Can International Law Trump Trump's Immigration Agenda: Protecting Individual Rights through Procedural Jus Cogens

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CAN INTERNATIONAL LAW TRUMP TRUMP’S IMMIGRATION AGENDA?
PROTECTING INDIVIDUAL RIGHTS THROUGH PROCEDURAL *JUS COGENS*

S.I. Strong*

I. INTRODUCTION

Donald Trump’s approach to immigration has been revolutionary, to say the least. In his short tenure in office, his policies banning travel of individuals from certain Muslim countries have been taken to the United States Supreme Court on two separate occasions,¹ and his most recent technique of separating children from their parents at the border has already spawned litigation.² His boldest proposal yet, however, involves the widespread denial of procedural rights to immigrants.³ In his words, “[w]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came [sic].”⁴

If implemented, this move will doubtless generate extensive constitutional debate.⁵ Immigration proceedings are considered civil rather than criminal in nature and must comply with traditional standards of due process.⁶ Still, the in-

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⁵. Procedural due process has long been considered a critical component of U.S. constitutional law. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 547 (3d ed. 2006).

creasing politicization of constitutional law, as well as the tendency of a majority of the Supreme Court to, in Justice Sonia Sotomayor’s words, “ignore[e] the facts, misconstrue[3] our legal precedent, and turn[] a blind eye to the pain and suffering the [Trump policies] inflict[] upon countless families and individuals, many of whom are United States citizens,” in immigration proceedings suggests that alternate arguments should also be considered. 7

One intriguing option involves international law. Some people may question this approach, given the isolationist tendencies of various members of the Supreme Court. 8 Jenny Martinez has recognized, however, that “[e]ven the late Justice Antonin Scalia, who argued so vociferously against the use of foreign law in interpreting the U.S. Constitution, agreed that consideration of foreign sources was relevant” in some circumstances. 9 Furthermore, international law offers the possibility of both judicial and non-judicial relief. 10

This Essay therefore considers the applicability of certain peremptory norms commonly referred to as jus cogens to the Administration’s recent calls to eliminate immigration hearings. 11 The “norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.” 12 Because “[j]us cogens norms are often thought to be equivalent to constitutional principles of international law . . .,” they are often referred to as “an international bill of rights, or . . . are said to constitute the highest in a norms hierarchy.” 13

The discussion begins in Section II by defining traditional and procedural elements of jus cogens, followed by an analysis in Section III of the content of procedural jus cogens. Next, Section IV considers how these principles might operate with respect to the Administration’s proposals to eliminate immigration hearings. Notably, the recommendations outlined herein may apply equally to other violations of procedural law, both in the immigration context and beyond. Section V then concludes the discussion with certain forward-looking observations.

II. TRADITIONAL AND PROCEDURAL JUS COGENS

The traditional conception of jus cogens (sometimes referred to as jus co gens) involves a tightly circumscribed set of non-derogable norms applicable to all states and “include[s], at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other

9. Id. at 1584.
10. See infra notes 71-88 and accompanying text.
12. Criddle & Fox-Decent, supra note 11.
cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary
detention; systematic racial discrimination; and ‘the principles of the United
Nations Charter prohibiting the use of force.’”14 These types of peremptory
norms are recognized in international instruments such as the Vienna Convention
on the Law of Treaties15 as well as in domestic authorities such as the Restatement
(Third) of the Foreign Relations Law of the United States.16

Although most discussions about jus cogens focus on substantive rights,
peremptory norms can also be framed in procedural terms.17 Some commen-
tators—such as those discussing the right to habeus corpus,18 state immunity,19
and access to justice20—have focused on specific procedures, whereas others
have made broader assertions and claimed that all human rights, including
those of both a substantive and procedural nature, can be considered perempto-
ry in nature.21

Determining which principles should rise to the level of jus cogens is a
challenging task.22 The current Essay adopts a test devised by Evan Criddle and
Evan Fox-Decent, who show a relationship between jus cogens and the rule of
law and suggest that a particular procedure “will count as jus cogens if respect
for it is indispensable to the state’s ability to secure legality for the benefit of
all.”23

Skeptics may oppose this effort from the outset, based on language from
the United States Supreme Court suggesting that “due process guarantees
and the right to a fair trial” are “derogable.”24 However, it appears
likely that this apparent paradox simply reflects a failure by the Court to distinguish
between rights that are waivable by the parties (such as the right to an appeal or to
a fully reasoned decision) and rights that are not waivable by the parties (such as
the audiatur principle).25 Thus, certain rights (such as notice) may

14. See Criddle & Fox-Decent, supra note 11, at 331–32 (footnote omitted).
United States has not yet ratified the Vienna Convention, U.S. courts routinely rely upon it. See, e.g., Abbott v.
16. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §
102 cmt. k (AM. LAW INST. 1987) [hereinafter RESTATEMENT].
17. See Strong, supra note 11, at 394.
18. See MAY, supra note 13, at 120.
19. See Sévérine Knauchel, State Immunity and the Promise of Jus Cogens, 9 NW. J. INT’L HUM. RTS. 149,
160–61 (2011); Alexander Orakhelashvili, The Classification of International Legal Rules: A Reply to Stefan
Talmon, 26 LEIDEN J. INT’L L. 89, 89–90 (2013); Stefan A.G. Talmon, Jus Cogens After Germany v Italy: Sub-
2033, 2035 (2014).
21. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 59–60 (2008);
22. Part of the difficulty involves the link between jus cogens and customary international law. See
Strong, supra note 11, at 370–72.
23. Criddle & Fox-Decent, supra note 11, at 367.
24. Id. at 371 n.144 (citation omitted); see also M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11
derogable (i.e., peremptory) by the state but waivable by the parties. Indeed, scholars have recognized that “certain ‘derogable’ rights,” including “due process guarantees and the right to fair trial,” can nevertheless be peremptory in nature.

Though important, the debate about waivable and non-waivable rights is beyond the scope of the current Essay, which assumes that the procedural rights that the current Administration has suggested eliminating are not rights that the individual immigrants would agree to waive. The discussion will therefore turn to issues relating to the content of procedural jus cogens.

III. CONTENT OF PROCEDURAL JUS COGENS

The largely undertheorized nature of procedural law in the United States may make the process of determining the content of procedural jus cogens challenging for U.S. scholars and jurists. Part of the problem can be traced to statements by the United States Supreme Court claiming that procedural due process, “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” Instead, the Court has characterized due process as a flexible concept that “calls for such procedural protections as the particular situation demands.”

While judges may appreciate the freedom associated with procedural flexibility, such an approach can be extremely problematic, since it allows courts to violate individual rights based on nothing more than political expediency. Indeed, that is precisely the concern that exists with respect to the current Administration’s approach to immigration proceedings.

Difficulties may also arise because of a lack of familiarity in the United States with procedures adopted by other legal systems. Commentators such as Kevin Clermont, John Langbein, and Richard Marcus have long bemoaned the

26. See id.
27. ORAKHELASHVILI, supra note 21, at 60; see also Criddle & Fox-Decent, supra note 11, at 370–71; Jenia Iontcheva Turner, Nationalizing International Criminal Law, 41 STAN. J. INT’L L. 1, 46 n.253 (2004).
30. Id. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
lack of international and comparative perspectives in U.S. scholarship on procedural law,\textsuperscript{34} and such analyses are critical to the determination of \textit{jus cogens} norms.\textsuperscript{35}

While space restrictions preclude a comprehensive discussion of comparative and international procedure and the way those principles affect the content of procedural \textit{jus cogens}, such analyses do exist.\textsuperscript{36} As a result, it is possible to summarize the process briefly here so as to apply those conclusions to the proposed U.S. policy involving immigration hearings.

According to Criddle and Fox-Decent, the general consensus is that “peremptory norms enter international law as ‘general principles of law.’”\textsuperscript{37} General principles of law have long been recognized as a legitimate type of international law and are reflected in international instruments such as the Statute of the International Court of Justice\textsuperscript{38} and domestic authorities such as the Restatement (Third) of the Foreign Relations Law of the United States.\textsuperscript{39} Commentary (\textit{opinio juris}) is also central to the task of identifying general principles of law.\textsuperscript{40} Perhaps the most important work in this area is Bin Cheng’s classic text, \textit{General Principles of Law as Applied by International Courts and Tribunals},\textsuperscript{41} which was updated in 2017 by Charles Kotuby and Luke Sobota.\textsuperscript{42}

General principles of law are derived through comparative analysis of rules and practices,\textsuperscript{43} including “basic individual rights enshrined in municipal constitutions, statutes, and judicial decisions.”\textsuperscript{44} In many ways, the methodology is not unlike that undertaken by the American Law Institute (“ALI”) when generating various Restatements and the ALI/UNIDROIT Principles of Transnational Civil Procedure.\textsuperscript{45} Identification of general principles of procedural law, however, is not the same as simply compiling and comparing a list of indi-

\begin{thebibliography}{10}
\bibitem{35} See infra notes 49–70 and accompanying text.
\bibitem{36} See Strong, supra note 11, at 390–403 (discussing authorities and deriving certain peremptory norms of procedure).
\bibitem{37} Criddle & Fox-Decent, supra note 11, at 341.
\bibitem{38} See Statute of the International Court of Justice, art. 38, ¶1(c).
\bibitem{39} See RESTATEMENT, supra note 16, § 102.
\bibitem{40} See Criddle & Fox-Decent, supra note 11, at 339.
\bibitem{41} See generally BIN CHENG, \textit{GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS} (digital reprint 2006) (Stevens & Sons Ltd. 1953).
\bibitem{43} See Strong, supra note 11, at 371 (discussing the use of municipal law in deriving general customary law, which is the basis of general principles of law); see also IAN BROWNLIE, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 52 (7th ed. 2008) (noting “collections of municipal cases” are critical to the “assessment of the customary law”).
\bibitem{44} Criddle & Fox-Decent, supra note 11, at 341.
\end{thebibliography}
individual rules of national or international procedure.46 As Ronald Dworkin said, a
principle is a "standard that is to be observed, not because it will advance or se-
cure an economic, political or social situation deemed desirable, but because it
is a requirement of justice or fairness or some other dimension of morality."47
Another way of describing the distinction in the procedural realm is that gen-
eral principles identify what is considered fair, whereas rules of procedure de-
scribe the tangible means of achieving that standard of fairness.48

Because Kotuby and Sobota’s analysis of general principles of international
law is more recent than Cheng’s, their conclusions will provide the
framework for the current discussion. According to Kotuby and Sobota, six
principles of procedure must exist if a tribunal is to provide a legitimate deter-
mination of a party’s legal rights.49 First, the court must have jurisdiction over
the parties and the dispute, and the parties must have adequate notice of the
proceedings.50 While arguments can arise over what constitutes “proper” jurisdic-
tion and “proper” notice, the fundamental concept appears incontrovertible:
jurisdiction and notice must exist if the resulting decision is to be considered
final and binding.51 Indeed, as Laurence Solum has said,

[Pr]rocedural justice is deeply entwined with the old and powerful idea
that a process that guarantees rights of meaningful participation is an essential
prerequisite for the legitimate authority of action-guiding legal norms. Mean-
ingful participation requires notice and opportunity to be heard, and it requires
a reasonable balance between cost and accuracy.52

The centrality of jurisdiction and notice to the adjudicative process sug-
gests that both should be considered to constitute procedural jus cogens. This
conclusion is supported by Criddle and Fox-Decent’s claim that “a norm will
count as jus cogens if respect for it is indispensable to the state’s ability to se-
cure legality for the benefit of all.”53

Kotuby and Sobota’s second principle of international procedural law fo-
cuses on the impartiality and independence of the decisionmaker.54 This prin-
ciple has been extensively discussed in scholarly and judicial settings55 and is al-

46. Compare FED. R. CIV. P. and CIV. PROC. R. (Eng.) with AMERICAN LAW INSTITUTE & UNIDROIT,
47. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (2d ed. 1978).
48. See ALI/UNIDROIT, supra note 46, at 39 (noting the ALI/UNIDROIT Rules of Transnational Civil
Procedure were meant to “provide[...] greater detail and illustrat[ ] concrete fulfillment of the Principles”).
49. See KOTUBY & SOBOTA, supra note 42. Cheng identified eight norms, although those were very
similar those proposed by Kotuby and Sobota. See CHENG, supra note 41, at 257–386 (listing jurisdiction;
power to determine the extent of jurisdiction (compeinte de la competence); nemo debet esse iudex in proprдо
sua causa; audiatur et altera pars; jura novit curia; proof and burden of proof; the principle of res judicator;
and extinctive prescription); see also id. at 258 (summarizing the principles outlined in the Greco-Bulgarian
Mixed Arbitral Tribunal in the Arakas (The Georgios) Case from 1927).
50. See KOTUBY & SOBOTA, supra note 42, at 158–60.
51. See Solum, supra note 28, at 183.
52. Id.
53. Criddle & Fox-Decent, supra note 11, at 367.
54. See KOTUBY & SOBOTA, supra note 42, at 165–76.
55. See Joseph R. Brubaker, The Judge Who Knew Too Much: Issue Conflicts in International Adjudica-
tion, 26 BERKELEY J. INT’L L. 115–16 (2008); Edward Gordon et al., The Independence and Impartiality
so considered central to the legitimacy of the dispute resolution process.\textsuperscript{56} Again, the peremptory nature of this principle appears incontrovertible, since independence and impartiality of decisionmakers is, as Criddle and Fox-Decent say, “indispensable to the state’s ability to secure legality for the benefit of all.”\textsuperscript{57}

Kotuby and Sobota’s third norm involves procedural equality and the right to be heard.\textsuperscript{58} While some commentators have found it difficult to distinguish between these two concepts at the level of individual rules,\textsuperscript{59} there seems to be little if any scope for arguing that procedural equality and the right to be heard in matters determining one’s substantive rights are not “indispensable to the state’s ability to secure legality for the benefit of all[]” as a matter of principle.\textsuperscript{60} As a result, these norms can be said to rise to the level of procedural \textit{jus cogens}.

Kotuby and Sobota’s fourth principle of international procedural law involves the condemnation of fraud and corruption.\textsuperscript{61} In some ways, these principles appear to relate more to substantive concerns than procedural issues, given that many of the examples discussed by Kotuby and Sobota involve the duty of adjudicators not to give effect to agreements or actions that are fraudulent or corrupt.\textsuperscript{62} Still, Kotuby and Sobota may also have been thinking about efforts to perpetuate a fraud on the judicial process, as in situations where parties or third parties seek to intimidate the judge.\textsuperscript{63} While this latter category of concerns appears to be procedural in nature, those matters could just as easily be included in provisions regarding the independence and impartiality of decisionmakers.\textsuperscript{64} Therefore, it does not appear that concerns about fraud and corruption can or should be characterized as independent \textit{jus cogens} norms, although further analysis could lead to a contrary conclusion.

The fifth principle discussed by Kotuby and Sobota involves evidence and burdens of proof.\textsuperscript{65} While the authors are to be commended for trying to unbundle the constituent elements of procedure, even they recognize that some of the items under this heading could be subsumed into other categories.\textsuperscript{66} For example, the failure to allow parties to present evidence could fall within the gen-

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\item \textsuperscript{56} See \textit{Kotuby & Sobota, supra }note 42, at 165–76.
\item \textsuperscript{57} Criddle & Fox-Decent, \textit{supra }note 11, at 367.
\item \textsuperscript{58} See \textit{Kotuby & Sobota, supra }note 42, at 176–83.
\item \textsuperscript{60} Criddle & Fox-Decent, \textit{supra }note 11, at 367.
\item \textsuperscript{61} See \textit{Kotuby & Sobota, supra }note 42, at 183–90.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See, e.g., \textit{Judges Targeted Fast Facts, CNN }(Apr. 18, 2018), \url{http://www.cnn.com/2013/11/04/us/judges-targeted-fast-facts/(listing federal judges who have been threatened or killed as a result of their work)}.
\item \textsuperscript{64} See \textit{Kotuby & Sobota, supra }note 42, at 165–76.
\item \textsuperscript{65} See \textit{id. }at 190–96.
\item \textsuperscript{66} See \textit{id. }at 197.
\end{itemize}
eral right to be heard, as could concerns about improperly or illegally obtained evidence.\(^{67}\) Other issues that are discussed by Kotuby and Sobota under this heading, such as those relating to burdens of production and proof, and matters involving the weight of evidence, would seem to be better categorized as rules rather than core principles of procedural justice, given the significant variation between jurisdictions on how these norms operate.\(^{68}\) Therefore, those issues—such as the right to present evidence—that fall within other protected categories could be considered peremptory in nature, whereas those matters—such as those involving burdens of production and proof—that are more akin to rules would not rise to the level of procedural \textit{jus cogens}.

Kotuby and Sobota’s sixth and final principle involves the concept of \textit{res judicata}, meaning that parties are bound by properly rendered judgments, which precludes claims from being retried a second time by the same court or tribunal.\(^{69}\) Given other commentary indicating that finality of decisions is “nonoptional,” the notion of \textit{res judicata} would appear to rise to the level of procedural \textit{jus cogens}.\(^{70}\)

### IV. APPLICATION OF PROCEDURAL \textit{JUS COGENS} TO U.S. IMMIGRATION DISPUTES

The next question involves how procedural \textit{jus cogens} can be used in matters involving U.S. immigration proceedings. Several possibilities exist, including those that can be asserted by individuals and those that can be asserted by states.

#### A. Individual Assertions of Procedural \textit{Jus Cogens}

The first way that procedural \textit{jus cogens} could arise in matters involving U.S. immigration policy and practice is in national court proceedings. The most obvious option would be for individuals to assert \textit{jus cogens} in U.S. court. For example, if the current Administration carries out its proposal to eliminate immigrants’ access to justice, procedural \textit{jus cogens}—particularly those aspects that focus on procedural equality and the right to be heard—could be asserted in a constitutional challenge to the implementation of that plan.\(^{71}\)

How would such claims be received? At this point, the United States Supreme Court has not decided whether and to what extent \textit{jus cogens} norms are applicable to disputes heard in U.S. court.\(^{72}\) A number of circuit courts, however, have relied on \textit{jus cogens} to hold foreign officials liable for certain actions—

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\(^{67}\) See id. at 196.

\(^{68}\) See id. at 191–95; Strong, supra note 11, at 402–03.

\(^{69}\) See \textit{KOTUBY \\ & SOBOTA}, supra note 42, at 197–202.


\(^{71}\) Rogers \\ & Stolberg, supra note 4.

Typically torture—that violate those norms.\textsuperscript{73} As a result, it is possible that some U.S. judges will be receptive to the invocation of procedural \textit{jus cogens}.

Although the United States is the most logical place to assert a claim relating to deficiencies with U.S. immigration processes, it is not the only possible forum. Because \textit{jus cogens} is a principle of international law, its application is not limited solely to the place where the wrongdoing occurred.\textsuperscript{74} If the injury in question arose as a matter of international law, then individuals may be able to assert a claim for damages in another national court.\textsuperscript{75}

One possible venue would be the home courts of the immigrant(s) in question. This option appears particularly appealing if the individual whose procedural rights were violated had obtained legal residency in the United States.\textsuperscript{76} Still, some individuals—such as those who are fleeing persecution or who come from a country that is not willing to endanger its relationship with the United States—may not find their national courts very welcoming.

In this latter subset of cases, injured individuals should consider whether it would be possible to assert their claims in a third nation, based on the concept of universal jurisdiction.\textsuperscript{77} Universal jurisdiction has been discussed most frequently in the context of criminal actions, but there are those who believe it is also available in civil disputes involving violations of international law.\textsuperscript{78} Such a proposition has never been tested in cases involving violations of procedural \textit{jus cogens}, but it is theoretically possible.

\textbf{B. State Assertions of Procedural Jus Cogens}

Although it may be possible for an individual to base a claim in national court on procedural \textit{jus cogens}, it is only recently that individuals have been considered competent to obtain recovery for violations of international law.\textsuperscript{79} Traditionally, international law operated only between states, meaning that any violation of that law was considered injurious only to a state, not an individu-
While the historic understanding of international law has shifted somewhat with respect to individual rights to recovery, the ability of states to enforce international law remains undiminished. It is therefore useful to consider whether and to what extent a state could object to possible violations of procedural *jus cogens* by the United States.

One possibility is for a state to bring a claim against the United States in the International Court of Justice ("ICJ"). The Statute of the ICJ respects peremptory norms as a type of binding authority, so there is no difficulty in basing legal arguments on *jus cogens*. Instead, the problem would involve establishing jurisdiction over the United States for injuries relating to the denial of procedural justice regarding immigrants, since the United States withdrew from the compulsory jurisdiction of the ICJ in 1985. This is not to say that jurisdiction could not be established, but simply to note that it cannot be assumed.

Although states should first resort to judicial means of enforcing procedural *jus cogens*, states are allowed to respond to violations of international law through certain non-judicial mechanisms known as countermeasures. Countermeasures involve various actions (other than force) that are “unilateral in character, taken for a coercive purpose by a State (the ‘reacting State’) in response to an internationally wrongful act committed by the State against whom the countermeasures are addressed (the ‘target State’) and which, under normal circumstances, would themselves be unlawful.” Countermeasures may be taken by a state that experiences a direct injury as a result of the violation of international law—as might be the case with the home state of an immigrant who was denied procedural justice in U.S. courts—or, in some cases, by third states.

The legal literature on countermeasures is extensive and should be consulted before any action is taken. It is enough for current purposes, however, to note that countermeasures need not be reciprocal in nature (i.e., they need not relate to the particular harm suffered, so long as the response is proportional) and may be triggered by violations of all types of international law, ranging

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80. See id.
81. See id.
82. See Statute of the International Court of Justice, art. 1. Only states may be parties in the ICJ. See id. art. 34.
83. Id. art. 38, ¶1.
87. See International Law Commission, supra note 94, arts. 26, 49–54; Christian Hillgruber, The Right of Third States to Take Countermeasures, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, supra note 74, at 265, 266.
88. See Calamita, supra note 86, at 242–44 (discussing authorities).
from customary international law to treaty law and thereby including *jus cogens*.

V. CONCLUSION

Since January 2017, the Trump Administration has challenged numerous legal and constitutional norms and threatened the international legal and political order in several respects. Furthermore, it appears likely that further initiatives, including those involving immigrants’ procedural rights, will be advanced in the future. Attacks on immigrants are highly problematic for a number of reasons, not the least of which is the vulnerability of the immigrant population within the relevant legal and social structure. Immigrants make a convenient scapegoat for those seeking to offset blame, and politicians who advance anti-immigration agendas often find comfort in the belief that such actions are insulated from external review or condemnation. But international law was created precisely in order to hold both countries and individuals accountable for their improper actions.

International procedural law has long been ignored by both advocates and scholars, likely because of the perception that procedural law exists merely “to serve the substantive task.” That paradigm, however, is neither accurate nor wise. Procedural law is inherently and intrinsically valuable to any system of justice and provides important limitations on state and official behavior. As this Essay has shown, international procedural law—particularly peremptory norms known as procedural *jus cogens*—can be used to counteract improper violations of immigrants’ rights in the United States. While one hopes that such efforts will not be necessary, history has shown that it is necessary to be prepared for all possible contingencies.

89. See id.
90. See supra notes 1–4, 32 and accompanying text.