

## PUBLIC DANGER

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*This Article provides the first account of the term “public danger,” which appears in the Grand Jury Clause of the Fifth Amendment. Drawing on historical records from the seventeenth and eighteenth centuries, the Article argues that the proper reading of “public danger” is a broad one. On this theory, “public danger” includes not just impending enemy invasions, but also a host of less serious threats (such as plagues, financial panics, jailbreaks, and natural disasters). This broad reading is supported by constitutional history. In 1789, the first Congress rejected a proposal that would have replaced the phrase “public danger” in the proposed text of the Fifth Amendment with the narrower term “foreign invasion.” The logical inference is that Congress preferred a broad exception to the Fifth Amendment that would subject militiamen to military jurisdiction when they were called out to perform nonmilitary tasks such as quelling riots or restoring order in the wake of a natural disaster—both of which were “public dangers” commonly handled by the militia in the early days of the Republic. Several other tools of interpretation—such as an intratextual analysis of the Constitution and an appeal to uses of the “public danger” concept outside the Fifth Amendment—also counsel in favor of an expansive understanding of “public danger.” The Article then unpacks the practical implications of this reading. First, the fact that the Constitution expressly contemplates “public danger” as a gray area between war and peace is itself an important and unexplored insight. Significantly, “public danger” provides a method for thinking about terrorism that is already built into the Constitution. Second, since the Founders recognized the concept of “public danger” but yet declined to extend enhanced authorities to the President during these periods, the Grand Jury Clause may operate as an implicit limitation on executive power in the post-9/11 era.*

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## TABLE OF CONTENTS

INTRODUCTION .....	2184
I. UNDERSTANDINGS OF PUBLIC DANGER .....	2186
A. <i>English Conceptions of Public Danger</i> .....	2187
B. <i>American Conceptions of Public Danger Before the Founding</i> .....	2192
C. <i>Public Danger and the Constitution</i> .....	2195
II. JUSTIFYING A BROAD CONCEPTION OF PUBLIC DANGER.....	2197
A. <i>An Intratextual Approach</i> .....	2198
B. <i>Rejection of “Foreign Invasion”</i> .....	2201
C. <i>“Public Danger” Outside the Fifth Amendment</i> .....	2204
III. PRACTICAL IMPLICATIONS.....	2208
CONCLUSION.....	2212

## INTRODUCTION

The Constitution speaks of a number of national security situations: war,<sup>1</sup> invasion,<sup>2</sup> rebellion,<sup>3</sup> and insurrection.<sup>4</sup> Much ink has been spilled over the various military powers extended and withheld during these periods—and over who should wield them.<sup>5</sup> Less often discussed are the two other national security situations mentioned by the Constitution: “imminent Danger as will not admit of delay”<sup>6</sup> and “time[s] of . . . public danger.”<sup>7</sup> These phrases, buried in dusty corners of the Constitution, seem to contemplate a situation more serious than peace but less serious than war. History makes clear that the phrase “imminent Danger,” borrowed from the Articles of Confederation,<sup>8</sup> was intended to refer to the period directly preceding an enemy invasion. But there are few clues as to the meaning of the term “public danger.”

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 11; *id.* art. I, § 10, cl. 3; *id.* art. III, § 1, cl. 3; *id.* amend. III; *id.* amend. V.

<sup>2</sup> *Id.* art. I, § 8, cl. 15; *id.* art. I, § 9, cl. 2; *id.* art. IV, § 4.

<sup>3</sup> *Id.* art. I, § 9, cl. 2; *id.* amend. XIV, §§ 2–4.

<sup>4</sup> *Id.* art. I, § 8, cl. 15; *id.* amend. XIV, §§ 3–4.

<sup>5</sup> For a general discussion of this problem, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 170 (1996).

<sup>6</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>7</sup> *Id.* amend. V.

<sup>8</sup> See ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 5 (“[A]nd the danger is so imminent as not to admit of a delay.”).

The Grand Jury Clause of the Fifth Amendment, drafted by James Madison in 1789,<sup>9</sup> provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .<sup>10</sup>

The apparent purpose of the Grand Jury Clause was to ensure that the government could never court-martial a civilian.<sup>11</sup> As the Supreme Court has explained, “[t]he phrase ‘in time of war or public danger’ qualifies the [component of the Grand Jury Clause] relating to the militia; as otherwise, there could be no court-martial in the army or navy during peace.”<sup>12</sup> Put simply, the “limitation as to . . . public danger relates only to the militia.”<sup>13</sup> Thus, the Grand Jury Clause suspends the requirement of indictment for two groups of people: (1) members of the army and navy, during either war or peace; and (2) members of the militia, but only when they are “in actual service in time of War or public danger.”<sup>14</sup> These two groups are subject to courts-martial. For all other persons, a grand jury indictment is always required.<sup>15</sup>

Although a few commentators have recognized that “[t]he Bill of Rights recognizes times of ‘public danger’ [as] distinct from ‘time[s] of War,’”<sup>16</sup> no scholar has yet attempted to construct an account of what “public danger” meant to the Founders—or of what that phrase might mean today. This Article fills that gap by providing the first description of the history and meaning of the term “public danger.”

Part I traces historical understandings of “public danger.” Part II argues that, in light of historical records from the seventeenth and eighteenth centuries, “public danger” should be interpreted broadly. On this theory, public danger includes not just impending enemy invasions,

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<sup>9</sup> CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 13 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS]. This text was originally intended to take the place of existing language in the Constitution at article III, section 2, clause 3. *Id.*

<sup>10</sup> U.S. CONST. amend. V.

<sup>11</sup> See *Johnson v. Sayre*, 158 U.S. 109, 114 (1895) (“The whole purpose of the [Grand Jury Clause] is to prevent persons not subject to the military law from being held to answer for a capital or otherwise infamous crime without presentment or indictment by a grand jury.”); *Ex parte Milligan*, 71 U.S. 2, 34 (1866) (“[M]ilitary tribunals for civilians, or nonmilitary persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government.”).

<sup>12</sup> *Milligan*, 71 U.S. at 34.

<sup>13</sup> *Ex parte Mason*, 105 U.S. 696, 701 (1881) (internal quotation marks omitted); *accord* *O’Callahan v. Parker*, 395 U.S. 258, 272 n.18 (1969), *overruled on other grounds by* *Solorio v. United States*, 483 U.S. 435 (1987); *Sayre*, 158 U.S. at 114.

<sup>14</sup> U.S. CONST. amend. V.

<sup>15</sup> *Id.*; see *supra* notes 11–13 and accompanying text.

<sup>16</sup> Gil Grantmore, Essay, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 469–70 (2003). Professor James Ming Chen authored this article under the pseudonym “Gil Grantmore.”

but also a host of less serious threats (such as plagues, financial panics, jailbreaks, and natural disasters). As Part II explains, this broad reading of “public danger” finds significant support in both English and American history. Moreover, the history of the Fifth Amendment itself supports an expansive reading. In 1789, the first Congress rejected an amendment that would have replaced the phrase “public danger” in the proposed text of the Fifth Amendment with the narrower term “foreign invasion.”<sup>17</sup> The rejection of this proposal provides inferential evidence that the Founders did not intend to limit “public danger” to times of “foreign invasion.” On the contrary, Congress may have intended to expose militiamen to military jurisdiction while they were acting to suppress riots or respond to natural disasters—both of which were “public dangers” commonly handled by the militia during the early days of the Republic.<sup>18</sup> Part II then explains that several other tools of interpretation—such as an intratextual analysis of the Constitution and an appeal to uses of the “public danger” concept outside the Fifth Amendment—also counsel in favor of an expansive reading.

Part III explores the practical implications of a broad understanding of “public danger.” First, the fact that the Constitution expressly contemplates “public danger” as a gray area between war and peace is itself important. Significantly, “public danger” provides a method of thinking about terrorism that is already built into the Constitution. The very existence of “public danger,” therefore, calls into question the elaborate but extraconstitutional theories that some scholars have invented to help order our thinking about terrorism.<sup>19</sup> Part III also argues that, since the Founders recognized the concept of “public danger” but yet declined to extend enhanced authority to the President during these periods, the Grand Jury Clause may operate as an implicit limitation on executive authority in the post-9/11 era.

## I. UNDERSTANDINGS OF PUBLIC DANGER

The phrase “public danger” is something of a Goldilocks term, capturing situations that worry society more than a fleeting threat, but less than a full-scale war. The Founders—cognizant that it would be “impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the national

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<sup>17</sup> See *infra* Part II.B.

<sup>18</sup> See *infra* notes 130–33 and accompanying text.

<sup>19</sup> See *infra* notes 192–207 and accompanying text.

means necessary to satisfy them”<sup>20</sup>--probably chose to use the phrase “public danger” precisely because of its flexibility.

#### A. *English Conceptions of Public Danger*

Although the phrase “public danger” is nearly five hundred years old, its meaning has always been somewhat ambiguous. One of the earliest known uses of phrase came in 1583, when the chief interrogator of Queen Elizabeth I published a pamphlet arguing that torture could legally be used to secure information necessary to protect England during a time of “publike danger.”<sup>21</sup> Before this time, most known references to “public danger” appeared in religious texts. In 1572, for example, an English translation of the work of the Flemish theologian Andreas Hyperius was published in London.<sup>22</sup> In that book, Hyperius had discussed church procedures during a time of “publike danger eyther of warre, or sedition, or treason.”<sup>23</sup> For both the Queen’s interrogator and for Hyperius, “public danger” seemed to have covered a broad swath of threats to the state.

“Public danger” appears to have entered the popular English vernacular in the early seventeenth century. By the 1640s, the phrase was commonly used by the Roundheads (Protestants and Parliamentarians) to describe the machinations of the Cavaliers (Catholics and Royalists).<sup>24</sup> In the months leading up to the English Civil War, control over the militia became a major source of antagonism between these two groups.<sup>25</sup> Before this point, the King had retained sole authority to appoint Lieutenants—the leaders of the local militias.<sup>26</sup> Tensions came to a head in the winter of 1642 when King Charles I of England rejected a series of recommendations for Lieutenants that had

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<sup>20</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 21, § 1178 (1833) [hereinafter STORY’S COMMENTARIES].

<sup>21</sup> THOMAS NORTON, A DECLARATION OF THE FAVOURABLE DEALING OF HER MAJESTIES COMMISSIONERS APPOINTED FOR THE EXAMINATION OF CERTAIN TRAITOURS AND OF TORTURES UNJUSTLY REPORTED TO BE DONE UPON THEM FOR MATTERS OF RELIGION 4–5 (Christopher Barker 1583), available at [http://eebo.chadwyck.com/search/fulltext?SOURCE=var\\_spell.cfg&FILE=../session/1398203755\\_12640&ACTION=ByID&ID=D00000998433350000&SUBSET=&DISPLAY=DATE\\_ASC&ECCO=N&WARN=N&SIZE=12](http://eebo.chadwyck.com/search/fulltext?SOURCE=var_spell.cfg&FILE=../session/1398203755_12640&ACTION=ByID&ID=D00000998433350000&SUBSET=&DISPLAY=DATE_ASC&ECCO=N&WARN=N&SIZE=12).

<sup>22</sup> ANDREAS HYPERIUS, THE REGIMENT OF THE POUERTIE (F. Coldock & H. Bynneman 1572), available at [http://eebo.chadwyck.com/search/fulltext?SOURCE=var\\_spell.cfg&FILE=../session/1398203755\\_12640&ACTION=ByID&ID=D00000998388230000&SUBSET=&DISPLAY=DATE\\_ASC&ECCO=N&WARN=N&SIZE=191](http://eebo.chadwyck.com/search/fulltext?SOURCE=var_spell.cfg&FILE=../session/1398203755_12640&ACTION=ByID&ID=D00000998388230000&SUBSET=&DISPLAY=DATE_ASC&ECCO=N&WARN=N&SIZE=191).

<sup>23</sup> *Id.* at 59.

<sup>24</sup> See *infra* notes 31–37 and accompanying text. For a summation of this period in English history, see PETER GAUNT, THE ENGLISH CIVIL WAR: A MILITARY HISTORY 51–64 (2014).

<sup>25</sup> See *infra* notes 27–36 and accompanying text.

<sup>26</sup> See *infra* notes 27–30 and accompanying text.

been submitted to him by the Parliament.<sup>27</sup> Shortly thereafter, Parliament passed the Militia Ordinance of 1642,<sup>28</sup> appointing their favored Lieutenants over the King's objection.<sup>29</sup> The Militia Ordinance, which was put into place without royal assent,<sup>30</sup> was a major factor in ushering in the Civil War some five months later.

In a communication sent to the King four days before the Militia Ordinance was passed, Parliament warned Charles I that his rejection of Parliament's Lieutenants might bring "public Dangers and Miseries . . . upon His Majesty and the Kingdom."<sup>31</sup> The Militia Ordinance itself stated that such drastic measures were necessitated by a "time of imminent danger" in which forces loyal to Charles I had sought to "stir up . . . rebellion and insurrections in this kingdom of England."<sup>32</sup>

Throughout the English Civil War, Parliament continued to use the phrase "public danger" to describe the threat posed by Charles I.<sup>33</sup> For example, Parliament provided during the height of the conflict that, given "this Time of imminent and public Danger,"<sup>34</sup> innkeepers and citizens would be forbidden from harboring drafted mariners or seamen who sought to avoid serving in the Roundhead navy.<sup>35</sup>

During the same period, Charles I used the phrase "public danger" to refer to the threat posed by Parliamentarians and Protestants. For example, during the Civil War, Charles I sent a command to the citizens of Portsmouth to "guard the sea" from an impending invasion by forces loyal to Parliament. The city sent word that they would not do so except upon payment of wages. The King then sent another message stating that "no Wages were due, by reason it was a Publick Danger."<sup>36</sup> The

<sup>27</sup> 4 H.L. JOUR. (1642) 620–21 (Eng. & Wales), available at <https://www.british-history.ac.uk/lords-jrnl/vol4/pp620-621>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> GAUNT, *supra* note 24, at 51.

<sup>31</sup> 4 H.L. JOUR., *supra* note 27.

<sup>32</sup> 4 H.L. JOUR. (1642) 625–29, available at <http://www.british-history.ac.uk/lords-jrnl/vol4/pp625-629>.

<sup>33</sup> See, e.g., 5 H.L. JOUR. (1642) 95–99 (Eng. & Wales), available at <http://www.british-history.ac.uk/lords-jrnl/vol5/pp95-99> (describing ongoing Civil War as time of "public danger"); 7 Nov. 1642, H.C. JOUR. 1 (1642), available at [http://eebo.chadwyck.com/search/fulltext?SOURCE=var\\_spell.cfg&FILE=../session/1398203755\\_12640&ACTION=ByID&ID=D00000476834350000&SUBSET=&DISPLAY=DATE\\_ASC&ECCO=N&WARN=N&SIZE=3](http://eebo.chadwyck.com/search/fulltext?SOURCE=var_spell.cfg&FILE=../session/1398203755_12640&ACTION=ByID&ID=D00000476834350000&SUBSET=&DISPLAY=DATE_ASC&ECCO=N&WARN=N&SIZE=3).

<sup>34</sup> Ordinance to Provide Mariners for Supplying the Navy, (1643) I ACTS & ORDS. INTERREGNUM 123, 123–24 (Eng.), available at <http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp123-124>.

<sup>35</sup> *Id.*

<sup>36</sup> THOMAS FRANKLAND, THE ANNALS OF KING JAMES AND KING CHARLES THE FIRST 605 (Tho. Braddyll 1681), available at [http://eebo.chadwyck.com/search/fulltext?ACTION=ByID&ID=D00000121375970000&SOURCE=var\\_spell.cfg&WARN=N&FILE=../session/1398203755\\_12640](http://eebo.chadwyck.com/search/fulltext?ACTION=ByID&ID=D00000121375970000&SOURCE=var_spell.cfg&WARN=N&FILE=../session/1398203755_12640); see *id.* at 607 (noting that the matter was "*pro Defensione Regni, Tuitione Maris*"—for the defense of the Kingdom, by protection of the sea).

King concluded that “when the whole Kingdom is in danger, the King may compel his Subjects to Assist in such publick Danger.”<sup>37</sup>

Thus, for much of the early seventeenth century, “public danger” seemed to denote either the time preceding a rebellion or the rebellion itself. But, by the late seventeenth and early eighteenth centuries, the phrase “public danger” was used mainly to denote an impending invasion. For example, in 1688, King James II of England issued a proclamation to restrain the spreading of false news.<sup>38</sup> His proclamation noted that this measure was necessary “in this time of Publick Danger, threatened by the intended Invasion [of William of Orange] upon this Our Kingdom.”<sup>39</sup> Various English sources from this period support this reading of “public danger.” One contemporary book, for example, uses the term “public danger” interchangeably with the phrase “when an enemy menaces an invasion,”<sup>40</sup> while a contemporary English newspaper defined the phrase by referring to “continued [enemy] encroachments.”<sup>41</sup> This reading is corroborated by an English pamphlet from 1756, near the beginning of the Seven Years’ War between England and France. That publication, entitled *Party Spirit in Time of Publick Danger, Considered* details the threats posed by France and the need for Englishmen to stick together to protect the nation.<sup>42</sup>

The phrase “public danger” was occasionally used to describe a diplomatic crisis. In 1701, for example, Parliament used the phrase “public danger” to describe the decision by King Louis XIV of France to place his grandson Phillip V on the Spanish throne. In a message to the English King, Parliament stated that, “in this Time of public Danger,” Louis XIV could no “longer [hope] to cover His ambitious Designs, or justify His Usurpations, under the specious Pretences of Peace.”<sup>43</sup> When tensions again flared between England and France a century later, Parliament bemoaned the strength of the English navy as it debated what to do about France’s recent military buildup. Parliament noted ominously that the English navy “was now much weaker than it had

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<sup>37</sup> *Id.* at 607.

<sup>38</sup> BY THE KING: A PROCLAMATION TO RESTRAIN THE SPREADING OF FALSE NEWS (Thomas Newcomb 1688), available at [http://eebo.chadwyck.com/search/fulltext?SOURCE=var\\_spell.cfg&FILE=../session/1398203755\\_12640&ACTION=ByID&ID=D00000998996810000&SUBSET=&DISPLAY=DATE\\_ASC&ECCO=N&WARN=N&SIZE=5](http://eebo.chadwyck.com/search/fulltext?SOURCE=var_spell.cfg&FILE=../session/1398203755_12640&ACTION=ByID&ID=D00000998996810000&SUBSET=&DISPLAY=DATE_ASC&ECCO=N&WARN=N&SIZE=5).

<sup>39</sup> *Id.*

<sup>40</sup> THOMAS MORTIMER, THE ELEMENTS OF COMMERCE, POLITICS AND FINANCES, IN THREE TREATISES ON THOSE IMPORTANT SUBJECTS 321 (R. Baldwin 1780), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015082432926;view=1up;seq=5>.

<sup>41</sup> THE MONITOR (BRITISH FREEHOLDER), July 16, 1757, at 437 (J. Scott 1756–57) (“[W]hile the enemy continued their encroachments, invaded our property, and conquered our strong holds[,] had [the ministry] in time of public danger from a foreign enemy advised the king to disarm his British subjects, and call in an army of foreigners?”).

<sup>42</sup> PARTY SPIRIT IN TIME OF PUBLICK DANGER, CONSIDERED. 1–5 (T. Waller 1756), available at <http://hdl.handle.net/2027/aeu.ark:/13960/t6zw21g11>.

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

been on former occasions of public danger.”<sup>44</sup> Similarly, in 1778, the General Assembly of the Church of Scotland sent a message of support to King George II of England referring to the ongoing American Revolution as “[a] season of public danger and alarm.”<sup>45</sup>

Although many sources indicate that “public danger” was used to indicate an impending military threat, the phrase was not limited to this meaning. Significantly, many Englishmen used the phrase “public danger” to signify nonmilitary threats. For example, in 1605, King James I of England issued a royal proclamation empowering sheriffs to pursue “Rebels and Traitours” if they absconded into another county or shire.<sup>46</sup> In so doing, the King declared that, unlike “private cases between party and party,” cases of fleeing criminals presented “eminent and publike danger” and, therefore, ought to be treated differently.<sup>47</sup> Another telling example comes from a 1649 English case in which the King’s Bench noted that “the speedy repair of breaches” in a seawall near Outwell was necessary “to prevent publique danger” from flooding.<sup>48</sup> A general tax to pay for the repairs, which had been levied at everyone in the community, was, therefore, permissible.<sup>49</sup> Moreover, some English sources from this period refer to financial unrest as a “public danger.” For example, in 1681, a group of Englishmen presented to the Privy Council a series of allegations relating to the mismanagement of the East India Trading Company.<sup>50</sup> One allegation was that the Company, “electing rather to Trade with Money at Interest, than to enlarge their *Stock* by new subscriptions,” had presented a “Publique danger to the Nation; for while they borrow so great a part of the Treasure of the Kingdom, at so low an Interest as 3 per Cent[,] they enrich themselves by the Common Hazard.”<sup>51</sup>

Several eighteenth-century English sources suggest that plagues and other epidemics were also thought to constitute “public danger.”

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<sup>44</sup> 13 PARL. HIST. ENG., H.L. (1802) 517 (Gr. Brit.).

<sup>45</sup> *Acts: 1778*, in ACTS OF THE GENERAL ASSEMBLY OF THE CHURCH OF SCOTLAND 1638–1842, at 796–99 (1843), available at <http://www.british-history.ac.uk/church-scotland-records/acts/1638-1842/pp796-799>.

<sup>46</sup> PROCLAMATION OF JAMES I CONCERNING CRIMINALS 1–2 (Robert Barker 1605), available at [http://eebo.chadwyck.com/search/fulltext?session/1398203755\\_12640&ACTION=ByID&ID=D00000998983240000&SUBSET=&DISPLAY=DATE\\_ASC&ECCO=N&WARN=N&SIZE=6](http://eebo.chadwyck.com/search/fulltext?session/1398203755_12640&ACTION=ByID&ID=D00000998983240000&SUBSET=&DISPLAY=DATE_ASC&ECCO=N&WARN=N&SIZE=6).

<sup>47</sup> *Id.* A few decades later, King Charles I equated “Publick danger” with “Common Danger,” perhaps indicating a vision of the term that was broader than mere military threats. FRANKLAND, *supra* note 36.

<sup>48</sup> *Custodes v. Inhabitants of Owtwell*, (1649) 82 Eng. Rep. 626 (K.B.); *Style* 178 (Eng. & Wales).

<sup>49</sup> *Custodes*, (1649) 82 Eng. Rep. 626 (K.B.).

<sup>50</sup> THE ALLEGATIONS OF THE TURKY COMPANY AND OTHERS AGAINST THE EAST-INDIA-COMPANY (1681), available at [http://eebo.chadwyck.com/search/fulltext?SOURCE=var\\_spell.cfg&FILE=../session/1398220056\\_16445&ACTION=ByID&ID=D00000116485830000&SUBSET=&DISPLAY=AUTHOR&ECCO=N&WARN=N&SIZE=51](http://eebo.chadwyck.com/search/fulltext?SOURCE=var_spell.cfg&FILE=../session/1398220056_16445&ACTION=ByID&ID=D00000116485830000&SUBSET=&DISPLAY=AUTHOR&ECCO=N&WARN=N&SIZE=51).

<sup>51</sup> *Id.*



For example, one English pamphlet from 1781 repeatedly describes smallpox as posing a “publick danger” in London, and warns that improper inoculation against that disease could produce a “public danger” that is “great and inevitable.”<sup>52</sup> Similarly, when a history of the London plague of 1665 was published in England in 1754, the plague was again described as a form of “publick danger.”<sup>53</sup> The historian noted that, to “put on a Face of just Concern for the publick Danger,” the English Royal Court responded to the 1665 plague by suspending gambling, dancing, and musical concerts at the Court.<sup>54</sup>

It is difficult to say with any precision exactly how the term “public danger” was understood in seventeenth- and eighteenth-century England. The phrase “public danger” is absent entirely from the works of treatise writers such as Blackstone<sup>55</sup> and Burlamaqui.<sup>56</sup> “Public danger” appears once in the works of Grotius, but this single use provides few clues as to the term’s meaning.<sup>57</sup>

There are some clues provided by Emmerich de Vattel, who used the term “public safety” some ten times in *The Law of Nations*.<sup>58</sup> Although “public danger” and Vattel’s term “public safety” are not identical, it may be possible to view them as antonyms. On this reading, “public danger” might refer to a situation in which the “public safety” has been threatened. (Such a reading is in keeping with the Suspension Clause of the Constitution, which also uses the phrase “public Safety.”<sup>59</sup>)

<sup>52</sup> WILLIAM BLACK, OBSERVATIONS MEDICAL AND POLITICAL, ON THE SMALL-POX, AND THE ADVANTAGES AND DISADVANTAGES OF GENERAL INOCULATION, ESPECIALLY IN CITIES: AND ON THE MORTALITY OF MANKIND AT EVERY AGE IN CITY AND COUNTRY 76–77, 57–58 (J. Johnson 2d ed. 1781).

<sup>53</sup> DANIEL DEFOE, THE HISTORY OF THE GREAT PLAGUE IN LONDON, IN THE YEAR 1665, at 35 (F. & J. Noble 1754).

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*130 (A. Strahan et al. 1825) (discussing martial law). Some sources erroneously suggest that Blackstone did discuss “public danger.” See, e.g., Comment, *Martial Law*, 13 YALE L.J. 150, 150 (1904) (imputing to Blackstone the suggestion that martial law “is an expedient resorted to in times of public danger, similar, in its effect, to the appointment of a dictator”). But a survey of the original sources indicates that Blackstone discussed only “real danger.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*136 (George Sharswood ed., J. B. Lippincott Co. 1893) (“[C]onfinement of the person . . . is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure.”).

<sup>56</sup> See, e.g., JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF POLITIC LAW: BEING A SEQUEL TO THE PRINCIPLES OF NATURAL LAW 277, 329 (Thomas Nugent trans., J. Nourse 1752).

<sup>57</sup> In *Of the Laws of War and Peace*, Grotius wrote that nations should make territorial acquisitions only to the extent necessary to punish enemies for their crimes. “[W]hatever is remitted” back to the conquered state, he said, “is to be attributed to mercy. But that Security which in publick danger exceeds Moderation, is Cruelty.” 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 241 (Rev. A. C. Campbell A. M. trans., B. Boothroyd 1814).

<sup>58</sup> EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (G.G. & J. Robinson 1797).

<sup>59</sup> U.S. CONST., art. I, § 9, cl. 2.

Unsurprisingly, Vattel understood the “public safety” to be threatened by impending invasions. Vattel noted that, when a “powerful enemy” threatens a part of the nation, that nation “has a right to cut [a city or province] off from the body, if the public safety requires it.”<sup>60</sup> But Vattel also seemed to think that the nation’s “public safety” could be endangered by situations less serious than impending invasions. He wrote, for example, that nations had a right to turn away fugitives and exiles if they had “just cause to fear that they will corrupt the manners of the citizens, that they will create religious disturbances, or occasion any other disorder, contrary to the public safety.”<sup>61</sup>

### B. *American Conceptions of Public Danger Before the Founding*

Founding-era sources confirm that “public danger” was understood similarly in eighteenth-century England and in early America. In March of 1788, for example, the Continental Congress passed a measure encouraging wealthy Americans to enlist in the Continental Army.<sup>62</sup> That resolution stated that, “in times of public danger, when the lives, liberties, and property of a free people are threatened by a foreign and barbarous enemy,”<sup>63</sup> it was especially important that members of the upper classes create a “laudable example” by joining the army.<sup>64</sup> Similarly, when the British threatened to invade South Carolina in 1778, that state’s legislature suspended the writ of habeas corpus and noted that in “this time of public danger, when this State is threatened with an invasion by the enemy,” extraordinary measures were warranted.<sup>65</sup> And when the British began their invasion of Virginia three years later, that state’s legislature again noted a “time of public danger” in its message suspending habeas

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<sup>60</sup> VATTEL, *supra* note 58, bk. 1, ch. 21, § 263, at 118 (“[T]he nation may lawfully abandon [a town or a province that composes a part of it] in a case of extreme necessity; and [it] has a right to cut them off from the body, if the public safety requires it.”).

<sup>61</sup> *Id.* bk. 1, ch. 19, § 231, at 108. Vattel also drew a link between “public safety” and eminent domain, suggesting that “[t]he right which belongs to the society, or to the sovereign, of disposing, *in case of necessity and for the public safety*, of all the wealth contained in the state, is called the *eminent domain*.” *Id.* bk. 1, ch. 20, § 244, at 112 (first emphasis added).

<sup>62</sup> 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 213 (Worthington Chauncey Ford ed., 1908) (entry for Mar. 2, 1778).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *An Ordinance to Empower the President or Commander-in-Chief for the Time Being, with the Advice of the Privy Council, to Take Up and Confine All Persons Whose Going at Large May Endanger the Safety of this State*, pmb., in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 458, 458 (Thomas Cooper ed., A.S. Johnston 1838). For a discussion of Revolutionary-era habeas suspensions by the states, see generally Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 959–63 (2012).

corpus.<sup>66</sup> In personal correspondence dated to late 1780, James Madison also used the term “public danger” to refer to the impending invasions of Virginia and North Carolina.<sup>67</sup> Three years earlier, when the British fleet had appeared in the Chesapeake Bay for the first time, Thomas Jefferson sat on a committee that authored a bill granting enhanced authority to the executive given the time of “public danger.”<sup>68</sup> And when relations with France deteriorated at the turn of the nineteenth century,<sup>69</sup> several American sources again deployed the phrase “public danger” to refer to the sense of impending conflict.<sup>70</sup> Even George Washington, in his Fifth Annual Message, cautioned that the nation should grow its arsenal during peace in hopes of avoiding the “uncertainty” involved with procuring weapons “in the moment of public danger” directly before a conflict.<sup>71</sup>

Given its frequent usage in England during the middle of the eighteenth century, it comes as no surprise that the phrase “public danger” seemed to be part of the Founders’ vernacular. Benjamin Franklin, for example, used the phrase “public danger” to refer to the situation in the Colonies just before the Revolution.<sup>72</sup> “Public danger” appears twice in *The Federalist*: once in a paper authored by Alexander

<sup>66</sup> *An Act for Giving Certain Powers to the Governour and Council, and for Punishing Those Who Shall Oppose the Execution of the Laws*, in 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 413, 413 (William Waller Hening ed., George Cochran 1822).

<sup>67</sup> Letter from James Madison to Edmund Pendleton (Sept. 12, 1780), available at <http://founders.archives.gov/documents/Madison/01-02-02-0054> (“We have the comfort to find from every successive account from the Southward that the late unfortunate affair in that quarter, although truly distressing, is by no means so fata[l] as was at first held up to us. Our scattered troops are again embodying, and as a sense of shame is now joined to a sense of public danger in the Militia it is to be hoped they will endeavour to cancel their disgrace by extraordinary exertions. Congress have recommended it to Virga. & N. Carolina to form Magazines for a large army, to the former to hasten the march of her new levies, & the latter to take immediate measures for filling her continental line.” (alteration in original) (footnotes omitted)).

<sup>68</sup> *Bill Indemnifying the Executive for Removing and Confining Suspected Persons*, in 2 THE PAPERS OF THOMAS JEFFERSON—1777 TO 18 JUNE 1779, at 119 (Julian P. Boyd ed., Princeton Univ. Press 1950), available at <http://founders.archives.gov/documents/Jefferson/01-02-02-0037> (noting “the late appearance of a hostile Fleet in the Bay of Chesapeake”).

<sup>69</sup> See George Washington, President of the U.S., Fifth Annual Message (Dec. 3, 1793), available at [http://avalon.law.yale.edu/18th\\_century/washs05.asp](http://avalon.law.yale.edu/18th_century/washs05.asp).

<sup>70</sup> See, e.g., *Gravel v. United States*, 408 U.S. 606, 652–54 (1972) (noting that a 1797 grand jury investigation had criticized several Congressmen for “disseminat[ing] unfounded calumnies” about the administration’s policies towards France during the then-reigning “time of real public danger”).

<sup>71</sup> Washington, *supra* note 69 (“[I]f we desire to secure peace, one of the most powerful instruments of our rising prosperity, it must be known that we are at all times ready for war. The documents which will be presented to you will [show] the amount and kinds of arms and military stores now in our magazines and arsenals; and yet an addition even to these supplies can not with prudence be neglected, as it would leave nothing to the uncertainty of procuring warlike apparatus in the moment of public danger.”).

<sup>72</sup> BENJAMIN FRANKLIN, *Albany Papers*, in POLITICAL, MISCELLANEOUS, AND PHILOSOPHICAL PIECES 85, 92 (J. Johnson 1779), available at <https://archive.org/details/politicalmiscell00franrich>.

Hamilton<sup>73</sup> and again in one authored by James Madison.<sup>74</sup> Hamilton's writings on financial stability indicated that, in his view, loans "in time of public danger, especially from foreign war," were an "indispensable resource."<sup>75</sup> But it was Madison who seemed to have the most affection for the term. He often used the phrase in his journals of the Convention<sup>76</sup> and was directly responsible for inserting it into the Fifth Amendment. Madison also used the phrase "public danger" in his personal correspondence, apparently intending it to refer to the possibility of a military defeat.<sup>77</sup> Use of the phrase was not limited to the Federalists. Even George Mason—the ardent anti-Federalist from Virginia—used the phrase in his speeches at the Federal Convention to refer to situations in which the nation's security might be threatened.<sup>78</sup>

Although "public danger" was most often discussed in relation to an impending invasion, some American sources from the Founding era seemed to equate "public danger" with general emergencies not related to war. For example, the Founders—much like the British Parliament—understood that "public danger" could refer to a situation of financial instability. In 1782, the Superintendent of Finance of the Continental Congress reported a letter to the full Congress complaining that the states were not paying their fair costs of military expenses during the

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<sup>73</sup> THE FEDERALIST NO. 15 (Alexander Hamilton) ("Is public credit an indispensable resource in time of public danger? [Under the Articles of Confederation, w]e seem to have abandoned its cause as desperate and irretrievable.").

<sup>74</sup> THE FEDERALIST NO. 58 (James Madison) ("Those who represent the dignity of their country in the eyes of other nations, will be particularly sensible to every prospect of public danger, or of dishonorable stagnation in public affairs. To those causes we are to ascribe the continual triumph of the British House of Commons over the other branches of the government, whenever the engine of a money bill has been employed.").

<sup>75</sup> ALEXANDER HAMILTON, FIRST REPORT ON THE PUBLIC CREDIT, reprinted in 2 THE WORKS OF ALEXANDER HAMILTON 227, 227–28 (Henry Cabot Lodge ed., 1904); see also Lee C. Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1210 n.22 (2007) (quoting Hamilton's *First Report on the Public Credit*).

<sup>76</sup> James Madison, *Journal—Friday, June 29, 1787*, reprinted in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 460, 467 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (journal entry quoting delegate Gerry as stating that "[t]he injustice of allowing each State an equal vote was long insisted on" and that Gerry "voted for it, but it was agst. his Judgment, and under the pressure of public danger, and the obstinacy of the lesser States."); Robert Yates, *Journal—Wednesday, June 20, 1787*, reprinted in 1 FARRAND'S RECORDS, supra, at 340, 346 (using the phrase in his notes of Mr. Mason's response to Mr. Lansing).

<sup>77</sup> Letter from James Madison to Edmund Pendleton (Sept. 12, 1780), in 5 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 369, 369 (Edmund C. Burnett ed., 1931) (noting that, given recent military defeats, "a sense of shame is now joined to a sense of public danger in the Militia").

<sup>78</sup> See, e.g., Robert Yates, *The Notes of the Secret Debates of the Federal Convention of 1787*, reprinted in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 389, 428 (J. Elliot ed., 2d ed. 1836) (quoting George Mason as having said that, "[i]n certain seasons of public danger, it is commendable to exceed power" and that, "[t]he treaty of peace, under which we now enjoy the blessings of freedom, was made by persons who exceeded their powers").

Revolution.<sup>79</sup> The states' intransigence left the federal government to foot the bill.<sup>80</sup> The Superintendent's Report declared that, as "the clamor of the [federal government's] creditors grew louder and louder," a "time of public danger" had descended upon the United States.<sup>81</sup> Given the "impending calamity,"<sup>82</sup> the Congress begged the states to send the requisitions due. Significantly, the Congress seemed to indicate that "public danger" had been caused by two conditions—not just by the war itself, but also by a threat to the integrity of the "public credit on which our safety and success depend."<sup>83</sup>

### C. *Public Danger and the Constitution*

The phrase "public danger" does not appear in the Declaration of Independence,<sup>84</sup> in the Articles of Confederation,<sup>85</sup> or in the early American Articles of War.<sup>86</sup> But it does appear that the phrase was known to early Americans. In addition to appearing in the Founders' notes from the Convention,<sup>87</sup> it also appears in proposals for constitutional text. New York, for example, submitted a suggestion to Congress that the Suspension Clause be amended to provide that a citizen's inquiry into the cause of a detention "ought not to be denied or delayed, except when on account of Public Danger the Congress shall suspend the privilege of the Writ of Habeas Corpus."<sup>88</sup> In the end, the phrase "public danger" made it into the Constitution only one time.

James Madison's first draft of the Grand Jury Clause was composed in early June of 1789.<sup>89</sup> As drafted, the provision would have amended Article III, Section 2, Clause 3 with the following text:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage . . . ; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an

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<sup>79</sup> 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 132 (Gaillard Hunt ed., 1914) (entry for Mar. 15, 1782).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 133.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>85</sup> ARTICLES OF CONFEDERATION OF 1781.

<sup>86</sup> See generally 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920).

<sup>87</sup> See *supra* notes 76–78 and accompanying text.

<sup>88</sup> CREATING THE BILL OF RIGHTS, *supra* note 9, at 22 (New York's proposed amendment).

<sup>89</sup> *Id.* at 11, 13.

enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same state . . . .<sup>90</sup>

Massachusetts and New Hampshire had proposed similar amendments to Congress.<sup>91</sup> But the language suggested by these states provided that the jury requirement would be waived “in such cases as may arise in the Government & regulation of the Land & Naval forces,”<sup>92</sup> without making any mention of the militia. The insertion of the phrase “public danger” appears to have been Madison’s idea alone.

Three weeks after Madison made his initial suggestions, Roger Sherman proposed a revised version of Madison’s text to the Committee of Eleven that was tasked with drafting the final amendment.<sup>93</sup> Sherman’s text specified that “[n]o person shall be tried for any crime whereby he may incur loss of life or any infamous punishment, without Indictment by a grant Jury,” but did not mention “public danger.”<sup>94</sup> The Committee ignored Sherman’s proposal and instead reported Madison’s text verbatim to the full House.<sup>95</sup> On August 18th, the full House began debate on what would become the Fifth Amendment.<sup>96</sup>

On August 21st, “public danger” had its day in the limelight. Elbridge Gerry of Massachusetts—a rabid anti-Federalist who had walked out of the Federal Convention in lieu of signing the Constitution<sup>97</sup>—objected to Madison’s insertion of the vague phrase “public danger.” Known as a stickler for the clarity of language,<sup>98</sup> Gerry seemed to think that the phrase left a critically important question open-ended. In light of this opinion, Mr. Gerry “proposed to amend [the Clause] by striking out these words, ‘public danger’ and to insert foreign invasion; this being negatived, it was then moved to strike out the last clause [of the proposed text]. This motion was carried, and the amendment was adopted.”<sup>99</sup> Shortly after killing Gerry’s proposed amendment, the House referred Madison’s text to the Senate.<sup>100</sup> In

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<sup>90</sup> *Id.* at 13.

<sup>91</sup> *Id.* at 14–15 (Massachusetts); *id.* at 16 (New Hampshire).

<sup>92</sup> *Id.* at 14–16. New York proposed the language “except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment.” *Id.* at 22.

<sup>93</sup> THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 266 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

<sup>94</sup> *Id.*

<sup>95</sup> Compare *id.*, with CREATING THE BILL OF RIGHTS, *supra* note 9, at 13.

<sup>96</sup> THE COMPLETE BILL OF RIGHTS, *supra* note 93, at 267–69; see also U.S. CONST. amend. V. The early debate was fairly cosmetic. The House, for example, rejected a few cosmetic amendments proposed by Burke. *Id.*

<sup>97</sup> 2 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES: 1788–1861, at 39 (1901).

<sup>98</sup> THE COMPLETE BILL OF RIGHTS, *supra* note 93, at 283 (noting that Gerry “objected to the word ‘district’ [in the draft Fifth Amendment] as too indefinite”).

<sup>99</sup> CREATING THE BILL OF RIGHTS, *supra* note 9, at 199; THE COMPLETE BILL OF RIGHTS, *supra* note 93, at 268.

<sup>100</sup> THE COMPLETE BILL OF RIGHTS, *supra* note 93, at 199.

private correspondence, Gerry later lamented the fact he had not been able to bring more clarity to the Bill of Rights.<sup>101</sup>

On September 4th, the Senate Committee tasked with handling the amendments cut all of Madison's text and proposed to replace it with a simpler amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury."<sup>102</sup> Five days later, the Senate Committee defeated a motion to reinsert Madison's language (including the "public danger" provision) by a deadlocked vote of eight-to-eight.<sup>103</sup> However, five days after that, the Senate voted to combine its shorter phrase with Madison's original language, creating a near-final version of what we now know as the Fifth Amendment.<sup>104</sup> Following minor cosmetic changes, the amendment—including "public danger"—was adopted.<sup>105</sup>

## II. JUSTIFYING A BROAD CONCEPTION OF PUBLIC DANGER

Although impending and actual invasions by enemy forces clearly constitute "public danger," it is just as clear that the term "public danger" is not limited to this meaning. On the contrary, persuasive historical evidence indicates that the Founders may have intended "public danger" to capture nonmilitary threats such as plagues, financial panics, jailbreaks, and natural disasters. For example, as noted above, English sources indicate that escaped criminals,<sup>106</sup> plagues,<sup>107</sup> and breached seawalls posed a "public danger."<sup>108</sup> And, in both America and in England, speculative financial dealings and financial panics were thought to be "public dangers" as well.<sup>109</sup>

But, judging from historical materials alone, it is difficult to identify a consensus interpretation of "public danger" at the time of the Founding. We know that an impending invasion constituted a "public danger," but we do not know whether certain less serious situations also would have qualified. In light of the ambiguous historical record, a broad reading of "public danger" is best justified by appealing to three other arguments: (1) an intratextual reading of the phrase "public danger";<sup>110</sup> (2) the fact that the Congress rejected a proposal to replace

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<sup>101</sup> See Letter from Elbridge Gerry to John Wendell (Sept. 14, 1789), *reprinted in* CREATING THE BILL OF RIGHTS, *supra* note 9, at 294.

<sup>102</sup> CREATING THE BILL OF RIGHTS, *supra* note 9, at 40 n.15.

<sup>103</sup> *Id.*

<sup>104</sup> THE COMPLETE BILL OF RIGHTS, *supra* note 93, at 266.

<sup>105</sup> *Id.* at 277–78.

<sup>106</sup> See *supra* notes 46–47, 61 and accompanying text.

<sup>107</sup> See *supra* notes 52–54 and accompanying text.

<sup>108</sup> See *supra* note 48 and accompanying text.

<sup>109</sup> See *supra* notes 50, 79–83 and accompanying text.

<sup>110</sup> See *infra* Part II.A.

“public danger” with “foreign invasion”;<sup>111</sup> and (3) expansive uses of the phrase “public danger”<sup>112</sup> outside the Fifth Amendment.

### A. *An Intratextual Approach*

Intratextualism--the practice of interpreting one provision of the Constitution by referencing other provisions within the document--may help readers find meaning in phrases that are otherwise ambiguous.<sup>113</sup> Intratextualism is especially useful when readers “seek the meaning of a word cluster--a phrase--rather than of a single word.”<sup>114</sup> Since phrases such as “public danger” do not appear in contemporary dictionaries, intratextualism may well be the best interpretive tool available.

An intratextual analysis of “public danger” reveals several interesting insights. First, the fact that the Founders chose to use the phrase “public danger” in the Fifth Amendment when the phrase “imminent Danger” already existed in Article I must mean that they intended these two phrases to mean different things. Article I of the Constitution provides that:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.<sup>115</sup>

Had the Founders intended for the term “public danger” in the Fifth Amendment to have the same meaning as “imminent Danger” in this clause, they would have just used the phrase “imminent Danger.” Indeed, the drafters of the Constitution often used similar phrases in different parts of the document to refer to a single idea. The Supremacy Clause,<sup>116</sup> for example, uses phrasing that is similar to the phrasing of Article III in describing the supreme law of the land.<sup>117</sup> Moreover, history shows that amenders of the Constitution have borrowed language from the Constitution proper when they seek to reference the

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<sup>111</sup> See *infra* Part II.B.

<sup>112</sup> See *infra* Part II.C.

<sup>113</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). Although intratextualism is most useful when it is clear “that the drafters specifically intended and that the ratifiers consciously considered” the relationships between provisions, Professor Amar contends that it retains value even when “the pattern[s] that we discern upon reflection may not have been specifically intended.” *Id.* at 793.

<sup>114</sup> *Id.* at 791.

<sup>115</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>116</sup> *Id.* art. VI, cl. 2.

<sup>117</sup> *Id.* art. III, § 1, cl. 1.



same concept. The Privileges and Immunities Clause of the Fourteenth Amendment,<sup>118</sup> for example, borrows language from the Privileges and Immunities Clause of Article IV.<sup>119</sup> Thus, had Madison intended the Grand Jury Clause of the Fifth Amendment to capture the same idea of “imminent Danger” employed in Article I, there is no reason to believe that he would not have used the phrase “imminent Danger.”

Second, the relationship between “imminent Danger” and “public danger” shows that the latter phrase should be interpreted broadly. When compared with the word “imminent,” the word “public” conveys a less serious threat. Indeed, many situations might constitute a “public” danger but not an “imminent” danger. Consider an escaped convict, who poses a danger to the public that is not particularly time-sensitive. Another example is an outbreak of disease, which poses a danger to the public but may not be “imminent” if it is not guaranteed to spread. On the other hand, a danger could be imminent and yet not public. Take, for example, an angry mob set on destroying the home of a private citizen.

The difference between “imminent Danger” and “public danger” is not just one of kind, but also one of degree. For the Constitution speaks of *states* that are in “imminent Danger,” but adopts a decidedly *federal* approach when discussing “public danger.” Article II of the Constitution, for example, provides that the federal government may call up the militia at *any* time—for example, during public danger.<sup>120</sup> In contrast, Article I specifies that the states may not call up their militias “unless *actually* invaded or in such imminent Danger as will not admit of delay.”<sup>121</sup> David Lewittes has argued that this

distinction rests upon the different principles that apply to private and to public self-defense powers. The language of the Constitution that describes Congress’s power to call forth the militia—before placing the militia under the President’s command to be employed, as he deems necessary, for the public safety—does not use the same restrictive language that applies to the states. *Public danger is not “imminent danger.”* If the President can employ the militia in times of public danger, not amounting to imminent danger, and to repel invasions, without waiting until actually invaded, then the President must be able to deploy federal armed forces to prevent a potential threat to the security of the United States from approaching the magnitude of “imminent danger” or of an actual invasion.<sup>122</sup>

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<sup>118</sup> *Id.* amend. XIV, § 1.

<sup>119</sup> *Id.* art. IV, § 2, cl. 1. This Article borrows these examples from Amar, *supra* note 113, at 793.

<sup>120</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>121</sup> *Id.* art. I, § 10, cl. 3 (emphasis added).

<sup>122</sup> David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1122 (1992) (emphasis added) (footnote omitted).

This analysis provides yet another reason to believe that “public danger” is broader than “imminent Danger.” The Founders, intending the President to have broader warmaking powers than the states, chose not to limit the President’s authority to times of “imminent Danger.” He is instead given authority to act in a much broader set of circumstances—during “public danger,” for example—so as to secure to safety of the entire nation.

Third, the relationship between “imminent Danger” and “public danger” helps define the scope of the states’ powers during emergencies. Though the President can act during “public danger,” states cannot; on the contrary, states can act only if confronted with an “imminent Danger” such as an impending enemy invasion. This distinction, though slight, is important. Say, for example, that Canada destroyed a dam in Ontario and, therefore, caused extensive flooding downriver in New York. These floods would constitute a “public danger” but not an “imminent Danger.” Thus, Article I would prevent New York from responding by waging war on Canada. But if militiamen were dispatched to help restore order to the flooded region in New York, those militiamen could be held without an indictment.

Taken together, these intratextual insights show that “public danger” was probably intended to be a catchall term that would serve as a sliding scale for various threats to national security. Some public dangers may be more serious than others: the Cuban missile crisis, for example, represented more serious public danger than a fire. But both situations fall in that gray area between war and peace, and both would constitute “public danger.”

At least one scholar of American history has interpreted “public danger” in precisely this way. During the height of the Civil War, Congressman Samuel Shellabarger of Ohio gave a speech on the House floor concerning the history of the Suspension Clause.<sup>123</sup> Shellabarger referred frequently to a sliding scale of what he called “public dangers.”<sup>124</sup> He purported to understand the final version of the Suspension Clause as having “stri[cken] out Mr. Pinckney’s plan [at the Federal Convention] of letting Congress judge of this urgent and pressing occasion,” and instead “legislat[ing] and defin[ing] what facts shall constitute this general state of public danger; and . . . put[ting] into the Constitution a legislative and unalterable definition of that ‘public danger.’”<sup>125</sup> On this reading, there were many possible “public dangers”

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<sup>123</sup> Samuel Shellabarger, Speech of Hon. Samuel Shellabarger, of Ohio, on the Habeas Corpus; Delivered in the House of Representatives (May 12, 1862), at 7–11, *available at* <https://ia700806.us.archive.org/18/items/speechofhonsamu00shel/speechofhonsamu00shel.pdf>; *id.* at 11 (“[A] rebellion or an invasion existing furnishes the only standard of public danger which any power in the Government can establish relating to the *general* state of the Republic.”).

<sup>124</sup> *Id.* at 7–11.

<sup>125</sup> *Id.* at 7.

that could have warranted suspension. From among that set of “public dangers,” Congress selected only two—rebellion and invasion—as sufficiently perilous to warrant suspension.<sup>126</sup> This line of reasoning necessarily assumes that “public danger” is broader than merely invasion and rebellion, since Congress was selecting from among many public dangers sufficient to trigger suspension.<sup>127</sup>

### B. *Rejection of “Foreign Invasion”*

The rejection of Elbridge Gerry’s suggestion to replace “public danger” with “foreign invasion” in the proposed text of the Fifth Amendment may be the single most telling piece of evidence in the historical record.<sup>128</sup> Although the *Congressional Record* and the relevant journals reveal little about the debate on this topic, the mere fact that Congress voted to preserve “public danger” in an up-or-down vote must mean that they felt some attachment to the term. This was not simply some phrase invented by Madison and then snuck into the Bill of Rights. “Public danger” was independently considered and approved.

Congress considered limiting the militia exception to the Grand Jury Clause to times of “foreign invasion,” but then expressly rejected that proposal. The logical inference is that Congress believed that the militia exception should apply broadly (in any time of “public danger”) rather than narrowly (only in times of “foreign invasion”). For example, Congress may have believed that the militia exception should apply in cases of *domestic* invasion such as Shay’s Rebellion, which had occurred only two years before the Fifth Amendment was drafted and was no doubt fresh in the Founders’ minds.<sup>129</sup> Even more importantly, Congress may have believed that the militia exception to the Fifth Amendment should apply to militiamen who were called out by either the states or the federal government to perform nonmilitary duties. For example, Congress passed several laws in the early days of the Republic that allowed the President to use the militia to secure public order and enforce civil laws.<sup>130</sup> Congress may have intended for the Fifth

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<sup>126</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>127</sup> *Id.*

<sup>128</sup> CREATING THE BILL OF RIGHTS, *supra* note 9, at 199; THE COMPLETE BILL OF RIGHTS, *supra* note 93, at 268.

<sup>129</sup> For a discussion of Shay’s Rebellion, see KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 103–28 (2001).

<sup>130</sup> See, e.g., Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87; An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections and Repel Invasions, Law of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264, 264 (repealed 1795); An Act to Recognize and Adapt to the Constitution of the United States the Establishment of the Troops Raised Under the Resolves of the United States in Congress Assembled, and for Other Purposes Therein Mentioned, Law of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96 (repealed 1790); see also STEPHEN

Amendment not to apply to militiamen called out to deal with these threats, many of which constituted “public danger” but not “foreign invasion.” Congress may also have intended to limit the applicability of the Fifth Amendment to militiamen called out *by their states* to deal with nonmilitary tasks such as quieting riots and restoring order after natural disasters. The states’ use of the militia for these purposes was common in the early Republic,<sup>131</sup> and, under the aegis of the “National Guard,” the militia continues to perform this role in modern America.<sup>132</sup>

Under the Supreme Court’s “rejected proposal” rule of statutory interpretation, courts should decline to attribute to Congress an intent to do something that Congress considered but later rejected.<sup>133</sup> If a court were to apply this rule to the Grand Jury Clause, it would likely hold that reading the phrase “public danger” to mean *only* a time of “foreign invasion” would be a mistake. This interpretive strategy finds support in numerous court opinions and law review articles that have interpreted the Constitution by reference to proposals that were rejected by the Federal Convention or by the first Congress.<sup>134</sup> For example, in *Mistretta v. United States*, the Supreme Court held that requiring federal judges to serve on the U.S. Sentencing Commission did not violate separation of

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YOUNG, *THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY*, at xiv & n.26 (2003) (discussing these laws); Jerald A. Sharum, *The Politics of Fear and Outsourcing Emergency Powers: The Death and Rebirth of the Posse Comitatus Act*, 37 LINCOLN L. REV. 111, 115 & n.14 (2010) (same).

<sup>131</sup> See LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 81 (1982) (detailing tasks performed by the state militias in the early days of the Republic); JOHN K. MAHON, *THE AMERICAN MILITIA: DECADE OF DECISION, 1789–1800*, 32–46 (1960) (similar); S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 474–80 (1917) (similar); Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 275 & n.35 (2007) (similar).

<sup>132</sup> See John G. Kester, *State Governors and the Federal National Guard*, 11 HARV. J.L. & PUB. POL’Y 177, 201 (1988) (“[Modern] governors do regularly use their National Guard forces in state service to assist in meeting floods and natural disasters and occasionally even to keep domestic order.”); see also Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1753 n.48 (1995) (“[T]he ‘unorganized militia’ constitutes the ultimate military reserve resource of both federal and state governments for call-up in dire emergency; for example, in case earthquake, flood, other natural disaster, or riot overwhelms police in circumstances in which the National Guard and Army are overseas or otherwise unavailable, perhaps because of transportation disruption.”).

<sup>133</sup> See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 182–85 (1978); *id.* at 185 (“[T]he legislative history undergirding [section 7 of the Endangered Species Act of 1973] reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The *pointed omission* of the type of qualifying language previously included in endangered species legislation *reveals a conscious decision by Congress* to give endangered species priority over the ‘primary missions’ of federal agencies. It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.” (emphasis added)).

<sup>134</sup> The Supreme Court has routinely suggested that “contemporaneous practice by the Founders themselves is significant evidence” of the meaning of the Constitution. *Mistretta v. United States*, 488 U.S. 361, 397–99 (1989). This includes actions by members of the first Congress. *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986).

powers principles.<sup>135</sup> As support for this holding, the Court noted that it found it “at least inferentially meaningful that at the Constitutional Convention two prohibitions against plural officeholding by members of the Judiciary were proposed, but did not reach the floor of the Convention for a vote.”<sup>136</sup> Similarly, in *U.S. Term Limits, Inc. v. Thornton*,<sup>137</sup> the Court considered the constitutionality of term limits on members of Congress. In reaching the conclusion that such limits were unconstitutional, the Court noted that it “found significant that the [Federal] Convention rejected” proposals that would have allowed Congress to fix certain qualifications for holding office in Congress.<sup>138</sup> Other examples of this interpretive strategy abound. For example, the Federal Convention rejected proposals for a “Council of Revision” that “would have empowered select judges working with the executive to revise pending legislation before it went into effect.”<sup>139</sup> The Convention’s rejection of this idea has been said to provide important clues about how the Founders intended to distribute powers among the branches.<sup>140</sup> Similarly, the Convention’s rejection of a proposal that would have given the President sole control over treaty-making has been interpreted as requiring a robust role for Congress in the sphere of international agreements.<sup>141</sup>

These sources confirm the importance of the “rejected proposal” rule in constitutional interpretation. Although history does not tell us why the Founders preferred “public danger” to “foreign invasion,” their rejection of Elbridge Gerry’s proposed amendment is nonetheless significant. Together with the other interpretive tools discussed in this

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<sup>135</sup> *Mistretta*, 488 U.S. at 371–412.

<sup>136</sup> *Id.* at 398; see Michael Blasie, Note, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 632–33 (2011).

<sup>137</sup> 514 U.S. 779 (1995).

<sup>138</sup> *Thornton*, 514 U.S. at 791. Many academics have drawn on the same sources to reach a similar conclusion. See, e.g., Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415 (1992). But see Einer Elhauge et al., *How Term Limits Enhance the Expression of Democratic Preferences*, 5 SUP. CT. ECON. REV. 59, 62 (1997); J. Richard Brown, Comment, *Coming to Terms with Congress: A Defense of Congressional Term Limits*, 22 CAP. U. L. REV. 1095, 1110 (1993).

<sup>139</sup> Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 49 (2000). The rejected proposals are detailed at 1 FARRAND’S RECORDS, *supra* note 76, at 21, and at 2 FARRAND’S RECORDS, *supra* note 76, at 73.

<sup>140</sup> See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1260 n.61 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 643 (1996); Molot, *supra* note 139, at 47–51; Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1125–30 (2002).

<sup>141</sup> See David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 PEPP. L. REV. 685, 733–34 (2014); see also Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 337 n.207 (2007).

Part, the rejection of “foreign invasion” provides important inferential evidence that “public danger” should be interpreted broadly.

C. “Public Danger” Outside the Fifth Amendment

No decision from any court has attempted to distill the meaning of the term “public danger” as used in the Grand Jury Clause. But the general concept of “public danger,” which dates to seventeenth-century England, has played an important role in the development of American law. Analyzing the uses of “public danger” in other legal theaters yields important insights about how this concept should be understood in the narrower context of the Fifth Amendment.<sup>142</sup> Significantly, the concept of “public danger” has consistently been interpreted very broadly when used outside the Constitution. These expansive interpretations—together with the history discussed above—counsel in favor of a broad reading of the phrase “public danger” as used in the Grand Jury Clause.

Under British and American common law, it has long been understood that “the sovereign has the right to destroy private property in times of great public danger when the public safety demands it.”<sup>143</sup> Under this so-called public necessity doctrine, “public danger” is defined broadly enough to include “fire, pestilence, [and] police activities in apprehending criminal suspects.”<sup>144</sup>

The public necessity doctrine was created in the *Case of Saltpeter*, in which the King’s Bench held that King James I of England had a right

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<sup>142</sup> Although the courts discussed in this Section referenced “public danger,” none of them were interpreting the phrase “public danger” as used in the Fifth Amendment. This Article argues that, when these judges used the phrase “public danger,” they may have been invoking a legal concept that dates to seventeenth-century England. Admittedly, that is impossible to know exactly what these judges intended. On one hand, they may well have meant to invoke a concept of “public danger” that dates to the English Civil War. On the other hand, they may have selected the phrase “public danger” without any knowledge at all of its rich history. As always, history involves a bit of guesswork. In order to give meaning to constitutional text, however, we must draw from all sources available. If nothing else, the sources below evince a vernacular understanding of “public danger” that matches my understanding of that phrase.

That said, it is worth noting that the Supreme Court itself has considered post-Founding interpretations of the Constitution in attempting to discern the Founders’ meaning. Justice Scalia did exactly that in *District of Columbia v. Heller*, 554 U.S. 570 (2008). His majority opinion in that case suggested that “the examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation.” *Id.* at 605. Embracing this approach, the *Heller* majority interpreted the Second Amendment by looking to antebellum cases decided well after the Founding. *Id.* at 610–14. The analysis here is somewhat different, as post-Founding invocations of “public danger” do not purport to interpret constitutional text. Still, these sources may invoke the same concept, and therefore have at least some interpretive value.

<sup>143</sup> John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 700 (2007).

<sup>144</sup> *Id.* at 691.

to take saltpeter from the land of his freeholder subjects in order to make gunpowder for use in war.<sup>145</sup> The American version of the public necessity doctrine can be traced to *United States v. Russell*.<sup>146</sup> In that case, the U.S. Supreme Court was confronted with the question of whether the government's seizure of three steamboats during the Civil War constituted a taking even though the act was done out of military necessity.<sup>147</sup> The Court found that, "under such extreme and imperious circumstances, [private rights] must give way for the time to the public good."<sup>148</sup> In so holding, the Court depended heavily on the language of "public danger."<sup>149</sup> The Court noted time and again that private property can be taken only when "the public danger [is] immediate, imminent, and impending."<sup>150</sup>

In the decades after the Civil War, lower courts began to articulate other situations that constituted a public danger.<sup>151</sup> Under case law developed during this period, it is well established that private property may be taken so long as the public necessity test is met.<sup>152</sup> This test allows for takings in a time of war.<sup>153</sup> It also allows for takings when "government officials or private individuals take action to avert a public danger."<sup>154</sup> Courts applying this doctrine have held that a number of situations qualify as "public dangers" sufficient to justify a taking. These situations include: fire;<sup>155</sup> flood;<sup>156</sup> jailbreaks and loose criminals;<sup>157</sup> and the outbreak of pestilence or disease.<sup>158</sup>

The concept of "public danger" also played a key role in *Korematsu v. United States*. In that infamous 1944 case, the Court was faced with

<sup>145</sup> The Case of the King's Prerogative in Saltpetre, (1606) 77 Eng. Rep. 1294 (K.B.); 12 Co. Rep. 12 (Eng. & Wales).

<sup>146</sup> 80 U.S. 623 (1871).

<sup>147</sup> *Id.* at 628–30.

<sup>148</sup> *Id.* at 629.

<sup>149</sup> *Id.* at 627–29.

<sup>150</sup> *Id.* at 628.

<sup>151</sup> See *infra* notes 155–57 and accompanying text.

<sup>152</sup> Cohan, *supra* note 143, at 691.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*; see also *id.* (noting that the public necessity doctrine reaches situations such as "fire, pestilence, [and] police activities in apprehending criminal suspects").

<sup>155</sup> See, e.g., *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (1788) ("Houses may be razed to prevent the spreading of fire, because for the public good."); Cohan, *supra* note 143, at 719–24.

<sup>156</sup> See, e.g., *Newcomb v. Tisdale*, 62 Cal. 575 (1881); Cohan, *supra* note 143, at 724–25.

<sup>157</sup> See, e.g., *Customer Co. v. City of Sacramento*, 895 P.2d 900, 909–11 (Cal. 1995); Cohan, *supra* note 143, at 728–32.

<sup>158</sup> See e.g., *Seavey v. Preble*, 64 Me. 120, 121 (1874) ("When the small-pox or any other contagious disease exists in any town or city the law demands the utmost vigilance to prevent its spread. . . . To accomplish this object persons may be seized and restrained of their liberty or ordered to leave the state; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights of persons and property."); Cohan, *supra* note 143, at 727–28.

the question of whether the government's decision to exclude all persons of Japanese ancestry from certain "military areas" on the West Coast could be justified under the Constitution.<sup>159</sup> Justice Murphy's dissenting opinion in *Korematsu* cited extensively to *Russell* and repeatedly invoked the concept of "public danger." In Justice Murphy's view:

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.<sup>160</sup>

A six-member majority of the Court, applying a test similar to the one articulated by Justice Murphy in *Russell*, deferred to the military's conclusion that the exclusion order was handed down in a time of "the gravest imminent danger to the public safety."<sup>161</sup> Given the "critical hour,"<sup>162</sup> the *Korematsu* majority felt that "[p]ressing public necessity" justified the government's decision to single out Japanese Americans for special treatment.<sup>163</sup> But in Justice Murphy's opinion, the exclusion order "clearly d[id] not meet the test" for public danger laid out in *Russell*.<sup>164</sup> His fiery opinion suggested that the order bore "no reasonable relation to an 'immediate, imminent, and impending' public danger,"<sup>165</sup> and that the government's evidence purporting to prove a public danger consisted of only "a few intimations that certain individuals actively aided the enemy."<sup>166</sup> Justice Jackson also dissented, bemoaning the fact that the Court's approval of internment might make "a passing incident" into a "doctrine of the constitution."<sup>167</sup> One later commentator has suggested that Justice Jackson's comparatively "temperate" dissent was intended to suggest that, "just as a general may not be subject to the Constitution in times of public danger, so too may the Court not be bound to approve that expediency as constitutional."<sup>168</sup>

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<sup>159</sup> *Korematsu v. United States*, 323 U.S. 214, 216–18 (1944) (noting that "public danger" provides "[t]he judicial test" for evaluating such actions).

<sup>160</sup> *Id.* at 234–35 (Murphy, J., dissenting).

<sup>161</sup> *Id.* at 218 (majority opinion).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 216.

<sup>164</sup> *Id.* at 234 (Murphy, J., dissenting).

<sup>165</sup> *Id.* at 235.

<sup>166</sup> *Id.* at 240; see also Richard Nicholson, Note, *Functionalism's Military Necessity Problem: Extraterritorial Habeas Corpus*, Justice Kennedy, *Boumediene v. Bush*, and al Maqaleh v. Gates, 81 *FORDHAM L. REV.* 1393, 1420 (2012).

<sup>167</sup> *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

<sup>168</sup> Nicholson, *supra* note 166, at 1421.



The Supreme Court again invoked the concept of “public danger” in the 1904 case of *Moyer v. Peabody*.<sup>169</sup> Following mass labor strikes in Colorado during 1903 and early 1904, a series of bloody clashes broke out between mine operators and mine workers.<sup>170</sup> The incident, which would come to be known as the Colorado Labor Wars, was declared an insurrection by the state’s governor.<sup>171</sup> He called out the National Guard and arrested the leader of the labor unions, Charles Moyer.<sup>172</sup> Moyer later sought federal habeas relief when he was denied access to the courts and told that the Governor had ordered his indefinite detention “until he could be discharged with safety.”<sup>173</sup> When the matter reached the Supreme Court, Justice Holmes wrote that, “[w]hen it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. *Public danger warrants the substitution of executive process for judicial process.*”<sup>174</sup>

The Supreme Court has also invoked the concept of “public danger” in its criminal law jurisprudence. In the seminal 1943 case of *United States v. Dotterweich*, the Supreme Court found that defendants could be subject to strict criminal liability when they engaged in behavior that placed the public at risk (for example, by shipping adulterated drugs).<sup>175</sup> The Court recognized that, although this approach departed from the usual requirement of scienter, such a rule nonetheless made sense as a burden-shifting framework.<sup>176</sup> In the Court’s view, “the interest of the larger good” was served by placing “the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”<sup>177</sup> Although it is not precisely clear what qualifies as a “public danger” under *Dotterweich*, the Court’s later decisions in this area have provided some clues. “[P]otentially harmful or injurious items” have been equated with posing a public danger,<sup>178</sup> as have those involving “dangerous or deleterious devices or products or obnoxious waste materials.”<sup>179</sup>

When taken together, the opinions discussed above paint a picture of “public danger” that is truly expansive. Under the public necessity

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<sup>169</sup> 212 U.S. 78 (1909).

<sup>170</sup> For a history of the Colorado Labor Wars, see GEORGE G. SUGGS, JR., *COLORADO’S WAR ON MILITANT UNIONISM: JAMES H. PEABODY AND THE WESTERN FEDERATION OF MINERS* (1972).

<sup>171</sup> *Moyer*, 212 U.S. at 82.

<sup>172</sup> *Id.* at 83.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 85 (emphasis added).

<sup>175</sup> *United States v. Dotterweich*, 320 U.S. 277, 280–81 (1943).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Staples v. United States*, 511 U.S. 600, 607 (1994).

<sup>179</sup> *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 564–65 (1971) (discussing *United States v. Balint*, 258 U.S. 250 (1922)).

doctrine, for example, a host of nonmilitary threats have long been understood to constitute “public dangers.” These threats include fires, flood, jailbreaks, police activities, and the outbreak of disease. The Supreme Court itself seems to have approved a broad reading of “public danger.” As discussed above, it is possible to interpret *Korematsu* as having held that Japanese Americans posed a “public danger” in the wake of Pearl Harbor,<sup>180</sup> even though there was never any particularized evidence that Japanese Americans were plotting pernicious activities in “military areas”<sup>181</sup> or that the Japanese were planning to invade the mainland of the United States.<sup>182</sup> The Court has also held that fights between labor and management are a “public danger” even when violence is limited and localized.<sup>183</sup> Moreover, “public danger” as envisioned by the public welfare doctrine is also quite broad. Adulterated drugs and toxic waste, for example, would certainly qualify under *Dotterweich* and its progeny.

These broad readings of “public danger” go far beyond the period directly preceding an enemy invasion. Thus, when interpreting “public danger” as used in the Fifth Amendment, courts might also adopt an expansive reading. Such an interpretation would be consistent with the general approach in American law, which has interpreted the “public danger” concept expansively in a number of legal theaters.

### III. PRACTICAL IMPLICATIONS

“Public danger” is best defined as a period in which the safety of the public is seriously threatened. Terrorism—which presents a constant but unpredictable threat to American national security—fits neatly within this paradigm. Indeed, during the nineteenth century, the general concept of “public danger” was understood to capture terrorism. In *Ex parte Milligan*, for example, the Supreme Court used the term “public danger” to refer to the situation in 1864 Indiana, which was the stomping ground of a “powerful secret association” conspiring to wage war against the national government.<sup>184</sup> This type of “public danger” is similar to the threat currently posed by al-Qaeda and associated groups. For this reason, some commentators have gone so far as to suggest that the public danger exception to the Fifth Amendment should have permanent “applicabl[ity] given that the terrorist regime that attacked

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<sup>180</sup> *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944).

<sup>181</sup> *Id.* at 235–39 (Murphy, J., dissenting).

<sup>182</sup> *Id.*

<sup>183</sup> See *supra* notes 169–73 and accompanying text.

<sup>184</sup> 71 U.S. (4 Wall.) 2, 140–41 (1866).

the [United States] is a pseudo-militia and the constant threat of terrorism presents a time of public danger.”<sup>185</sup>

Legal academics have long struggled with the fact that the Constitution provides little guidance on the limits of the President’s power to confront terrorism.<sup>186</sup> Many of the national security situations contemplated by the Constitution simply are not apt descriptors of terrorism. The Constitution apportions power during times of war,<sup>187</sup> for example, but Congress has not yet declared war on any terrorist groups. The Constitution also discusses rebellion<sup>188</sup> and insurrection,<sup>189</sup> but both of these terms imply a domestic disturbance quite unlike the threat posed by international terrorist groups. So too does the Constitution speak of invasion,<sup>190</sup> but this term suggests an organized movement of many soldiers rather than one-off bombings or attacks. And the only other term used by the Constitution—“imminent Danger”<sup>191</sup>—suggests certain and impending peril, whereas terrorism is unpredictable.

Given the seeming absence of any guidance from the Constitution, some scholars have developed extraconstitutional frameworks to describe the threat posed by terrorism. Samuel Issacharoff and Richard Pildes, for example, have argued that the operative legal distinction is between “‘normal’ times” and “[t]imes of heightened risk to the physical safety of . . . citizens.”<sup>192</sup> Others—including Bruce Ackerman;<sup>193</sup> Eric Posner and Adrian Vermeule;<sup>194</sup> and Richard Posner<sup>195</sup>—have used the term “emergency” when describing the risks posed by global terrorism. (This descriptor is in keeping with President George W. Bush’s declaration of “national emergency” following 9/11,<sup>196</sup> and it is also

<sup>185</sup> Andrew T. Jackola, Comment, *A Second Bite at the Apple: How the Government’s Use of the Doctrine of Enemy Combatants in the Case of Zacarias Moussaoui Threatens to Upset the Future of the Criminal Justice System*, 27 *HAMLIN L. REV.* 101, 126 n.154 (2004).

<sup>186</sup> U.S. CONST. art. I, § 8, cl. 11; *id.* art. I, § 10, cl. 3; *id.* art. III, § 1, cl. 3; *id.* amend. III; *id.* amend. V.

<sup>187</sup> See, e.g., Bradley & Goldsmith, *supra* note 5.

<sup>188</sup> U.S. CONST. art. I, § 9, cl. 2; *id.* amend. XIV, §§ 2–4.

<sup>189</sup> *Id.* art. I, § 8, cl. 15; *id.* amend. XIV, §§ 3–4.

<sup>190</sup> *Id.* art. I, § 8, cl. 15; *id.* art. I, § 9, cl. 2; *id.* art. IV, § 4.

<sup>191</sup> *Id.* art. I, § 10, cl. 3.

<sup>192</sup> Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 161, 161–63 (Mark Tushnet ed., 2005).

<sup>193</sup> Bruce Ackerman, Essay, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004).

<sup>194</sup> ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3 (2007).

<sup>195</sup> RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

<sup>196</sup> See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

consistent with the War Powers Act of 1973.<sup>197</sup>) Still others—including Oren Gross,<sup>198</sup> Laurence Tribe,<sup>199</sup> and Patrick O. Gudridge<sup>200</sup>—have used the term “crisis” to describe the period following a terrorist attack. Not satisfied with these options, others insist—or fear<sup>201</sup>—that the fight against terrorism is an “endless war.”

The latest intervention comes from Mary Dudziak, who has thoughtfully argued that “wartime” is a socially constructed and highly variable concept.<sup>202</sup> Dudziak suggests that the common element in the labels discussed above is that the phrases “[w]artime” and “peacetime” broke down, but the basic temporal structure (normal times, ruptured by non-normal times) largely remained in place, even if it seemed unclear whether normal times would ever return.<sup>203</sup> On Dudziak’s reading, “wartime” has traditionally been understood to “be an era of altered governance . . . when presidential power expands, when individual rights are often compromised.”<sup>204</sup> The altered rules present in wartimes are “thought to be tolerable because wartimes come to an end, and with them a government’s emergency powers.”<sup>205</sup> The problem is that, “[f]or the formulation of wartime-as-exceptional-time to work, war must have temporal limits.”<sup>206</sup> This is not the case in the global war on terror.<sup>207</sup>

“Public danger” provides the missing label. Although “crisis,” “emergency,” “endless war,” and “heightened risk” are all apt descriptors of the security situation in a post-9/11 world, the Constitution does not use these terms. It instead uses the phrase “public

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<sup>197</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, § 2(c) (1973) (providing the President with authority to deploy troops in response to “a national emergency created by attack upon the United States,” among other situations).

<sup>198</sup> Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1021 (2003). Gross also uses the term “chaos.” *Id.* at 1011.

<sup>199</sup> Laurence H. Tribe & Patrick O. Gudridge, Essay, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1813 (2004). Tribe and Gudridge also use the term “emergency.” *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at ix (2012). For a thoughtful discussion of the dangers of expanded executive authority in the age of terrorism, see PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

<sup>202</sup> See MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012) (identifying the concept of “wartime”); see also Samuel Moyn, *Book Review: War Time: An Idea, Its History, Its Consequences by Mary L. Dudziak*, LAWFARE (May 24, 2012, 11:10 AM), <http://www.lawfareblog.com/2012/05/war-time-an-idea-its-history-its-consequences>.

<sup>203</sup> Mary L. Dudziak, Essay, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1699 (2010).

<sup>204</sup> *Id.* at 1669.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1682.

<sup>207</sup> *Id.* at 1696–97; *id.* at 1697 (“Anxiety about time has broken to the surface in recent years as we find ourselves in an ambiguous era. It is called a wartime, but is simultaneously described as an era without war’s usual boundaries in time and space.”).

danger” to describe an identical concept, thus providing a textual hook for exactly the type of situation that academics have struggled to name. Instead of bickering over nomenclature, scholars would be well advised to call the global war on terrorism what it is: a time of “public danger.” Indeed, James Ming Chen has suggested that, “[i]f ever there were a time of public danger in American history, this is it.”<sup>208</sup>

Once terrorism is understood as a form of “public danger,” the Constitution begins to provide inferential guidance about what powers the President has to confront this threat. In recent years, hawkish bloggers and other lay commentators have argued that drone strikes and targeted killings can be justified on the theory that global terrorism presents a time of “public danger” as contemplated by the Fifth Amendment. For these commentators, it seems obvious that the phrase “public danger” was “not inserted into the amendment by Congress in a social or political vacuum. [James] Madison and other lawmakers had just experienced the long, brutal hardship of a revolutionary war.”<sup>209</sup> On this view, the Founders “intimately understood that the Government, when faced with war or clear ‘public danger,’ needs the power to suspend constitutional guarantees.”<sup>210</sup>

This theory ignores the text of the Constitution. The Founders could have said that, in a time of “public danger,” the President is authorized to unilaterally suspend habeas corpus, appropriate Treasury funds for defense purposes, or quarter soldiers. But the Founders did not say these things. The Founders’ decision *not* to extend these powers may indicate their hesitance to extend additional authority to the executive during times like the present—times when the nation is in danger but is not at war.<sup>211</sup> Indeed, under the canon of *expressio unius est exclusio alterius*—that the express mention of one thing excludes all

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<sup>208</sup> Grantmore, *supra* note 16, at 469. In support of his theory, “Gil Grantmore” marshals a wealth of post-9/11 military and executive orders that spoke of an “unusual and extraordinary threat to the national security” and an “extraordinary national emergency.” *Id.* at 469 nn. 81 & 88 (internal quotation marks omitted).

<sup>209</sup> Billy Sinclair, *An Assassination or Death Sentence Without Due Process*, CAPITAL PUNISHMENT BOOK (Oct. 26, 2011), <http://www.capitalpunishmentbook.com/?p=649>.

<sup>210</sup> *Id.*

<sup>211</sup> This Article does not mean to overstate with this argument. A skeptic of this suggestion would rightly argue that drawing this negative inference risks the possibility of blowing the phrase “public danger” entirely out of proportion. Although it is true that the Founders declined to extend additional powers to the President during “public danger,” the Fifth Amendment would admittedly have been an unlikely vehicle for extending such powers. This objection, though well taken, does not limit our ability to leverage intratextualism in hopes of better understanding the Constitution. It is clear that the concept of “public danger” was known to the Founders. *See supra* notes 67, 72–78 and accompanying text (noting various uses of “public danger” in the Founders’ speeches and correspondence). It also appears in the Fifth Amendment. U.S. CONST. amend. V. Thus, had the Founders wished to provide for additional executive power during terrorism, they could have done so by providing instructions for resisting “public danger.” Their decision not to do so provides at least some evidence that no such expansive authority was intended.

others<sup>212</sup>—the Founders’ decision to list only one limit on civil liberties during times of “public danger” may mean that the government has no right to suspend any other rights in response to the threat of terrorism.

Given that reality, we ought to be skeptical when the President claims enhanced authorities to confront the threat of terrorism. Contrary to the arguments of some on the political Left, the Constitution *does* allow for some civil liberties to be infringed during the War on Terror. But the list is a short one. Terrorism and other “public dangers” permit the government to suspend jury rights for members of the active militia,<sup>213</sup> but do not permit the suspension of other constitutional rights.

#### CONCLUSION

Although reasonable minds might disagree over how broadly to define “public danger,” the bulk of the available evidence suggests that the Founders intended this term to be read broadly. In seventeenth-century England, the phrase “public danger” was commonly used to signify military threats such as impending invasions. But it was also used to describe a wide set of less serious threats, including plagues, financial panics, jailbreaks, and natural disasters. When the term found its way to early America, it was used in much the same way. “Public danger” ultimately found its way into the Constitution—and into a number of legal doctrines that have shaped the development of American law. Properly understood, “public danger” captures threats as serious as the Spanish Armada and as fleeting as a forest fire.

Given the amount of ink spilled over the meaning of certain words in the Constitution, it is surprising that “public danger” has been ignored for over two centuries. That phrase, hidden in plain view, shows that the Constitution can still surprise us. Indeed, it is a tribute to the Founders’ brilliance that “public danger,” though long ago forgotten, may provide a fitting limit to executive authority in the age of terrorism.

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<sup>212</sup> See generally Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191 (1931).

<sup>213</sup> U.S. CONST. amend. V.