial review during times of crises is just as persuasive with regard to a natural disaster or pandemic response as it is during a military campaign. One might reply that congressional action could provide a remedy to check official misconduct during a PHE. But then *Bivens* claims would not be necessary if Congress always took such action. As Judge Calabresi argues in his *Arar* dissent, "The conduct that Arar alleges is repugnant, but the majority signals—whether it intends to or not—that it is not *constitutionally* repugnant. Indeed, the majority expressly states that the legal significance of the conduct Arar alleges is a matter that should be left entirely to congressional whim."[105] What is galling to Calabresi and many others is that even if one assumes someone like Arar could prove that he was totally innocent and brutally tortured through the misconduct of individuals acting under the color of federal law, no one in the United States would be held accountable.[106] Lastly, if the Obama Administration will go to such lengths to defend officials like Yoo from the previous administration, will they not do the same for their own officials alleged to have engaged in misconduct?

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[104] Arar v. Ashcroft, 585 F.3d 559, 603 (Sack, J., dissenting) ("Civil rights actions influence policy: They make it more costly for executive officers to violate the Constitution. That is their point.").

[105] *Id.* at 638 (Calabresi, J., dissenting).

[106] *See also* Hui v. Castaneda, No. 08-1529 (U.S. May 3, 2010), *available at* http://www.supremecourt.gov/opinions/09pdf/08-1529.pdf. This recent U.S. Supreme Court case held that the Federal Tort Claims Act (FTCA), 42 U.S.C. § 233(a) (Supp. II 2008), provides complete *Bivens* immunity for federal Public Health Service (PHS) officers and employees. As a result of this decision, PHS workers are shielded from personal liability for constitutional claims, and punitive damages are unavailable for aggrieved plaintiffs. The particular facts of this case are very troubling, as it appears the defendant committed gross medical negligence in refusing to appropriately treat a U.S. Immigration and Customs Enforcement (ICE) detainee who subsequently died of cancer. While in ICE custody, the plaintiff repeatedly requested medical attention for a painful penile lesion that was bleeding and growing in size. A PHS physician's assistant and three outside specialists all recommended that the lesion be biopsied to determine if it was cancerous. Defendant, a PHS medical doctor, repeatedly refused to order such a biopsy for nearly ten months, stating that such a procedure was "elective." After ICE released the plaintiff from custody, a biopsy confirmed the lesion was cancerous. The day after his biopsy, plaintiff's penis was amputated and he began chemotherapy which was ultimately unsuccessful.

Conclusion

The American constitutional and political structure has always emphasized that civil liberties are not absolute and must be balanced against the need for effective and decisive executive response to emergencies and crises. Invoking 9/11 in nearly every sphere of executive power, including public health emergency matters like disaster planning and pandemic preparations, the Bush Administration disrupted this balance to the detriment of civil liberties. Upon taking his oath of office, President Obama reassured the country that he would restore this proper balance, bringing back the rule of law while keeping the nation secure. Indeed, Obama "tapped for the most senior positions in his Justice Department people who have been outspoken critics of the Bush administration's extreme and secretive arrogation of powers . . . ."[107] This is why it is so puzzling and disturbing that the Obama Administration is backing away from its initial promise and instead ratifying the broad claims of unaccountability and secrecy in the name of national security—a tactic that defined the Bush Administration.

There is no empirical evidence to suggest that the Obama Administration is interested in exploiting the context of an emergency, public health or otherwise.[108] Further, the high-level staffing choices of the Obama Administration might suggest that its institutional DNA is committed to the rule of law and warrants a reservoir of trust from the public. However, whether such trust is warranted is beside the point. First, once these emergency policies are normalized, future administrations may be less scrupulous than the current one and could use PHEs as a pretext to abuse the rights of individuals and groups. Second, with four million employees in the executive branch,[109] it is impossible to believe that the President and his trusted top advisors can control the actions of all their subordinates. Third, and perhaps most importantly, providing even otherwise just officials with tremendous power and impunity inherently invites abuse.

Government misconduct, in addition to being a harm in itself, invites mistrust. Trust is at the core of effective public health efforts in which the public voluntarily complies with government regulations and orders. If a government cannot maintain legitimacy and trust during a serious PHE, even the most coercive actions might fail to secure the public safety.[110]

According to Marc Ambinder of *The Atlantic*, President Obama pays close attention to civil libertarians that criticize his policies and, "according to an administration official, finds this outside pressure healthy and use-

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[107] Lithwick, *supra* note 56.

[108] For example, conspiracy theories such as those suggesting that the Obama Administration is interested in setting up "FEMA concentration camps" are correctly ridiculed as paranoid. *See Glenn Beck Program: FEMA Concentration Camps Do Not Exist* (Fox News Channel broadcast Apr. 6, 2009), *available at* http://www.huffingtonpost.com/2009/04/08/glenn-beck-fema-concentra_n_184692.html.

[109] The White House, Executive Branch, http://www.whitehouse.gov/our-government/executive-branch (on file with the Harvard Law School Library).

[110] *See* Mariner et al., *supra* note 15, at 358.

ful."[111] This characteristic distinguishes Obama from his predecessor and makes it even more imperative that the same voices that sounded the alarm on the PATRIOT Act or the MSEHPA during the Bush Administration direct the same healthy criticism at the current Administration's theory of emergency powers and accountability.

[111] Marc Ambinder, *The Rubicon of Indefinite Detention*, ATLANTIC, May 22, 2009, http://www.theatlantic.com/politics/archive/2009/05/the-rubicon-of-indefinite-detention/18087/ (on file with the Harvard Law School Library).