

„PRESIDENTS SHOULD NOT BE AUTHORISED TO DECLARE AN EMERGENCY ON THEIR OWN AUTHORITY”

INTERVIEW WITH BRUCE ACKERMAN BY GÁBOR HALMAI

*My first question regards the Hungarian Constitution. You wrote in your book, *The Future of Liberal Revolution* (1992) that it is unconditionally necessary to enact an entirely new constitution in order to constitutionally guarantee a liberal rule of law regime. As you know Hungary is one of the countries in this region, which has not done so. You wrote in another piece on transition that this is a time window that will be closed. What do you think about this very special Hungarian approach of so-called permanent constitution-making, which does not entail changing the whole constitution but rather amending it? I would also like to ask for your thoughts on another very paradoxical aspect of the whole history of this region. Hungary and Poland are the two most developed countries in the region, and yet Hungary has not enacted a new constitution and Poland was comparatively slow to do so (1997). Those countries where the obstacles of a new democracy were seemingly more present, on the other hand — e.g. Russia, Bulgaria, Romania — enacted new constitutions very rapidly. What do you think of these phenomena of Eastern-Central-European constitution-making approaches?*

Let's begin by comparing Poland and Hungary. In Poland we have a genuine, popular mobilisation and movement led by Walesa, who fails to be equal to the challenges of constitutional creativity. In contrasting Walesa with Mandela, we have a very nice comparison. I have no doubt that it was his petit self-aggrandisement that disrupted the movement toward a constitution, which was, nonetheless, accomplished in the end. Now, Hungary is a very different case. There was not a popular solidarity similar to that which existed in Poland; the great events of 1989 were symbolic. The mass mobilisation was directed to the reburial of Imre Nagy. Remnick wrote a very interesting article that describes the movement of mass changes and popular opinion in more prominent terms than it is normally described. The standard view is that Hungary is simply a case of an elite negotiation. This article casts an interesting light on the deep changes in public opinion, which made this

transformation possible. Nonetheless, I certainly do believe that a new constitution in Hungary is both possible and more desirable. The sad fate of the Sólyom-court suggests the desirability of a genuine constitutional solution. It was an admirable, heroic effort at judicial statesmanship. We can argue about particular decisions, but this is of no significance. It was an admirable effort to constitutionalise fundamental liberal democratic values and give them public centrality, which is terribly important in the legitimisation process. It is the court, which substitutes for a new constitution.

May I interrupt you in order to expand upon your comparison between Poland, where a kind of movement was present, and Hungary, where there was no revolution at all? My question is whether achieving a new legitimacy, a new legality in society demands a kind of revolution, which wasn't present in Hungary. The negotiation with the former communist party was a "revolution", according to Timothy Garton Ash. It was a negotiation between the new and the old regime. Would it have been appropriate to have a totally new constitution for that approach of development?

Sure. It would have been. Of course, I understand your point that there is a sociological continuity and legal continuity. That is Andrew Arato's point, too. However, merely because there is a considerable sociological continuity doesn't mean that we should not use the legal symbolic resources to express and qualify a change in values, which expresses a new set of public commitments. I very much believe in the relative autonomy of the political. To some degree it is easier to have a new constitution in states which have a substantial continuity in their elite. This is the case, of course, in Germany. After all, a great percentage of the elite had Nazi past in the 1940s. The fact that the Americans gave them pieces of paper does not eliminate history. And yet the constitution symbolically expressed a set of values, which, given the *Wirtschaftswunder*, the economic developments afterwards, served as a way of expressing the new German statehood.

My major problem is related to the legitimacy problem in Hungary, which I believe is similar to the German case. Which body would have been the legitimate one to enact a new constitution?

There are two very different models of the relationship between constitutional legitimacy and sociological reality. One model is that constitutional legitimacy reflects and underlines agreement. And that is sometimes true. Sometimes the constitution creates legitimacy... if you are lucky. Let's go to Germany before we go back to Hungary. In 1947, there was this fragile situation. They created an expressed set of ideals, which many people in the society were very sceptical about. But after a decade of good fortune and accidents, which we don't have to repeat now, the basic law that we now call the constitution had become, by 1960, a highly expressive component of German identity. Not because it reflected something of 1948, but because it actually helped to create. So, I would argue that the round table in 1989 in Hungary is the functional equivalent of the Philadelphia Convention of 1787.

People with no legitimacy at all...

No, with a little bit. There is not a complete absence of legitimacy, but rather a problematic legitimacy. The delegates to the American Constitution were not even elected by people and they acted far beyond the authority granted them by the state legislatures. They just declared themselves representatives of *We the People* and expressed something, which then, through a sequence of events became profoundly expressive of national identity. That is the possibility that Hungary missed. Which is not to say that you can't have a legitimate system, that you can't develop it over time, and, in fact, what is going to happen now, is that a great deal of the legitimacy debts will be taken up by the European Union. Let me just give you one comparative example. Let's take the Russian system, a system that is far less legitimate than the Hungarian system is today. Here we have a very technically poor constitution proposed by Boris Yeltsin. He didn't read my book, *The Future of Liberal Revolution*, and yet he followed my advice. This constitution was ratified in a referendum, a referendum that resulted in questions about how accurate it was, who won and who lost. Very obscure. Despite the fact that this referendum reflected very little, it has been crucial. If they had not had that referendum and that constitution, would Yeltsin have been willing to run for re-election for the presidency, rather than moving into a form of absolutism? No,

probably not. That is very important. In contrast, what we have in Hungary is the round table in 1989, which does not give birth to a constitution. The constitutional court in this heroic modality tries to symbolize foundational values, and has done so with a great deal of popular support and legitimization as far as public opinion is concerned. Then, at the end of the term what happens? We'll see. The modality of expression being judicial rather than textual means the process of sustaining this central expressive modality is more vulnerable.

In my opinion one of the advantages to the Hungarian approach of continuing this constitution-making process mostly in the constitutional court is that the court can keep the whole development within a legal framework and avoid some of the efforts of the political forces. In the effort to achieve transition and justice, compensation or lustration, etc., the court very rigorously said that no transition could exist without applying the rules of the game and the rule of law.

Through how many time horizons should we judge the process of constitutionalisation? You are talking about short-term phenomena. 5 years, 10 years. There is a trade-off here, but there are also longer-term phenomena. Let me refer to a hypothetical counter-argument. Let's imagine that Fidesz had won the 2002 election 53 to 47, rather than lost. And, let's imagine that the next generation of constitutional court justices had been very poor and not seriously engaged in the process of the construction of liberal democratic values. Let's suppose we are in the year 2015. And the next generation of Hungarians are looking back to monuments of cultural, legal, political identity. What would they have seen? A treatise by László Sólyom. A treatise as opposed to a textual statement like the Grundgesetz. Well, that is a big difference.

It is true. The constitution of Germany is, however, not only the Grundgesetz but also the jurisprudence of the Federal Constitutional Court.

We are talking about several things here.

If we are talking about the U.S., the U.S. constitutionalism nowadays is not the text of 1787. It is also the jurisprudence of the Supreme Court in the last two centuries.

Yes. It is another perspective. But the question is not whether the failure of Hungary or the Hungarian round table, the failure of the first government

to take constitutionalism seriously, delegating it instead to the constitutional court, was the only important factor in the constitutional development of Hungary? Obviously, this is not the question. The question is whether this was a missed opportunity. And I think it was. Let's take another example. Look at Israel. The Israelis could have had a constitution written by the Knesset, the first Knesset. They don't. Of course, parts would have changed or even everything, but it was a missed opportunity. You are absolutely right that there are some countries in which there are pieces of paper, which have a little value. Some exist in the region. I suggest that, even in Russia, one might be sceptical about the constitution and many of its basic provisions. Nonetheless, the act of writing a constitution wasn't altogether in vain. It was significant in important ways. I am not knowledgeable enough about some of the other countries to make an informed judgement.

If you think that was a missed opportunity, do you think that is a handicap for Hungary in the European Union?

Not a serious one. Obviously, we have a legitimacy problem. And the constitution is part of the solution to the legitimacy problem. The fact that we have an alternation of political power is another very important fact. Which is the more important? The second. The fact that there was this heroic effort of constitutional creativity by the constitutional court is an important fact in sustaining the legitimisation process. The fact that the next constitutional court has not developed it as aggressively is another fact. So, we have a complex picture here. But, of course, the transformation into the structure of the European Union is a dramatic loss of sovereignty, making the status of the Hungarian legitimisation system less important compared to the constitution of a new Europe and the success of the EU project. So, our concerns about the mixed picture of legitimacy in Hungary at the end of 15 years would be more fundamental if Hungary would have remained outside the EU for the next 25 years. However, it remains important. But you are now part of this European project and the crucial question for Hungary, and for everybody else, is whether that will succeed or not. Your crystal ball is as good as mine.

On the other hand, of course, the EU itself has a large deficit in legitimacy and democracy. Let's take Dieter Grimm's argument that actually the Union and the source of the Treaty of the Union is not the people, but the different member states. So, how to create democ-

racy and legitimacy and at the very end a constitution knowing the existence of that kind of deficit?

It is fair to question whether there has ever been a government that does not have a legitimacy deficit. A big question. If you think of liberal democratic political philosophy, and you think of Jürgen Habermas' work, John Rawls' work, or my work, and then you look at political reality, there is a huge deficit. John Rawls and I were philosophers not only of democracy but of social justice. Outside Scandinavia, how many states can, in a straightforward sense, be considered to be just or even moderately just? As far as the political process is concerned, taking into account the role of money in it and the extent of popular attention paid to it, it is very weak. Nonetheless, despite this huge legitimacy deficit, there are completely illegitimate systems and then other systems in the grey area. That's how we should think of it. When we look at the so-called successful countries that Dieter Grimm has in mind, I don't know which ones they are. Italy? Is that the one that he has in mind? Let's look at Germany! Germany in 1950, 1960 or 1970? When is it that this country has had a legitimate system? What we have here is the following. We have a set of European values, which we call Enlightenment liberal values. There are many interpretations of them. But the fact remains that if an enlightenment Hungarian encounters an enlightenment Portuguese person, they know what to talk about. Maybe that is just the elite, but it is also more than the elite. If you look at the educational content of the "gimnázium" in Hungary and you compare it to the educational content of the "gimnázium" in Holland, it is not that different. That is one important point. If you look at a 17-year-old in Hungary and you look at 17-year-old in Italy, they dress the same way. They listen to the same music. They eat the same food. They have the same complaints about their parents. That's another fundamental point. They travel around in ways they wouldn't have 50 or a 100 years ago. So both on the social and on the high cultural level there is a convergence. Consensus would be a strong word for that. So, what phenomenon are we talking about? What we are talking about is something important but not decisive. We are talking about the fact that there are no European-wide parties. That if you look at the headlines of *Népszabadság* and you compare them to those of *Le Monde*, they are different. They are different in a way that the *New York Times*, the *Washington Post*, and the *Los Angeles Times* are not. So, it is certainly true that the political system of Europe, which is not based on values, high values or cultural

commitment, still has a lot of constructive activity to undertake in the federal system. But because there is also, both in my generation and that of the 40-year-olds, a recollection of the disaster of the 20th century, I am not persuaded that this is beyond the capacities of the political class in Europe. I was in Budapest in 1967 and then again in the 1980s, and while I can see that there is a big difference, one still sees much of the disaster of nationalism all around. Talk to a Spaniard or a German, it is the same thing. People know that the 21st century should not be like the 20th century. It is a negative evolution, but it is still very important. Of course, you can fail. But to say that the political presuppositions for a European federation do not exist is much too strong. The European federation has to be built. It is time to move beyond the Marxist notion that the constitutional order is just part of a superstructure, beyond the notion that the base has to be built first. There is autonomy in political life, there is energy and there are constructive possibilities.

Do you see the American model of federalism as a model for the European approach or should it be totally different?

There are many analogies between the American constitutional system between 1787 and 1860, what I call in my paper the First Republic, and the present situation in Europe. It was important in the U.S. at that time that you as a Virginian were religiously and culturally very different from a New Yorker. The state was at the centre of the political life in the U.S. not the federal union. There were constant efforts and arguments about secession at the court and it ended in civil war. So I think there are striking analogies between the federal experience of the U.S. and that of Europe in the future. We have different models of federalism. The German model is one of administrative federalism with a weak bureaucratic centre. But the law-making confidence of the centre is very substantial. *Bürgerliches Gesetzbuch* is a national thing. In the U.S., each state is in control of the foundations of private law and many other institutions. I think that is what should be true of Europe. The premature national Europeanization of large areas of local law should be resisted. And I think it will be resisted. These basic patterns, then, will have a certain American look to them, as will the political party system. Just as in America, a lot of European politics will be a politics of greed, local greed for a very long time. The “Let’s help the Hungarian farmers” sorts of political action, rather than principle. That will be a demoralising feature of pol-

itics. That will be too much regional aggrandisement politics and too little European articulation politics for my taste. That is also true of America, even today.

Absolutely. In your paper you said that the spirit of dualist democracy will die if the present generation of the American citizens fail to discover in their constitution a living language of self-government? Do you think this has already happened after the elections of 2000 or it is going to happen?

One of my models in my book *We the People* is based on Montesquieu’s *The Spirit of the Laws*. It does not die with the election. We are talking about a generational phenomenon.

The Electoral College could die. Yet it is a very substantial part of the American approach to democracy, which had been designed as a kind of deliberative body before Jefferson reformed it. It was a very basic, fundamental idea of the American democracy.

There are two different facts here. One is whether the spirit of the American Constitution, the possibility for ordinary people to organize themselves and actually affirmatively and constructively participate in the shaping of public values, will die. As you point out, the Electoral College was killed in 1800. So, it has been dead for a long time. The crucial question, and it is one that the Europeans will have to think about is the notion of “we the people” as capable of action in an affirmatively creative way. I think that the only nation in Europe that has this notion is the French. It is different from the Americans, but very similar in its affirmation of a past of popular sovereignty. It is not an accident that the French, even though for little micro-reasons, had a plebiscite on Maastricht, while the others didn’t. If the French didn’t go 52 for 48 for Maastricht, we would be in a very different situation today. And, whether or not, after the trauma of the 20th century in Europe, Europeans over the next fifty years will develop greater self-confidence in their politically generative capacities is a fundamental question. In the U.S., the civil rights revolution is a paradigmatic exercise of “we the people” politics. So, we are talking about the 1960s. Whether this kind of confidence and political generativity will prevail in the next generation is a fair question. The outcome will partly depend on whether or not militarization, a new phenomenon in American political life, and increasing economic inequality will undermine this idea of popular liberal constitutionalism. In Europe, of course, it was populism that was demagogic while liberalism

was elitist. However, in America the issue is whether this popular liberal constitutionalism can be maintained. I hope so.

I raised the question concerning the Electoral College because one of your books, Bush v. Gore, has the subtitle, The Question of Legitimacy. Does the 2000 election raise the question of legitimacy?

Let's imagine Al Gore had won. I would certainly have advised him to propose a constitutional amendment on the election of presidents, an amendment that would have a number of basic elements, obviously on the national scale. The Electoral College would be abolished. You would want to reorganize the process of selecting candidates, which is a scandal and a mess at the present time in the U.S. We would have had a reconstruction of the presidential selection process to reflect what the presidency has become over two centuries: the pre-eminent national office. This is what G. W. Bush should have done. Rather than engage in particular domestic programs, he should have taken his election as an indication of the need for a fundamental reform, and he could have earned a great deal of respect from the losers for doing this. Instead, he chose to pretend that the problem didn't exist, and he governed not from the centre but from the right. This is an opportunity missed. Hungary missed an opportunity in 1989, but it probably survived that well. I hope that we will as well, but it is perfectly possible that we will have another electoral crisis in 2008.

Let's get back to the problems of a real dualist system that you discuss in your writings. One of the points that you bring up in your recent work, if I understand correctly, is the lack of democracy, the lack of the involvement of citizens and the lack of deliberative systems that would use the capacity of the citizens. One of your recent texts deals with the deliberation day, another one with voting with dollars and a third that deals with stakeholder society. All of these ideas target this lack of citizen involvement.

Absolutely right. I can see these new books to be books on 21st century constitutional flaws. There is a parallel between Habermas and myself. That is to say he talks about a legitimisation crisis. In many of his works, he talks about the problem of civic-private citizen. To some degree civic-privatism is good. It is a good thing that we are not always included in some great political project. People have their own lives to live. I am for the private sphere. I am not against the private sphere. As soon as you say that you are for the

private sphere, civic-privatism is a problem... always. People are often going their own way and they are over-reluctant to share and participate in the common good. So we have to think of techniques, which are liberal and not totalitarian, to seduce them a little bit more into being concerned about the public. And you are absolutely right that all of my recent practical proposals are that kind of thing. Let's say one got a civic inheritance as well as a family inheritance, and as a result, because you are a Hungarian, you get 4,000,000 HUF when you are 21. You might say, "Why did I get it? Maybe I should contribute a little bit to Hungary if I get something serious." Or, if you have to vote and all the campaigning parties are trying to solicit your 10,000 HUF, you might say "I could give it to them and then I'd get a little bit more engaged." This kind of thing. These are the borderlines to create more civic involvement without being oppressive. We certainly have enough oppression. It is a balance. That is why the central concept in my book is private citizenship. A private citizen is someone who asks two questions: What is good for me? What is good for the country? I understand that these are two different questions. I understand that coordinating these two roles rather than being a stoic citizen or a libertarian privatist with no civic concerns requires maintaining a balance between these two aspects of people's personalities. We must achieve this through cleverness, not through hoping and praying.

A kind of effort like that of Habermas in Faktizität und Geltung to use both liberal and republican ideas.

There are several German reviews of my work, one of which described me as "an Anglo-Saxon Habermas", which is not a compliment. But for me it is good enough. There are more similarities between myself and Habermas, than myself and Rawls. The emphasis on dialogue, on coordinating the liberal and the democratic, the problem of civic privatism, the solution of Verfassungspatriotismus, all of these are, as it were, Anglo-Saxon variations of a common problematic. I haven't really followed through. But there is a similarity. I am also very much against the libertarianism of Nozick and Hayek, who believe far too much that the free market will solve all the problems. This has just not happened.

So how do you think a day dedicated to deliberation can contribute to this idea of a deliberative society?

We began the work with one of my colleague's, James Fishkin, who is running a deliberative poll in Hungary on the Roma. A deliberative poll is

a random sample of 500 Hungarians. He asks their opinion about the status of the Roma, their rights and the stereotypes of them. Afterwards they deliberate for two days in a structured conversation and then ask the same questions again and again. They observe what happens. It has been organized 25 times in different countries throughout the world, including once in Bulgaria. People's opinions change quite a lot as a result of a day and a half of conversation. The framework of the deliberation day is as follows: there are small groups of 15 people who meet for an hour at a time, and then they meet in a larger session of 500, where there are experts or political party representatives who are asked questions that were initially framed by the small groups. People aren't trying to persuade each other about what is right in the small groups. They are rather trying to ask the questions that they really need answer to in order to have an intelligent opinion. They frame the questions, and then either the experts or the politicians, depending on the issue, respond to the questions. Then they go back and formulate more questions, which are once again answered. It is a dialogue of that kind. Often times the opinions change by 5 to 15%, not always progressively but sometimes. It is a fascinating the extent to which deliberation leads to more liberal judgements. We will see what results the case of the Roma produces. The important thing about these deliberate polls, which create a micro-cosmos of the nation, is that we have established that people actually engage constructively in the process. They listen to each other much more than you might expect. They don't scream at one another. They are more capable of constructive engagement than many cynics and sceptics suppose. It is not unique. We have done this in America and in many parts of the world. In Bulgaria it was very successful. The idea is to have a national holiday two weeks before the election. The holiday would begin with a television debate between the party leaders on a set of issues that are specified in advance, similar to the one that you had in the last election. Two, three or four issues. Then, people throughout the country, in schools and community centres where there are televisions, watch the debate. They engage in a small group deliberation about some questions and then they gather in groups of 500 persons at places where local party leaders go to answer questions. The crucial consequence would be the transformative impact on politics. The way people govern and the way they campaign would be very different if they knew that there was actually a day when people would be invited and they would have to come to think and to

talk to one another about positions. It would be a positive change to have one day like this every three to five years. On the one hand, this sounds like a utopian suggestion, but, on the other hand, it is a rather modest proposal.

Which is actually about changing the party financing system. This is currently very relevant to Hungarian politics as well.

The most radical proposal is based upon a stakeholder society. It's been adopted by Tony Blair, who proposed the idea during his run for re-election. I have just finished my contribution to a book of essays that is coming out and that begins with an essay by the head of the Prime Minister's planning office about the program to which he is committed for his five year term. According to this essay, each baby born in Britain will get a bank account upon their birth. It will contain capital assets of 5,000 GBP, to which they will have access at the age of 18. I think, however, that this is too early. It should rather be in the twenties, as a young adult, that they come into possession of the money. That would be a birthright of citizenship. This is a tremendous breakthrough. It isn't 18,000 USD or 7,500 GBP, but it is, nonetheless, the beginning of the notion of an economic birthright that is equivalent to a vote. The basic foundation of the idea is that the wealth of England or Hungary is not merely the product of individual family members, passing it on their own, but it is rather the result of collective effort. It isn't socialism, it's universal private property. It is a concept that is different from the liberal political community, but it is political community at the same time. Each of these ways represents a marginal rather than a revolutionary transformation. Each one is a practical proposal that might be a stupid idea or it might not. It is not a one size fits all solution, and I encourage people to propose other solutions because these are by no means the only middle-sized ways to improve. I encourage people to think both that they are implicated and that they are political community people.

Following September 11th, a new situation developed in the American constitutional system. President Bush declared "the war on terror", and, as a result of this, he won the elections. The resulting consequences include oppressive laws that aim to establish greater security, military tribunals and the deportation of non-U.S. citizens. Even free speech limitations are everyday practice. This is also somehow undermining the traditional values of American constitutionalism.

Of course. The reaction of the administration has been extreme and they, of course, had a lot of short-term popular support, not for these particularly oppressive measures, but because of the victory in Afghanistan, etc. The Jose Padilla case, which will probably be decided by the Supreme Court in June of 2006, presents a unique threat to the survival of the republic. If the president can throw citizens into solitary confinement for years on end, our democracy is in very deep trouble. And it is not good enough to tell Americans that they can regain their freedom if they can convince a military tribunal of their innocence. The mere threat of arbitrary presidential action is sufficient to destroy normal democratic life.

*In your essay, *The Emergency Constitution*, which appeared in the March, 2004 issue of the *Yale Law Journal*, as well as in your forthcoming book *Before the Next Attack: Acting Now to Preserve Our Freedoms in an Age of Terrorism*, you yourself also argue that, under the emergency constitution, the thousands of terrorist suspects who may be arrested by the police and FBI for preventive detention — the overwhelming majority of whom will probably turn out to be perfectly innocent — must wait 45 days before they can gain their freedom through the standard mechanism of the criminal law. Is this morally right?*

In speaking of an emergency constitution, I don't mean to be taken too literally. Almost nothing I propose will require formal constitutional amendment. The "emergency constitution" can be enacted by Congress as a framework statute governing responses to terrorist attacks. First and foremost, it imposes strict limits on unilateral presidential power. Presidents should not be authorized to declare an emergency on their own authority, with the exception of declarations that last for a week or two while Congress is considering the matter. Emergency powers should then cease unless a majority of both Houses vote to continue them. Even such a vote, however, has a temporal limit and is valid for only two months. The President must then return to Congress for reauthorization, and this time, a supermajority of sixty percent would be required. After two more months, the majority would be set at seventy percent, and then eighty percent for every subsequent two-month extension. Except for the worst terrorist onslaughts, this "supermajoritarian escalator" would terminate the use of emergency powers within a relatively short period.

What is then the crucial difference in approach between President Bush's "war on terror" and your "emergency constitution" approach?

Classical wars come to an end. This won't happen with the war on terror. Here is where the emergency constitution provides a crucial alternative. If left to their own devices, presidents will predictably exploit future terrorist attacks by insisting that we need to sacrifice more and more of our freedom if we ever hope to win this "war". But with an emergency constitution in place, collective anxiety can be channelled into more constructive forms. This is the point of my suggesting an emergency constitution that would serve as a constitutional alternative.

But the most serious and sensitive question has to do with defining the scope of emergency power.

Yes, but, at its core, it involves the short term detention of suspected terrorists to prevent a second-strike. Nobody should be detained for more than 45 days and detainment for periods of less than 45 days should only take place upon reasonable suspicion. Once the 45 days have elapsed, the government must satisfy the higher standards of evidence that apply to ordinary criminal prosecutions. And even during the period of preventive detention, judges should intervene in order to protect against torture and other abuses.

*Your reform ideas with regard to the emergency constitution indicate that you have more confidence in the checks and balances built into the political processes than you have in the process of judicial review. Why are you sceptical about the processes of constitutional review of ordinary courts and special constitutional courts? As Laurence Tribe and Patrick Guidridge argue in their reply — also published in the *Yale Law Journal* — to your initial essay on the emergency constitution, some substantive limits of the restrictions you acknowledge need the interpretation of the courts, as in the mentioned case of torture. What is the role of the courts and especially that of the Supreme Court in your enterprise?*

The success of the emergency constitution will depend in part on the Supreme Court. If it decisively rejects extraordinary presidential actions that are undertaken in the name of "the war on terror", it may help force the presidency to accept an emergency regime as its best available alternative. But the Court's first encounters with the subject, which have already been mentioned, leave a great deal open for the future.

And it also depends on the efforts of the current administration, following the death of Chief Justice

Rehnquist and the resignation of Justice O'Connor, to nominate new justices with the majority in the senate.

In 2003 I published an article on this in the Los Angeles Times. I argued, as I did in the *Bush v. Gore* book, that the judges have a responsibility not to retire until 2005. Were the same judges that appointed the president to secure a majority for over thirty years through nominations made by the man to whom they gave the presidency, that would have indicated that the constitutional system is out of equilibrium. This was a unique situation in the history of the U.S. They had responsibility to stay on the court until 2005. Now we have seen that President Bush could win an honest election.

Unfortunately, there are no guarantees.

There are no guarantees. Self-government has no guarantees. But we should not overestimate short-term events. We are in a peculiar moment of vulnerability, to be sure. First, there is the problematic election of the president, and second there is Osama Bin Laden. It is the Osama Bin Laden vote that transforms a problematic president into a war hero, even if he never actually found Osama Bin Laden. So we are at this particularly puzzling moment, and it is easy to overemphasize this. It is possible to tell the story that 20 years from now the U.S. will have deeply transformed its political and constitutional regime for worse. It is perfectly possible. But I am not all that pessimistic. It is easy to be sceptical, but there are many millions of people in the U.S. who would prefer to repudiate the blunders of the past few years and set a better course.