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Presidential Systems in Stress: Emergency Powers in Argentina and the United States

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PRESIDENTIAL SYSTEMS IN STRESS: EMERGENCY POWERS IN ARGENTINA AND THE UNITED STATES

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*Alejandro D. Carrió***

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INTRODUCTION

During a set of interviews in 1976, former President Richard Nixon maintained that only the president's judgment could fix the dividing line between constitutional and unconstitutional conduct when national security is at issue: when "the President does it, that means that it is not illegal."¹ Now, in the 1990s, executives from an eclectic combination of nations — Russia, Germany, Venezuela, and Brazil, among others — are claiming extraordinary powers.² As radical and out of step with constitutional norms as Nixon's statement and claims by these national leaders are, they also mesh with the views of most recent presidents of Argentina and the United States and reflect the growth of presidential emergency powers in these two nations.

Consider the following examples:

1) An executive agency compiled computer files on thousands of citizens involved in a protest movement, infiltrated organizations, opened mail, collected non-public information on activists, and monitored international phone, telegraph, and radio traffic involving these

1. *Excerpts From Nixon's Responses to Senate Select Committee on Intelligence*, N.Y. TIMES, Mar. 20, 1976, at A16 (quoting President Richard M. Nixon discussing national security concerns).

2. See, e.g., Marc Fisher, *Kohl's 'Emergency' Suggestion Raises Questions, Draws Criticism*, WASH. POST, Nov. 3, 1992, at A16 (assessing efforts by Chancellor Helmut Kohl to take probable extra-constitutional measures to combat the influx of refugees into Germany); Serge Schmemann, *Russia's Parliament Hesitates Between Law and Power*, N.Y. TIMES, Dec. 13, 1992, at E2 (describing threats by President Boris Yeltsin to seize additional powers unconstitutionally in Russia); Ken Silverstein, *Marketing Misery in Latin America*, THE NATION, Dec. 21, 1992, at 766 (detailing excesses by executives in Brazil, Argentina, Mexico, and Venezuela).

people and groups. When the targets of surveillance sued the government for violating constitutional rights, the executive admitted that at least some of the plaintiffs were targets of the surveillance, but it successfully stopped the lawsuit by refusing to reveal data concerning the details of the surveillance, claiming that disclosure would seriously injure the national security.³

2) When high inflation and dwindling bank reserves threatened the national economy, the executive declared a freeze on bank customer savings withdrawals. The government summarily seized depositors' currency and in its place, provided depositors with government bonds, whose weak market value and exchange restrictions effectively robbed millions of citizens of their life savings.⁴

3) A statute granted the president discretion in emergency conditions to detain anyone whom the government believed planned to engage in espionage or sabotage. Detention centers were created, where detainees could either await the end of the emergency or seek release through administrative proceedings. Detainees were not entitled to a judicial trial.⁵

4) During a period of internal strife, military officials arrested and imprisoned civilians for various crimes alleged to have contributed to the insurrection then being combatted by the national government and its military. The civilians were denied civilian trials and the constitutional protections afforded those accused of crimes. When the accused sought redress in the civilian courts, the military successfully argued that emergency conditions required military detention and trials and that in difficult times, constitutional rights must be subordinated to the need for order.⁶

Without identifying the actors and places, it is not easy to place these incidents in Argentina or the United States. That is, of course, the point of the examples and an important part of the message that this article seeks to convey — that to an extent few would have considered possible in earlier times, Argentina and the United States have in common an executive branch whose excessive reliance on self-described emergency conditions to justify extraordinary powers has contributed to the creation of practically monarchical presidencies.

Despite important differences in history and traditions, Argentina and the United States each adopted a presidentialist system and then

3. See *infra* text accompanying notes 280–83.

4. See *infra* text accompanying notes 207–11.

5. See *infra* text accompanying notes 252–60.

6. See *infra* text accompanying notes 160–62.

limited the president's constitutional powers, only to have those restrictions abused and often ignored in the last century through actions justified as necessary responses to emergency conditions. While presidents of both countries have frequently acted unilaterally, the judicial and legislative branches have also contributed to the ascendant presidencies. Over time, the legislatures of both countries have become close to impotent, calling into question the efficacy of the separation of powers and of the presidential systems.⁷ Instead of performing their constitutionally assigned role of checking executive abuses and protecting individual rights, the congresses and courts often have acquiesced in lawless presidential action, and at times have authorized or upheld presidential emergency powers.

This comparative examination of presidential emergency powers in Argentina and the United States confirms Justice Jackson's warning that "emergency powers . . . tend to kindle emergencies."⁸ As presidents have accrued ever greater discretion to act outside the bounds of rules for "ordinary" times, presidents who wish to act aggressively in implementing personal policy goals have found "emergency" conditions a convenient path for their actions. Unfortunately, excesses in the exercise of presidential emergency powers have exacerbated the growing disrespect that our citizens have for their governments and laws.⁹

Our constitutions could not have anticipated the growth in the real powers of the modern presidency in either Argentina or the United States. While constitutional changes may be needed in Argentina to control the excessive use of emergency powers by the president, a better strategy for strengthened constitutional government in both nations is to turn to the congresses and courts and seek structural and institutional change which would provide these two branches with the means for curbing executive power.

This article offers three comparative insights. First, it concludes that comparative inquiries into presidential systems may be useful for those interested in constitutional government, regardless of historical, cultural, or other contextual differences among nations. Thus, nations with

7. See generally Fred W. Riggs, *The Survival of Presidentialism in America: Para-constitutional Practices*, 9 INT'L POL. SCI. REV. 247, 252 (1988); Juan J. Linz, *The Perils of Presidentialism*, J. DEMOCRACY, Winter 1990, at 51.

8. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

9. See Julia Preston, *Latin Americans Protest Corruption*, WASH. POST, Sept. 21, 1992, at A11; Peter Alsberg, *Children Seen Losing Trust in Government*, WASH. POST, Sept. 14, 1992, at A13; GEORGE GALLUP, JR., *THE GALLUP POLL, PUBLIC OPINION 1991*, at 212 (1992) (survey on confidence in institutions); see also *infra* text accompanying notes 362-64.

presidentialist constitutional systems may have common problems because of the institutional presidency. The article maintains that our presidential systems are in such states of disrepair that a fundamental reinvigoration of the legislative and judicial branches is required, so that government may better serve important constitutional values in our nations.

Second, the ethnocentric claim of many constitutionalists that the United States and its Constitution serve as the ideal model for a constitutional government is a myth which Argentina should reject. While separation of powers theory promises adequate checks on presidential power in the United States, constitutional practice is increasingly proving the theoretical protections woefully inadequate. It may be that some of the structural features of presidential systems — fixed terms of office, opportunities to veto legislation, powers to act independently of an elected legislature — contribute to the excessive exercise of emergency powers and are gradually undermining constitutional government in the United States. To the extent that Argentina has not shared some of the ameliorating conditions which have contributed to insuring more stable constitutional rule in the United States — a tradition of respect for the Constitution and laws, an independent judiciary, and an electoral and party system which encourages compromise and facilitates presidential leadership — the presidential system as currently structured may not support effective democratic self-government in Argentina.¹⁰ Instead, Argentina should seek reforms for its unique problems, changes which will make another cycle of repression and lawlessness less likely.

Third, this article teaches that those concerned about the future of accountable constitutional government in the United States can learn something from the Argentine experience. Argentina's decades of repression under centralized power suggest that the trend toward relatively unchecked and expansive presidential emergency powers in the United States could provide the context for the extreme abuses of executive powers which have caused so much harm in Argentina.

In Part I, the article briefly revisits each nation's preconstitutional history and framing period as they bear upon the development of executive power. Important differences in history, tradition, and philosophical influences, along with different settlement patterns, contributed to markedly differing conceptions about emergency powers in framing the constitutions of Argentina and the United States. In response to its past, Argentina created a stronger president vested with a greater degree of

10. See Riggs, *supra* note 7, at 247; Linz, *supra* note 7, at 51–52 (claiming that parliamentarianism “is more conducive to stable democracy” than a presidential system).

discretion. However, each nation embarked upon its future with a firm commitment to constitutional government and the rule of law.

Part II traces the evolution of presidential emergency powers in the nineteenth century. In both countries, until about the turn of the century, emergency powers were infrequently exercised and were generally either invoked with advance legislative approval or were conceded illegal but later justified as necessary under exigent circumstances.

In Part III, examples of the exercise of emergency powers are used to show how the respect for constitutional limits broke down in the twentieth century, aided by subservient congresses and courts and aggressive presidents. Although the causes and effects of excessive reliance on emergency powers differ in Argentina and the United States, perceived threats to the national security highlight the common trend toward greater presidential powers. Part III also examines, in the context of these examples, how our nations' institutions have failed in the task of controlling an arbitrary executive. It demonstrates that, with a few important exceptions, the norm for the courts and legislatures in Argentina and the United States has been abdication to the executive branch, either through active support or through inaction.

Finally, Part IV concludes that excessive exercise of presidential emergency powers is damaging the commitment to constitutional government in both nations and is lessening the respect held by the citizens for their governments and laws. The article also recommends fundamental systemic changes and mechanisms which may produce effective statutory controls on presidential actions, and judicial review to secure obedience to the rule of law.¹¹

11. We offer a brief justification for comparing Argentina and the United States to the same set of standards. No one would claim that constitutional government or the rule of law or democracy has been a "way of life" in Argentina in a way that many would claim has existed in the United States. Nor is it necessarily the case that Argentines seek any or all of these European ideals which, of course, have strikingly different features as they have been implemented in the nations of Western Europe and in the United States. See generally Richard Rose, *The Job at the Top: The Presidency in Comparative Perspective*, in *THE PRESIDENCY AND PUBLIC POLICY MAKING 3* (George C. Edwards III et al. eds., 1985). However, in most important respects, the Argentines say that they want and expect a constitutional democracy based on the rule of law. The Argentine Constitution emulates that of the United States in important ways, as we will discuss further below. Many Argentine leaders have sought to establish fully a European version of democracy, and a struggle to establish effectively functioning constitutional institutions is ongoing in Argentina today. DANIEL PONEMAN, *ARGENTINA: DEMOCRACY ON TRIAL* xiv (1987).

Another reason for comparing Argentine and U.S. constitutional developments is the traditionally high respect that the Argentine Supreme Court has paid to American constitutional law. For instance, in Judgment of Dec. 7, 1934 (*Avico v. de la Pesa*), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 172 Fallos 37 (Arg.), analyzing the extent of the constitutional right to own property, the Argentine Supreme Court said:

I. PRECONSTITUTIONAL AND FRAMING HISTORY

This Part reviews the historical contexts for the exercise of presidential emergency powers in Argentina and the United States. Section A considers preconstitutional history, philosophical influences, and traditions bearing upon the development of emergency powers and the presidency. Section B briefly examines each constitution and its framing period in order to assess what was intended by the framers regarding emergency powers.

A. Preconstitutional Influences

1. Argentina

Spanish and particularly Castilian culture dominated the early settlement trends in what is now Argentina. The strong, authoritarian, and royal central government; the weak and ineffectual parliament; the strong and authoritarian church; the inexperience with any idea of shared or balanced powers in government; and the idea that individuals did not require freedoms *from* the government because they would be protected *by* the government, all typified Castilian society and its early migration to the Americas.¹² The leadership of Castile, exercised by a succession of energetic monarchs — Isabella and Ferdinand, Charles V, and Philip II — effectively curtailed challenges from the elected parliament and from the aristocracy.¹³ The old European values held firm in Spain and in colonial Argentina, even as nations to the European north were experiencing rapid changes in society and public life.¹⁴ However, by the end of the eighteenth century, the Spanish monarchy was collapsing and along with it, effective control over its colony in Argentina was diminishing. After fighting off invasions of Buenos Aires by the British

Our Constitution, by adopting to a great extent the principles of the Constitution of the United States, has given us, among other things, the immense advantage of the wise interpretation of their [U.S.] Supreme Court relative to the principles we have incorporated. . . . It is, therefore, of great interest to study how the Supreme Court of that country has interpreted the nature, extent and limits of that [constitutional] right.

Id. at 40–41.

Finally, it has been suggested that the similarities among presidential constitutional systems may offer comparative insights, notwithstanding historical, cultural, and other differences between our nations. Riggs, *supra* note 7, at 272.

12. ROBERT D. CRASSWELLER, *PERÓN AND THE ENIGMAS OF ARGENTINA* 22–27 (1988).

13. *See id.* at 24–25.

14. *Id.* at 26.

in 1806 and 1807, and battling Spanish troops between 1811 and 1815, the Argentines moved toward a declaration of independence in 1816.¹⁵

As the Argentine nation took shape during the nineteenth century, the inherited Spanish institution of strong and authoritarian central executive rule was widely absorbed by the Creole leaders, though it was modified to permit the Creoles to distance themselves from the peninsular Spaniards. As the Crown had entrusted colonial government exclusively to Spanish officials, the excluded Creoles felt frustration and distrust of the Spanish-born as they moved away from Buenos Aires, where they could escape witness to their different status.¹⁶ Although this initial rift was between Spanish-born and native-born Creoles as they competed for superiority in the colonial system to the exclusion of Indians, Blacks, and Mestizos, gradual racial intermixing broadened the term "creole" to include all mixes and all native-born people. As the Spaniards were set apart from the native-born Creoles, so too were the city (Buenos Aires) and country divided.¹⁷

The 1810 Men of May movement, for example, sprang from Buenos Aires and sought to further the cause of Argentine independence. The Men of May emulated the latest European ideas, including those of Rousseau, in theorizing a centralized government based on liberal European principles. Those from the interior were in many respects opposed to everything advocated by the Men of May — everything except independence. The so-called "Great Rift"¹⁸ was thus born: urban versus rural values, aristocrats versus commoners, Buenos Aires versus the interior, and liberal monarchy versus populist federalism.¹⁹

The two groups were, by tradition, intolerant and uncompromising. From 1827 until 1852, the nativists dominated, as the Men of May movement and its leaders were unable to heal the growing rift. Thus was born the first *caudillo* — "the provincial leader of the common people who ruled by physical and psychological prowess."²⁰ According to Nicolas Shumway, Juan Manuel de Rosas became the first ruler of Argentina by disavowing whatever was foreign or modern, while persecuting the Men of May followers into destruction or exile. Although

15. *Id.* at 32–33; see also FREDERICK A. KIRKPATRICK, A HISTORY OF THE ARGENTINE REPUBLIC 75–103 (1931).

16. CRASSWELLER, *supra* note 12, at 35–36.

17. *Id.*

18. *Id.* at 35.

19. *Id.* at 37.

20. *Id.*; Eduardo Galeano has written that a *caudillo* "is like a magnet: he lives to the extent that he attracts." EDUARDO GALEANO, WE SAY NO: CHRONICLES 1963–1991, at 55 (1992).

Rosas formally governed only the Buenos Aires province, he in fact ruled all of Argentina. The terms of his appointment as governor in 1829, sanctioned by the provincial legislature, gave Rosas extraordinary powers for three years.²¹ Although Rosas brought order out of the anarchic conditions that existed prior to his term, according to Shumway, he "restricted the press, neglected education, supported the conservative clergy, strengthened the army, and muzzled critics."²² When he returned for a second term in 1835, beckoned by provincial leaders to reassert control over the province lost during his absence, Rosas demanded even more power and, with the acquiescence of the legislature, became a virtual dictator who dominated Argentine politics for seventeen more years.²³

Rosas' government was a loose federation in form, where provinces had local *caudillos*, each under the de facto control of Rosas.²⁴ Dispensing with elections, Rosas remained in power by periodically submitting his resignation to a hand-picked congress, which dutifully refused his offer and begged him to continue for another term. In some ways Rosas was a classic *caudillo*, although his constituency included the conservative owners of the *estancias*, who supported him because of his policies of taking land from the Indians and keeping the market for beef and hides strong.²⁵ Although the union was preserved in this loose confederation form until 1852, when Rosas was defeated in battle by military leaders, the nation remained deeply divided.

By the mid-nineteenth century, Argentina had become a nation, but it was an unusual union, producing what has been called "a society of opposers."²⁶ Contrary to *caudillo* ideals, Rosas was reportedly aristocratic and opposed to federal rule and democracy.²⁷ It was likely the Men of May and their high-minded ideas of Argentina that were the most responsible for the pre-constitutional mindset in the nation; their ideals were exclusionary, not inclusive, divisive and not conciliatory.²⁸ Among all the divisions which became apparent in the first half of the nineteenth century, just about the only point upon which the competing dominant groups agreed was that strong leaders were good and necessary.²⁹

21. NICOLAS SHUMWAY, *THE INVENTION OF ARGENTINA* 117-20 (1991).

22. *Id.* at 117.

23. *Id.* at 118-19; see also KIRKPATRICK, *supra* note 15, at 145-59.

24. KIRKPATRICK, *supra* note 15, at 143.

25. SHUMWAY, *supra* note 21, at 118.

26. *Id.* at x (quoting novelist Ernesto Sabato).

27. *Id.* at 119-20.

28. *Id.* at x-xi.

29. *Cf. id.* at 294 ("Argentine nationalism is impatient. It wants powerful leaders with quick fixes and fast cures.").

2. United States

In contrast to the Castillian ideal of the all-powerful monarch and to the Argentine *caudillo*, the European liberal tradition bequeathed a vision of leadership to the North American colonists steeped in the rule of law. Liberal constitutional thought in the eighteenth century separated lawful from lawless government by simply positing a boundary line: "separate spheres of emergency versus non-emergency governance."³⁰ It was a cardinal feature of liberal political thought that law provided all the rules for governance, except when necessity made playing by the rules impossible.³¹ Nonetheless, the idea of extraordinary or emergency powers has been a feature of European liberalism at least since the time of John Locke. Through the doctrine of prerogative, Locke's theory vested in the executive the power to respond to "necessities," where expedience demanded that action be taken before a cumbersome and slow legislative process could be completed.³² Fundamental to Locke's version of executive emergency powers was their extra-legal character. The prerogative was to act "according to discretion, for the publick [sic] good, without the prescription of the law, and sometimes even against it."³³

Relying upon the European liberal tradition, the key predicate for the exercise of emergency powers in the North American colonies became exigency, the pressure of time. In general, the colonists abhorred the authoritarianism of King George and thus sought legal limits on executive power. However, because written law could not provide the limits on actions taken in times of emergency, it was argued that governments and their people had to look to the idea of representation for protection against arbitrary rule. According to Edmund Burke, representatives of the people serve as their "trustees" and must be permitted at times to act independently of the control of their constituency and of

30. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1389 (1989).

31. See generally Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736 (1978).

32. JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 159-160 (Peter Laslett ed., 1970).

33. *Id.* Rousseau also recognized a need for such extra-legal recourse: "If . . . the peril is of such a kind that the paraphernalia of the laws are an obstacle to their preservation, the method is to nominate a supreme ruler, who shall silence all the laws . . ." JEAN J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 124 (G.D.H. Cole trans., 1950). The Men of May movement in Argentina looked to Rousseau in particular for the philosophical basis for a modern and liberal Argentine state. See *supra* text accompanying note 18 (assessing Men of May movement).

their laws.³⁴ What had not been settled at the time of the Constitutional Convention in 1787, however, was the nature of the executive that would be permitted to exercise these representative powers in ways that would not threaten individual freedom or constitutional principles.³⁵

3. Conclusions

The idea of a prerogative power for a national leader is thus pre- and extra-constitutional. The traditions from which the Argentine and North American conceptions of presidential prerogative spring are, to be sure, dissimilar in many important respects. In Argentina, the idea of prerogative emerged more by default than design, as the Great Rift made agreement about such first principles impossible. The Men of May and their followers would have tethered leaders to the rule of law and to European concepts of extra-legal emergency powers,³⁶ while the supporters of the *caudillos* sought no such niceties to justify their leaders' exploits. The failure to bridge the Great Rift facilitated the firm establishment of prerogative powers in pre-constitutional Argentina.

In the United States, English heritage and its Lockean content are unmistakable and dominant. In addition, the colonists, though a diverse lot, shared a common enemy as they struggled toward nationhood, thus encouraging consensus and compromise in a new culture whose inhabitants came from places where compromise and competition among ideas and groups were common. Unlike the Argentine colonists, the early Americans were not accustomed to all-powerful institutions.

B. *The Framing Periods and the Constitutions*

1. Argentina

"The new states of formerly Spanish America need kings under the name of presidents."³⁷ After Rosas was defeated in 1852 by the troops of Justo José de Urquiza, *caudillo* of Entre Rios province, Urquiza was unable to unify the country under constitutional rule. Urquiza appointed a representative committee to draft the rules for a constitutional convention. That committee produced the Pact of San Nicolás of May 31,

34. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 164–65 (1987).

35. DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES 44 (1991).

36. See SHUMWAY, *supra* note 21, at 156.

37. JUAN BAUTISTA ALBERDI, LAS "BASES" DE ALBERDI [THE "BASES" OF ALBERDI] 229 (Jorge M. Mayer ed., 1969) (quoting Simon Bolivar).

1852, which provided for provincial delegate representation, made Buenos Aires the federal capital of all Argentina, and granted Urquiza all governmental powers until a constitutional government could be established.³⁸ However, the people of Buenos Aires refused to accept the Pact. In September 1852, Buenos Aires rebelled and then seceded from the federation.³⁹

Meanwhile, the Men of '37, a group of young intellectuals determined to rescue Argentina from the rule of Rosas and the anarchy that preceded it, advanced a plan for national unity. Seeking inspiration in Juan Bautista Alberdi's *Bases y puntos de partida para la organización política de la República Argentina* [Bases and Points of Departure for the Political Organization of the Argentine Republic], completed in 1852, the Men of '37 hoped to develop a representative government with democratic institutions relinquishing power to the will of the people who had supported Rosas and his authoritarianism.⁴⁰ Alberdi realized that the *caudillo* was indigenous to Argentina and that his persisting presence demonstrated an Argentine truth: the need for a strong executive. Alberdi wrote:

Give to the executive all the power possible. But give it to him by means of a constitution. This kind of executive power constitutes the dominant need in constitutional law at this time in South America. The attempts at monarchy, [and] the tendency . . . towards dictatorship are the best proof of the need we speak of.⁴¹

The Constitutional Convention contemplated by the Pact of San Nicolás was convened in Santa Fé, far from Buenos Aires. A draft constitution was debated for ten evenings; each article was debated for less than twelve minutes before being adopted by the Constitutional Congress.⁴² The resulting Constitution of 1853 borrowed heavily from the United States, but was also influenced by various European ideas and by the earlier failed Argentine charters.⁴³ The Constitution established a republican form of government based on principles of separation of powers and (through provincial governments) federalism, and guaranteed a list of individual rights more extensive than those

38. SHUMWAY, *supra* note 21, at 172.

39. *Id.* at 173-74.

40. *Id.* at 129, 132-33.

41. ALBERDI, *supra* note 37, at 352.

42. PONEMAN, *supra* note 11, at 128.

43. Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641 (1948-49); see generally SANTOS P. AMADEO, ARGENTINE CONSTITUTIONAL LAW (Edwin W. Patterson ed., 1943).

embodied in the Bill of Rights of the U.S. Constitution.⁴⁴ The president and members of two houses of Congress were to be elected, and an independent judiciary whose appointments would be made by the president and confirmed by the Senate comprised the third branch of government.

Despite North American influence, the Constitution retained the Spanish emphasis on centralization of powers. The president was made "supreme head of the Nation"⁴⁵ for one six-year term, he was given power to appoint high-ranking officials without congressional approval,⁴⁶ and, patterned after the French revolutionary law of 1791 and the Chilean Constitution of 1833,⁴⁷ he was granted the authority to declare a "state of siege" and suspend constitutional rights when internal unrest endangered the Constitution or the government.⁴⁸ Under the Constitution, the power of the president to declare a state of siege is limited by procedural protections. The president is required to obtain the Senate's approval before declaring a state of siege in the event of foreign attack;⁴⁹ and only Congress is given power to declare a state of siege in the event of internal disorder,⁵⁰ except when the Congress is in recess, in which case the president may declare a state of siege and Congress may approve or reject the declaration when it reconvenes.⁵¹

Further, the Constitution designates siege as a temporary and exceptional condition, limiting the state of siege to "the Province or territory in which the disturbance of order exists."⁵² Although the Constitution is silent concerning the time during which a state of siege imposed in response to internal disorder is to remain in force, article 86 states that a

44. CONST. ARG. arts. 1-35.

45. *Id.* art. 86(10).

46. *Id.* art. 86(1).

47. Alejandro M. Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action Under a State of Siege*, 4 HUM. RTS. L.J. 311, 316-17 (1983).

48. CONST. ARG. art. 23. In France, the state of siege was legally recognized as early as 1791, but it was different from and more grave than a state of war and was directly related to an armed attack on the territory of the nation. The Argentine framers incorporated the French idea because they feared a continuation of the prolonged fighting which followed independence from Spain. However, like the Chileans, the Argentines expanded the conditions which could prompt the state of siege to include internal disorder. In addition, while French law subordinated civilian authority to the military as necessary to repel the foreign attack, article 23 of the Argentine Constitution permits the president to suspend some or all constitutional guarantees and does not grant any additional powers for the military. See Garro, *supra* note 47, at 317 n.14.

49. CONST. ARG. art. 53.

50. *Id.* art. 67(26).

51. *Id.*; see also *id.* art. 86(19).

52. See *id.* art. 23.

state of siege caused by foreign attack may be declared "for a limited period."⁵³ In addition, the president's power to arrest citizens does not permit him to punish the accused, and he must allow a detained person to leave Argentina if the individual so chooses.⁵⁴

To protect the new government from uprisings by local *caudillo* leaders, and inspired by Alberdi, the Constitution provided in article 6 that the "the Federal Government shall have the right to intervene, with or without the request of provincial legislatures or governors, in the territory of any province only when necessary to re-establish public order threatened by sedition, or to protect national security under threat of attack or foreign danger." Although article 6 was developed from the moribund Republican Form of Government Clause in the U.S. Constitution,⁵⁵ intervention by the national government into the provinces soon became a habit.⁵⁶ Because the executive has no constitutional obligation to request approval from Congress under article 6, most interventions have been by executive decree.⁵⁷ Aside from periods of military rule, in which the provinces have been controlled by de facto authorities appointed by the central government, there were 148 cases of federal intervention between 1853 and 1976. Approximately 100 of those interventions were ordered by the executive acting alone.⁵⁸ In addition, during the extended periods in which Argentina has been ruled by the military, the president has unilaterally declared every state of siege; Congress has been dissolved during periods of military rule.

2. United States

During the Revolutionary War, the Continental Congress enacted the first emergency authority for the United States in a series of resolutions and statutes directed at conducting the war.⁵⁹ However, at the Constitutional Convention and during the ratification debates, emergency powers

53. *Id.* art. 86.

54. *Id.* arts. 6, 23.

55. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

56. CRASSWELLER, *supra* note 12, at 40.

57. SHUMWAY, *supra* note 21, at 154.

58. See JONATHAN M. MILLER ET AL., 2 CONSTITUCIÓN Y PODER POLÍTICO [CONSTITUTION AND POLITICAL POWER] 1057 (1987).

59. See J. REUBEN CLARK, JR., EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917 DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE: PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS OF ANALOGOUS LEGISLATION SINCE 1775, at 201-28 (1918).

were not expressly a subject of discussion.⁶⁰ The U.S. Constitution anticipates emergency conditions in conferring upon the House of Representatives the power to impeach;⁶¹ upon the Senate the power to try impeachments;⁶² upon the Congress the power to declare war,⁶³ to call forth the militia,⁶⁴ and to suspend the privilege of habeas corpus only in cases of rebellion or invasion when the public safety may require it,⁶⁵ and upon the president the discretion to call special sessions of Congress.⁶⁶ What these provisions and the attendant lack of debate about emergency powers reveal most is that actions not mentioned in the Constitution but taken by the president in the name of emergency conditions were not given constitutional approval.⁶⁷

Yet, during the framing period there were signs that the absolute denial of presidential emergency powers did not mean that the government as a whole lacked theoretical justification for emergency actions. As Alexander Hamilton argued in *The Federalist*, the constitutional power of the federal government to provide for national defense "ought to exist without limitation: because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them."⁶⁸ Although Hamilton was referring to the authority of the elected branches acting in concert, presidents have misappropriated Hamilton's argument to justify unilateral presidential emergency powers.

60. STAFF OF SPECIAL COMMITTEE ON THE TERMINATION OF EMERGENCY POWER, 93D CONG., 1ST SESS., *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES* 5 (1973) [hereinafter *BRIEF HISTORY*].

61. U.S. CONST. art. I, § 2, cl. 5.

62. *Id.* art. I, § 3, cl. 6.

63. *Id.* art. I, § 8, cl. 11.

64. *Id.* art. I, § 8, cl. 16.

65. *Id.* art. I, § 9, cl. 2.

66. *Id.* art. II, § 3.

67. The only emergency seriously contemplated by the framers was war. In light of their recent experiences, the framers were determined to make war an exception, a condition which should be difficult to undertake, only after careful deliberation. Thus, Congress was given the authority to declare war and grant letters of marque and reprisal. Otherwise, only an armed attack upon the United States would empower the president to take extraordinary measures not expressly contemplated by the Constitution. Short of the defensive use of force or delegation of legislative powers, the president was not given constitutional emergency powers. See Charles Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 694-700 (1972).

68. *THE FEDERALIST* No. 23, at 147 (Alexander Hamilton).

II. THE DECLINE OF THE TETHERED PRESIDENCY

A. Argentina, 1853–1930

Early Argentine presidents generally acted within the limits of their generous constitutional powers. From the beginning, however, the presidency established its dominance over the legislative and judicial branches of the new government. After ratification of the Constitution of 1853 in all of the provinces except Buenos Aires, Bartolomé Mitre fielded an army to keep the Constitution out of Buenos Aires. It became apparent that national reconciliation would only occur on Buenos Aires' terms.⁶⁹ Mitre employed his provincial army to win the decisive Battle of Pavón in 1861, after which he dissolved the federal government and proclaimed himself "head of the national executive."⁷⁰ Until he was elected as the united nation's first president in May 1862, Mitre exercised the powers of the presidency of Argentina de facto. When the legitimacy of his rule was challenged in court, the Argentine Supreme Court recognized for the first time the legality of a de facto president: "[A]s governor of Buenos Aires and Commander-in-Chief of the Army [General Mitre] had authority to rule . . . since, after the Battle of Pavón, he provisionally exercised all the national powers, enjoyed the popularity of a triumphant revolution, and assumed the momentous duties victory had thrust upon him."⁷¹

After his election, Mitre sought to bridge the Great Rift by recommending the federalization of Buenos Aires as the capital of Argentina (like Washington, D.C. in the United States) and the development of a new capital for Buenos Aires province.⁷² Although he failed in his efforts at federalizing Buenos Aires, Mitre further centralized the government by appointing his allies to all important posts and improving

69. Edwin Early, *Argentina, Paraguay, and Uruguay*, in *THE CAMBRIDGE ENCYCLOPEDIA OF LATIN AMERICA AND THE CARIBBEAN* 253 (Simon Collier et al. eds., 1985). At Buenos Aires' urging, the 1853 Constitution was re-examined and important amendments, patterned on the U.S. Constitution, were adopted in 1860. KIRKPATRICK, *supra* note 15, at 168.

70. See GERMAN J. BIDART CAMPOS, *THE ARGENTINE SUPREME COURT: THE COURT OF CONSTITUTIONAL GUARANTEES* 115 (1982).

71. Judgment of Aug. 5, 1865, Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 2 Fallos 143 (Arg.).

72. Mitre also "extended postal service, built roads and railroads, installed a judicial system, expanded public education, and encouraged immigration." SHUMWAY, *supra* note 21, at 227.

services to the provinces, while at the same time cementing control over provincial affairs and “hammer[ing] out of existence all traces of *caudillo*-based populism, no matter how representative it was of provincial sentiment.”⁷³ Mitre raised a national army, fought a war with Paraguay, and then unsuccessfully employed the army to try to reverse his defeat at the polls in 1874.⁷⁴

Domingo Faustino Sarmiento, Mitre’s successor from 1868 to 1874, was pro-Buenos Aires but was also a native of San Juan province in the northwest. His writings and work gave form to the liberal theories in Argentina for an entire generation. He advocated republican institutions, free trade, freedom of religion, and laissez-faire economics. Sarmiento ended the Paraguayan war, defeated the last of the *caudillos* as a military force, and generally continued the progress of the liberal system.⁷⁵

Sarmiento’s presidency has been criticized for its ruthlessness in dealing with Indians and *gauchos*, his propensity to intervene in the provinces,⁷⁶ and the corrupt means by which he promoted Nicolás Avellaneda as his successor over the protests of Mitre.⁷⁷ Avellaneda continued the liberal projects, while he effectively completed the settlement of Argentine land by forming an army to move south and liquidate Indian society along the way.⁷⁸ The years 1880–1930 are sometimes called “the years of triumph” in Argentina.⁷⁹ However, as economic progress mushroomed and immigration prospered and thus changed Argentine social structure, creating a large new class of first and second generation ethnic group members, the Creole elites were understandably threatened. The elite became less interested in reform and more interested in retaining their hold on the top strata of society. Corruption increased and public interest reform diminished.⁸⁰

As the immigrant class grew, the new citizens demanded political power, and the fearful elite strengthened the already centralized power of the executive branch of government.⁸¹ One-party rule was effectively

73. *Id.* at 228; see also KIRKPATRICK, *supra* note 15, at 172–85.

74. PONEMAN, *supra* note 11, at 15; see also CRASSWELLER, *supra* note 12, at 41.

75. Sarmiento also improved public education, increased immigration, enacted homesteading policies, created specialized schools and colleges, expanded the public library system, tripled the railways, rewrote the commercial and military legal codes, and ordered the first census. SHUMWAY, *supra* note 21, at 253.

76. *Id.*

77. *Id.* at 42.

78. KIRKPATRICK, *supra* note 15, at 184–85.

79. SHUMWAY, *supra* note 21, at 45.

80. *Id.* at 52.

81. *Id.* at 55.

in place by the 1880s, and constitutional norms were sometimes abused or ignored through corruption or violence.⁸² The political frustrations of the immigrants were matched by economic decline in the 1890s. Immigrant-led revolts were successfully put down in 1890, 1893, and 1895. Their by-product, however, was the creation of the only Argentine political party with a continuous institutional history: the Union Cívica Radical, or Radical Party.⁸³

The Radicals and the newly formed Socialist Party engaged in anarchism as their major instrument of dissent. Labor strikes proliferated, the national economy faltered, and a state of siege was proclaimed in 1902, when Congress approved the expulsion of foreign-born persons who were found by the President to be disturbing the public order.⁸⁴ Similar strikes and retribution continued until 1910.⁸⁵

The Radical Party, through its new leader Hipólito Yrigoyen, again attempted a revolution in 1905, assisted by elements of the army. After its failure, Yrigoyen and the Radicals, citing widespread corruption in government, refused to participate in any election or voting.⁸⁶ After voting in presidential elections was made compulsory in 1912,⁸⁷ the Radicals renewed their electoral participation and Yrigoyen won the presidency in 1916. Yet Yrigoyen's presidency has been criticized for tending to ignore Congress, spending money without an appropriation, and having no programs. Yrigoyen also intervened in the provinces widely — twenty times in fourteen provinces during his first term. (There had been sixty-two such interventions between 1860 and 1912.)⁸⁸ In 1919, a labor strike flared and, at first, Yrigoyen ignored it. When the army announced it would no longer support the government unless strong measures were taken to deal with the strike, Yrigoyen relented. For the first time under the 1853 Constitution, the military had intervened in the processes of government.⁸⁹

Although the Supreme Court's endorsement of *de facto* presidential rule in 1862 established an unfortunate precedent, early presidents

82. *Id.*

83. See PONEMAN, *supra* note 11, at 16, 42-44.

84. *Id.* at 56.

85. *Id.*

86. *Id.* at 60.

87. Ley Electoral No. 8871(1), Título Primero, Capítulo III, Tomo XVII COLECCIÓN DE LEYES NACIONALES [Electoral Law No. 8871(1), First Title, Chapter III, Volume XVII COLLECTION OF NATIONAL LAWS] [hereinafter LEYES] 554 (1918) (Arg.); see KIRKPATRICK, *supra* note 15, at 215.

88. See PONEMAN, *supra* note 11, at 16.

89. *Id.*

generally advanced the causes of constitutional government and republican institutions. Only when late nineteenth century immigration threatened the traditional elites' hold on power did corrupt and lawless government by decree become prevalent. Through states of siege and interventions in the provinces, early twentieth century presidents began to drift from constitutional moorings.

B. *United States, 1787–1890*

In general, early presidents of the United States followed the Lockean theory of emergency powers: "necessities" on occasion required emergency measures, but the emergency powers were concededly extra-legal. When it was feared that the French Revolution might extend to the United States, the Congress first quadrupled the size of the regular army, and then Hamilton and other Federalists began to urge the creation of a special army for use in intimidating political opponents and suppressing dissent.⁹⁰ Although Congress authorized the provisional army, President John Adams was reluctant to use the special army and instead relied upon civilian authority to enforce internal security. When cabinet members questioned his restraint, Adams fired them and sought to dismantle the provisional army.⁹¹

Presidential restraint diminished when the Republicans replaced the Federalists. President Thomas Jefferson ordered the army to arrest Aaron Burr for treason before he was turned over to civilian courts for trial. Jefferson also employed the army to enforce embargo laws on the northeastern border, and he had the army arrest civilians during the War of 1812.⁹² When a British frigate attacked a U.S. ship in 1806 during a congressional recess, Jefferson obligated the treasury for the funds to defend the ship, even though there was no appropriation for that purpose. Notwithstanding the President's bold and occasionally unconstitutional actions, Jefferson did not claim that his actions were authorized by law. Generally, Jefferson disclosed his illegal actions to Congress and asked for and received congressional approval.⁹³

As General Andrew Jackson learned, executive officers who acted illegally during times of emergency could be held liable for injuries suffered due to their actions. Jackson declared martial law when fighting the British in New Orleans in 1815. In a lawsuit against him, Jackson

90. JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775–1980*, at 14 (1991).

91. *Id.* at 14–15.

92. *Id.* at 15–16.

93. Lobel, *supra* note 30, at 1392–93.

argued that necessity "may, in some cases . . . justify a departure from the constitution."⁹⁴ Jackson was fined, although Congress indemnified him almost thirty years later.⁹⁵

During the first century of the republic, emergency powers were limited by the courts, either by fixing liability on officers for violating legal rules notwithstanding emergency conditions, or through a restrictive determination of whether an emergency in fact existed. The quintessential example of the former is Justice Story's opinion for a unanimous Supreme Court in *The Apollon*,⁹⁶ awarding damages against an executive official for seizing a ship and its cargo, and rejecting the defense of necessity:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.⁹⁷

Thus, by the 1850s, there was little cause for apprehension about abuses of presidential emergency powers. The widespread nationalism that followed the War of 1812 and the dominance of state governments in most spheres of society quieted any concerns about internal security.⁹⁸

94. Abraham Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 239, 245-46 (1981).

95. *Id.* at 248-51; see also *Little v. Bareme*, 6 U.S. (2 Cranch) 170, 175-76 (1804) (unanimously upholding the imposition of liability on a naval commander for violation of a statute limiting naval activities, even though the commander was following a presidential order).

96. 22 U.S. (9 Wheat.) 362 (1824).

97. *Id.* at 366-67. Alternatively, in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), the Court upheld a damages award in similar circumstances by determining that whether an emergency exists is a question for the jury. Although the Court did recognize a lawful executive emergency power, the standard adopted was akin to the president's power to repel attacks — the need to act before the legislative authority is capable of acting must be clear. *Id.* at 133-35. Although in at least one instance the Supreme Court refused to adjudicate whether an emergency existed, in that case, Congress had authorized the President's actions. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827). Notably, "[w]here the executive had proceeded on its own, the judiciary displayed a remarkable willingness to analyze the relationship between its conduct and the war emergency." CHRISTOPHER N. MAY, *IN THE NAME OF WAR, JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918*, at 18 (1989).

98. JENSEN, *supra* note 90, at 16. Exceptions included President Jackson's deployment of the army in an 1834 labor dispute and the army's arrest of civilians in the Dorr Rebellion in Rhode Island in 1849. *Id.*

At least the European Americans held this view. Since most Native Americans were aliens, unprotected by the Constitution, the warfare that started in the late 1820s due to the federal government's attempts to settle the West permitted military officials to engage in widespread atrocities with impunity. Given public support for the role of the army in dealing with the Native Americans, the fact that even international law and law of war norms were regularly broken was of little concern.⁹⁹

African American slaves were also abused through unilateral presidential actions. Although slave revolts were not common, President James Madison deployed General Andrew Jackson to destroy a fort being maintained by escaped slaves in Florida and to return the slaves to their owners. Most of the 300 slaves died in the destruction of the fort.¹⁰⁰ Later, President Jackson mobilized the army to put down Nat Turner's slave revolt, although the militia did the deed before federal troops arrived.¹⁰¹ As slavery became a turbulent national issue, the question of whether the military should be used in law enforcement also became prominent nationally. Congress enacted Fugitive Slave Acts in the early 1850s, which expressly allowed the president to use the army to assist in returning fugitive slaves.¹⁰²

Even President Lincoln's emergency actions taken during the Civil War, which were more extensive and unilateral than those of any previous president, were in part justified by public necessity "whether strictly legal or not."¹⁰³ Taking advantage of Congress not being in session, Lincoln issued proclamations in 1861 which arguably ran counter to Congress' commerce and war powers, when he effectively committed the nation to war by ordering the blockade of southern ports and by increasing the size of the armed forces. He labelled the event an "insurrection" and branded the citizens within the insurrection territory as enemies of the United States, outside the protection of the Constitution.¹⁰⁴ In his 1861 report seeking congressional ratification of his actions, Lincoln practically conceded that his emergency actions were unconstitutional.¹⁰⁵

99. *Id.* at 17.

100. *Id.* at 18.

101. *Id.*

102. *Id.* at 19-21.

103. 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 20, 24 (James D. Richardson ed., 1898) [hereinafter Richardson I].

104. The Supreme Court later agreed that it "is a question to be decided by *him*" whether the insurrection is of such a character as will compel the president to treat fellow citizens as belligerents. Prize Cases, 67 U.S. (2 Black) 635, 670 (1862).

105. Richardson I, *supra* note 103.

One of Lincoln's 1861 proclamations authorized the commanding general of the U.S. army to suspend the writ of habeas corpus "at any point or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington."¹⁰⁶ He later extended the power to the area between Washington, D.C. and New York.¹⁰⁷ Although the Constitution does not expressly say that only Congress may suspend the writ of habeas corpus, it was widely agreed then, as it is now, that the clause was directed to Congress.¹⁰⁸ Early in the war, the Union army arrested hundreds of civilians suspected of disloyalty. Many were held for long periods and some were tried by military courts.¹⁰⁹

The circumstances of arrest and detention of political prisoners were in clear violation of constitutional protections for those accused of crime:

The person suspected of disloyalty was often seized at night, searched, borne off to the nearest fort, deprived of his valuables, and locked up . . . crowded with men that had had similar experiences. When he resolved to send for friends and an attorney, he was informed that the rules forbade visitors, except in rare instances, and that attorneys were entirely excluded . . .¹¹⁰

John Merryman, one of the arrested civilians from Maryland, sought and obtained a writ of habeas corpus from Chief Justice Roger Taney sitting in the circuit court in Baltimore.¹¹¹ Taney held that only Congress could suspend the writ, echoing the commonly held view. The *Merryman* decision was ignored, however, and while Merryman remained detained, the legal issues remained clouded.¹¹² In February 1862, an executive order provided for the release of most political prisoners, excepting suspected spies "or others whose release at the present moment may be deemed incompatible with the public safety."¹¹³ In 1863, Congress granted the president the right to suspend the writ.¹¹⁴

106. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3219 (James D. Richardson ed., 1897) [hereinafter Richardson II].

107. *Id.* at 3220.

108. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 227 (1948).

109. JENSEN, *supra* note 90, at 26.

110. *Id.* at 261-62.

111. *Ex parte Merryman*, 17 F. Cas. 144 (1861).

112. BRIEF HISTORY, *supra* note 60, at 16-17.

113. Richardson II, *supra* note 106, at 3303-3305.

114. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (1863).

By 1864, Lincoln argued that "measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."¹¹⁵ In 1866, the Supreme Court rejected Lincoln's emergency powers claim. In another habeas corpus case, *Ex parte Milligan*,¹¹⁶ the Court said: "No doctrine, involving more pernicious consequences, was ever invented . . . than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government."¹¹⁷ Nonetheless, the Lincoln administration's bold exercise of emergency powers illustrated that exigent circumstances tend to place political power in the executive branch. As Lincoln demonstrated, future presidents could expect to act without much resistance from Congress or the judiciary.

Following the Reconstruction, the next set of challenges which produced conflict over emergency powers were labor strikes. For the first time since Andrew Jackson used troops in an 1834 strike, President Hayes called federal troops to quell an 1877 railway strike which had reached thirty-eight cities.¹¹⁸ In one sense, Hayes' actions were modest, careful, and in keeping with constitutional formalities (responding to calls from governors and first issuing proclamations to disperse in three of the six states to which he sent troops). Moreover, the troops acted with restraint and violent confrontations with workers were rare. In another sense, however, this episode revealed the ad hoc nature of federal responses to emergencies.

After the 1877 strike, a report prepared by a military officer recommended that the government buttress the army for participation in defending against domestic radicals. Congress remained hostile to the concept of a standing army and in 1878 the Posse Comitatus Act was passed, criminalizing the use of the army to enforce the laws, except where authorized by the Constitution or by Congress.¹¹⁹ Except for the

115. Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), in 10 COMPLETE WORKS OF ABRAHAM LINCOLN 65-66 (J. Nicolay & J. Harp eds., 1894). Lincoln's actions during the Civil War, justified by the war power, included the right to determine the existence of a "rebellion" and thereby justify calling forth the militia to suppress it; the right to increase the size of the regular army beyond the authorized total; the right to suspend habeas corpus; the right to proclaim martial law, including the right to arrest without warrant and to detain without judicial review; the right to seize property if necessary to the successful prosecution of the war; the right to spend funds without an appropriation; and the right to censor the press. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 36-37 (1951).

116. 71 U.S. (4 Wall.) 2 (1866).

117. *Id.* at 121.

118. JENSEN, *supra* note 90, at 34.

119. 18 U.S.C. § 1385 (1988). For a history of the evolution toward the Posse Comitatus Act, see David Engdahl, *The New Civil Disturbances Regulations: The Threat of Military Intervention*, 49 IND. L.J. 581, 597-603 (1974).

1894 Pullman strike, assessed in the next Part of this article, the Posse Comitatus Act effectively curtailed excessive use of the military in internal security in the late nineteenth century.¹²⁰

Thus, except for the Civil War, the experiences with presidential emergency powers in the first century of the United States isolated the executive's authority to act in emergencies to narrow and extra-constitutional limits. An extreme emergency threatening the nation had to be at hand; the unlawful conduct had to be terminated when the emergency ended; the acting official had to concede the illegality of the conduct; the conduct had to be reviewable by the courts or Congress; and judicial remedies or congressional indemnification had to be available for any wrongs suffered as a result of the actions taken in the name of the emergency.¹²¹ Although this system expressly permitted the president to engage in unlawful conduct and to violate the Constitution, it was thought by early leaders that the difficulties in creating a constitutional justification for the exercise of emergency powers were more grave than allowing the president to act unlawfully in certain instances. The requirement of congressional or judicial review tended further to discourage presidential abuses, while citizen respect for the Constitution provided an additional disincentive to presidents who would openly violate its terms.¹²²

III. THE TRANSFORMATION OF EMERGENCY POWERS IN THE MODERN ERA

The emergence of theories of inherent constitutional executive power occurred at different times and under different circumstances in Argentina and the United States. In Argentina, presidential excesses first proliferated as the military intervened in civilian life, accompanied by economic turmoil and gridlock in government bureaucracies. In the United States, the trend began with the emergence of the nation as a world power. The idea of acting to protect the national security emerged to provide a virtually limitless justification for presidential discretion. In this Part, the rise of inherent executive emergency powers in the United States and Argentina will be traced. This Part will also examine the performance of the legislature and judicial branches of the two governments in fulfilling their constitutionally contemplated roles of checking this executive power.

120. JENSEN, *supra* note 90, at 45.

121. Lobel, *supra* note 30, at 1396.

122. *Id.* at 1396-97.

A. Argentina, 1930–Present

Although Argentina had suffered challenges to its constitutional system and its laws, by 1930 Argentines surveyed the future from a perspective of seventy years of unbroken constitutional succession to the presidency and eighteen years of participatory democracy. Notwithstanding the effects of the worldwide depression of 1929–1930, rapid growth had made the average Argentine better off than the average Spaniard and only slightly less well-paid than the average Italian. Nonetheless, President Yrigoyen's second term ended prematurely in 1930 when, for the first time, a military coup toppled an elected government in Argentina.¹²³ The coup leader, retired General José F. Uriburu, declared himself president and promised his "respect for the Constitution and basic laws in force."¹²⁴ Thus began a downward spiral from which Argentina has yet to recover.

1. The Rise of Inherent Emergency Powers

The decline in Argentina has been economic and political in nature. More fundamentally, it has been a period of decline in respect for the Constitution and the basic laws of the nation. Uriburu's pledge, repeated by coup leaders and even some elected presidents since 1930, reflects Argentine reality for the past sixty years — leaders seize control or take other actions illegally while simultaneously promising to obey the laws. Since 1930, there have been five military coups: in 1943, 1955, 1962, 1966, and 1976. A new constitution remained in place only from 1949–1955. The Supreme Court was completely or partially restructured seven times. No civilian president before Menem served his full term in office. When the military has not officially been in power, it has wielded enormous influence, and when civilians have held the presidency, they have supported military coups.¹²⁵

The Argentine Constitution separates federal powers in terms that are virtually copied from the U.S. Constitution.¹²⁶ Although the

123. See generally CRASSWELLER, *supra* note 12, ch. 3.

124. Quoted in ROBERT A. POTASH, *THE ARMY AND POLITICS IN ARGENTINA, 1928–1945*, at 58 (1969).

125. See PONEMAN, *supra* note 11, at 3–8.

126. See CONST. ARG. arts. 67, 86, 100, 104. As the Chairman of the Committee on Constitutional Amendments to the Buenos Aires Convention of 1860 said:

The committee has been guided in its recommendations by the provisions of a similar constitution, recognized as the most perfect, viz., that of the United States. The provisions of this Constitution are most readily applicable to Argentine

Argentine founders had no intention of making the executive subordinate to the legislature, a concept foreign to their Spanish tradition,¹²⁷ the country was still suffering the ill effects of the tyrannical Rosas regime in 1853 in the same way that the North American founders were working in the shadow of the recent yoke of British domination. Thus, checking and control mechanisms were fashioned in Argentina as they were in the United States.¹²⁸ The six-year presidential term was offset by a prohibition on reelection. Although the Argentine president has appointment powers unencumbered by senatorial advice and consent, his power is checked in one sense by a requirement that all acts and orders of the president be countersigned by a member of the cabinet.¹²⁹

Judicial review of the acts of coordinate branches of government was established early on in Argentina,¹³⁰ as it was in the United States, based on the implications of popular sovereignty rather than an explicit textual grant of power. In one of its earliest decisions, the Supreme Court acknowledged that the framers of the Argentine Constitution "sought to imitate the Constitution of the United States" with regard to the jurisdiction of the federal courts.¹³¹ The judicial power in Argentina is "vested in a supreme court of justice and in such other inferior courts as Congress may establish in the national territory."¹³² Judges hold office during good behavior and may be removed on the same grounds that U.S. Supreme Court justices may be removed.¹³³ The Supreme Court

conditions, having served as the basis for the formation of the Argentine Confederation . . . The democratic government of the United States represents the last word of human logic, for the Constitution of the United States is the only one that has been made for and by the people

Alexander W. Weddell, *A Comparison of Executive and Judicial Powers Under the Constitutions of Argentina and the United States*, 31 BULL. OF THE C. OF WM. & MARY NO. 5 (1937) (quoting the Chairman of the Committee on Constitutional Amendments at the Buenos Aires Convention of 1860).

127. Weddell, *supra* note 126, at 8.

128. *See id.* at 13.

129. *Id.* at 11.

130. *See* Judgment of Nov. 12, 1886 (*Municipalidad de la Capital v. Isabel A. de Elortondo* [*Municipality of the Capital v. Isabel A. de Elortondo*]), Corte Suprema de Justicia de la Nación [*National Supreme Court of Justice*], 33 Fallos 162 (Arg.). The Supreme Court declared a presidential decree unconstitutional in 1863. Phanor J. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 576 (1960).

131. Judgment of May 20, 1865 (*Gomes v. la Nación* [*Gomes v. the Nation*]), Corte Suprema de Justicia de la Nación [*National Supreme Court of Justice*], 2 Fallos 36 (Arg.).

132. CONST. ARG. art. 94.

133. *See id.* art. 45 (concerning impeachment of the president and vice-president, members of the cabinet, Supreme Court members, and federal judges); *see also id.* art. 96 (declaring that judges will hold office for life and cannot be removed, except for cases of misconduct).

originally was required to have nine members, but the court's size was decreased to five in 1863.¹³⁴

These similar constitutional provisions do not account for the weaker role of the judiciary in Argentina than in the United States. In the United States the foundation for an independent judiciary had been laid early, albeit with some uncertainty.¹³⁵ In contrast, neither Spain nor the early Argentine government had an independent judiciary strong enough to assert itself against the executive. Thus, the inability of the modern Argentine judiciary to exercise its constitutional powers independent of strong-willed executives, civil or military, is not surprising.¹³⁶

The courts and the Congress have done little to enforce the rule of law and respect for the Constitution in Argentina. Symbolically, the most important element in the decline of the Argentine legal system has been the excessive exercise of emergency powers and their purported constitutional sanction. This institutionalization of constitutional emergency powers began in 1930, four days after the coup, when the Supreme Court was asked to decide whether to recognize formally the legitimacy of the military government.¹³⁷ The Court faced a dilemma. If it declared the new government unconstitutional, there was no mechanism to assure that its decree would be obeyed. Nor was there any protection for the justices' independence or, for that matter, their tenure. The Court could risk losing whatever ability it had retained to control the excesses of the military government. On the other hand, if it upheld the government, it would legitimate an unconstitutional seizure of power and thereby lessen the Court's independence and the integrity of the legal system.

In a brief opinion signed by all of its members, the Court declared that "de facto," the new government was capable of carrying out any of the ends of the elected government and would be recognized as legally valid notwithstanding the unconstitutionality of its origin.¹³⁸ The

134. Act 182 of Aug. 28, 1858, art. 12, 1852-1880 *Leyes Nacional* 175, stated that the Supreme Court would have nine members and two prosecutors (*see* art. 12). Act. 27 of Oct. 1862, art. 6, 1852-1880 *Anales de Legislación Argentina* [hereinafter A.D.L.A.] 354, brought the number of Supreme Court members to five and added a solicitor general (*see* art. 6).

135. *See* Marcus, *Judicial Review in the Early Republic*, reprinted in *LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA* (R. Hoffman ed., 1992).

136. *See* Weddell, *supra* note 126, at 17.

137. Decree of Sept. 10, 1930, 158 *Fallos* 290 (Arg.).

138. *Id.* The de facto doctrine originated in 1862 when the Supreme Court rejected a challenge to Mitre's presidency. *See supra* text accompanying note 71. In 1865, the Supreme Court declared that a de facto government "exercised provisionally all national power . . . with the right of the triumphant revolution, assented to by the people." Judgment of Aug. 5, 1865 (*Baldomero Martínez v. Manuel Otero*); *Corte Suprema de Justicia de la Nación* [National Supreme Court of Justice], 2 *Fallos* 127 (Arg.). Over time, the Supreme Court

government should be given legal sanction, said the Court, on the basis of "necessity," "public policy," and for the purpose of "protecting the citizens, whose interests could be affected because it is not now possible for them to question the legality of those now in power."¹³⁹

The Court purported to rely on its 1927 decision,¹⁴⁰ where a provincial court judge's authority to decide a case was challenged on the ground that a declared state of siege in that province deprived the local judge of judicial power. In the 1927 case, the Court made the unexceptional decision that so long as a federal judge had not been appointed to replace the state official, the state official could legitimately act — he had "de facto" remained the provincial judge.¹⁴¹ No unconstitutional assertion of federal power was alleged in the 1927 case; indeed, the claimant was seeking to take advantage of the state of siege to avoid an adverse decision by the provincial judge. In contrast, in 1930, the new government itself was illegitimate, having asserted its right to rule without the benefit of elections and constitutional processes. The Supreme Court simply abdicated its responsibility to measure official conduct against legal norms. Although later decisions by the Court purported to limit the powers of a de facto government,¹⁴² the lawless character of emergency powers has rendered judicial controls ineffectual even concerning executive usurpations of the basic right to rule Argentina.

The 1930 decision effectively relegated the judiciary to a position of

broadened its recognition of de facto governments, granting to them legislative as well as executive powers. See generally J. Irizarry y Puente, *The Nature and Powers of a "De Facto" Government in Latin America*, 30 TUL. L. REV. 15, 42-44 (1955) (detailing development of recognition). On June 7, 1943, in the wake of the coup that toppled President Castillo, the Court received a communique issued by the Military Government that had held power and again upheld the new de facto government. See MILLER ET AL., *supra* note 58, at 832-33. The latest military coup, in 1976, was given legitimacy by the Court in 1977. In *Jaime Lockman* the Court found that the *junta's* plan for governing was "part of the Constitution so long as the causes which conferred legitimacy to the norms remain in existence, those norms being grounded on the state of necessity which prompted the adoption of exceptional measures." Jaime Lockman, [1978-C] *Revista Jurídica Argentina—La Ley* [hereinafter L.L.] 331, 332 (1978).

139. Decree of Sept. 10, 1930, 158 Fallos 291 (Arg.).

140. Judgment of June 16, 1926 (Cristóbal Moreno Postigo re. Remoción de Tutela [Cristóbal Moreno Postigo re. Removal of Guardianship]), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 148 Fallos 303 (Arg.).

141. *Id.* at 306.

142. See, e.g., Judgment of Nov. 15, 1933 (Administración de Impuestos Internos v. Martiniano Malmonge Nebreda [Administration of Internal Taxes v. Martiniano Malmonge Nebreda]), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 169 Fallos 309 (Arg.), where the Supreme Court declared that, although a de facto president generally enjoys the same authority as a de jure president, he lacks authority to create new taxes as long as the legislature does not confirm their validity. *Id.* at 321.

utter subservience to the executive branch, destroying whatever independence Argentine judges might have brought to bear in upholding constitutional norms. Since 1947, when President Perón initiated the impeachment of three disfavored Supreme Court justices, the entire Court and most of the remainder of the Argentine judiciary have been replaced en masse five times.¹⁴³

2. States of Siege

Under the French revolutionary law of 1791, a state of siege could be invoked to empower the military only when a part of the nation was actually under siege by an external enemy, and only for the purposes of repelling the attack.¹⁴⁴ Pursuant to article 23 of Argentina's Constitution, "internal disorder" may trigger a state of siege and constitutional rights may be suspended, apparently including any individual rights except the right to petition for habeas corpus.¹⁴⁵

In theory, this extraordinary set of presidential powers is subject to constitutional controls and to judicial review to assure that the prescribed mechanisms are followed. The Constitution requires that the Congress either approve a request for a state of siege declaration in advance, or after the fact if Congress is in recess.¹⁴⁶ Article 23 limits the state of siege to "the Province or territory in which the disturbance of order exists." Although the president may arrest citizens, he may not mete out punishment and he must permit the detainee to leave the country if he wishes. Finally, article 100 grants the judiciary "jurisdiction over . . . all cases dealing with matters governed by the Constitution . . .," apparently including challenges to government actions taken during a state of siege. These safeguards have proven ineffective. Congress has merely rubber-stamped what the executive branch has

143. PONEMAN, *supra* note 11, at 134. The other breaks of constitutional order were not followed by similar rulings of the Supreme Court, mainly because the Supreme Court itself was removed after every coup. This happened in 1955 when President Perón was overthrown, in 1966 when General Onganía overthrew President Illia, and again in 1976 when a military *junta* toppled President Isabel Perón. Only in the overthrow of President Frondizi in 1962 did the Supreme Court play a substantial role when it swore in the president of the Senate, Mr. José María Guido, as the new president of the country, thereby frustrating the wishes of the coup leaders to hold power again. The Supreme Court members appointed by the military during *de facto* governments were replaced by new judges every time a civilian government was reinstated. See MILLER ET AL., *supra* note 58, at 832-33.

144. See MICHELE VOISSET, L'ARTICLE 16 DE LA CONSTITUTION DU 4 OCTOBRE 1958 [ARTICLE 16 OF THE OCTOBER 4, 1958 CONSTITUTION] (1969).

145. Compare the experience with suspending habeas corpus in the United States, *supra* text accompanying note 108.

146. CONST. ARG. arts. 53, 67(26), 86(19).

done; states of siege have routinely been extended to the entire nation; and the limits on arrest and punishment have been abused.

States of siege have been imposed more than thirty times, in all or parts of Argentina. Siege periods have been as short as six weeks and as long as nine years.¹⁴⁷ The safeguards contemplated by article 23 to curb executive excesses in the use of the siege device could have been effective only if an independent judiciary enforced them and punished those who abused them. The courts have failed. That the courts have on occasion rendered decisions restraining the government and protecting individual rights may have served only to establish what Frederick Snyder calls a "discourse of rationality"¹⁴⁸ surrounding states of siege, obscuring the injustices suffered by thousands who gained no relief.¹⁴⁹ Admittedly, however, judges often have been asked to perform their tasks under nearly impossible conditions during states of siege.

In 1976, the military seized the government from the ineffectual and exhausted President Maria Estela [Isabel] Martinez de Perón. Conveniently, Perón's government had declared the entire nation to be in a state of siege since 1974.¹⁵⁰ After President General Jorge Rafael Videla promised to safeguard the "highest interests" of the nation and to "develop[] a genuine spirit of social justice,"¹⁵¹ the *junta* issued the Statute for the Process of National Reorganization,¹⁵² in which it dissolved federal and provincial legislative bodies; fired the principal government officials; prohibited political party and union activities; and declared that the Constitution would remain in force only "to the extent that it does not oppose the main objectives set forth by the military *junta* or the provisions" of its law.¹⁵³

Soon thereafter, the *junta* put into place a series of statutes and decrees restricting individual liberties. The Act to Consider the Conduct of Those Persons Who Prejudice the Higher Interests of the Nation¹⁵⁴ permitted the government to scrutinize negligence in the exercise of a

147. PONEMAN, *supra* note 11, at 131.

148. Frederick E. Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 LAW. OF THE AM. 503, 518 (1984).

149. See PONEMAN, *supra* note 11, at 132.

150. Decreto 1368 of Nov. 6, 1974, XXXIV-D A.D.L.A. (1974).

151. Quoted in Snyder, *supra* note 148, at 508.

152. Estatuto para el Proceso de Reorganización Nacional [Statute for the Process of National Reorganization] of Mar. 24, 1976, XXXVI-B A.D.L.A. 1021 (1976).

153. Ley 21.258, XXXVI-B A.D.L.A. 1032 (1976).

154. Acta para Considerar la Conducta de Aquellas Personas Responsables de Ocasionar Perjuicios a los Superiores Intereses de la Nación [Act to Consider the Conduct of Those Persons Who Prejudice the Higher Interests of the Nation]; XXXVI-B A.D.L.A. 1020 (1976).

public, political, or social interest, acts or omissions that facilitate subversion, tolerance of corruption, and failure to observe basic moral principles in activities that involve the public interest.¹⁵⁵

Under the military *junta* between 1976 and 1983, the "Dirty War" against alleged subversives was conducted under the state of siege declared by the since-deposed constitutional government. Of the thousands who were arrested and thousands more who disappeared by 1978, 23 lawyers were murdered, 109 were detained, and 41 disappeared. Judges who were thought to have been too lenient with alleged subversives or too thorough in their investigation of human rights abuses were themselves threatened with murder.¹⁵⁶

The basic legal question surrounding a declared state of siege is whether internal disorder or foreign attack merits the suspension of constitutional rights.¹⁵⁷ Although this question may appear to be quintessentially for judicial determination under Argentine law,¹⁵⁸ the Supreme Court has been unwilling to review on the merits the constitutionality of an executive or congressional declaration of a state of siege.¹⁵⁹

Other statutes and decrees during the Dirty War criminalized participation in political parties or labor strikes, publication of news concerning terrorism, subversion, or kidnappings and the discovery of bodies, criticism of official policies in university classrooms, and political acts that related to a political party.¹⁶⁰ The serious legal problem facing the *junta* was in circumventing the part of article 23 which declares that the executive "shall not convict or apply punishment upon [its] own authority." Undaunted, the *junta* engaged in interrogation, indefinite

155. *Id.* art. 1.

156. See *Report on the Situation of Human Rights in Argentina*, Inter-Am. C.H.R., OEA/Ser.L/V/II.49, doc. 19, corr. 1 (1980) [hereinafter *Human Rights Report*].

157. See CONST. ARG. art. 23.

158. GERMAN J. BIDART CAMPOS, *MANUAL DE DERECHO CONSTITUCIONAL ARGENTINO* [MANUAL OF ARGENTINE CONSTITUTIONAL LAW] 455-60 (1981); Judgment of Oct. 22, 1962 (re Ruggero), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 254 Fallos 116 (Arg.).

159. See, e.g., Judgment of Dec. 28, 1956 (Iscaro), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 236 Fallos 632 (Arg.); Judgment of Aug. 26, 1960 (Trossi), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 247 Fallos 528 (Arg.); Judgment of Apr. 26, 1961 (Almeyra), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 249 Fallos 522 (Arg.); see also BIDART CAMPOS, *supra* note 70, at 100-101.

160. Trabajo [Employment], Ley 21.400, XXXVI-C A.D.L.A. 2116 (1976); Universidades Nacionales [National Universities], Ley 21.276, XXXVI-B A.D.L.A. 1041 (1976); Seguridad Nacional [National Security], Ley 21.322, XXXVI-B A.D.L.A. 1102 (1976); Seguridad Nacional [National Security], Ley 21.325, XXXVI-B A.D.L.A. 1104 (1976); Ley de Represión del Sabotaje [Law of Repression of Sabotage], Ley 21.264, XXXVI-B A.D.L.A. 1034 (1976).

detention, and arrest on suspicion alone. Summary proceedings before special military tribunals were set up, and the enforcers were themselves granted immunity from prosecution for abuses except in the military courts.¹⁶¹ Thus, instead of "convicting" or "punishing" citizens, the *junta* detained enemies of the state for arbitrary periods, tortured them, and caused them to disappear.¹⁶²

After the Dirty War, the lower courts began to assert a somewhat stronger role. At first, the courts simply adopted the executive's assertions that the accused was linked to "subversive activities" in reviewing a request for habeas corpus.¹⁶³ However, when well-known defense lawyer and human rights activist Carlos Mariano Zamorano sought habeas relief in 1977 after being detained since December 1974, the acting Federal Court of Appeals ordered his release after rejecting the "reasonableness" of his detention.¹⁶⁴ His was thus the first case where a court reviewed an arrest under a state of siege and required that the government offer "particular facts" linking his detention to the reasons for the state of siege. Zamorano was held while the government appealed to the Supreme Court, and after the executive supplied information *ex parte* informing the Supreme Court of his supposed "communist contacts," his release was revoked. Zamorano was given no opportunity to contest the accuracy of the government's claims of subversion.¹⁶⁵ Thus, the decision in *Zamorano* merely succeeded in supplying the government with a blueprint for perfecting unlimited detention.¹⁶⁶

In another case, the father of Ines Ollero sought habeas corpus relief in order to find facts concerning the location of his daughter, who had disappeared in 1976.¹⁶⁷ Although one of the requirements of habeas

161. Seguridad Nacional [National Security], Ley 21.272, XXXVI-B A.D.L.A. 1038 (1976); Fuerzas de Seguridad [Security Forces], Ley 21.267, XXXVI-B A.D.L.A. 1036 (1976); Seguridad Nacional [National Security], Ley 21.460, XXXVI-D A.D.L.A. 1894 (1976); Consejos de Guerra Especiales Estables [Permanent Special Councils of War], Ley 21.461, XXXVI-D A.D.L.A. 2895 (1976).

162. See *Human Rights Report*, *supra* note 156; see also PONEMAN, *supra* note 11, at 131; MARTIN EDWIN ANDERSON, DOSSIER SECRETO: ARGENTINA'S DESAPARECIDOS AND THE MYTH OF THE "DIRTY WAR" 223-94 (1993).

163. Judgment of Dec. 15, 1977 (Tizio), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 299 Fallos 294 (Arg.).

164. *Carlos Mariano Zamorano*, Federal Chamber of Appeals of Buenos Aires (1977). For a lengthy excerpt from the *Zamorano* opinion in English, see *Case Notes of Some Typical Cases Affecting Lawyers and Judges in Argentina — Appendix I*, BULL. CENTRE INDEPENDENCE JUDGES & LAW., Feb. 1978, at 13.

165. See Judgment of Aug. 9, 1977 (Zamorano), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 298 Fallos 441 (Arg.).

166. See Snyder, *supra* note 148, at 516-17.

167. Judgment of Apr. 25, 1978 (Ollero), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 300 Fallos 457, 469 (Arg.).

corpus — that an official responsible for the detention be identified — could not be met in Ollero's case, the court ordered a broadened investigation in light of evidence that she had been among a group of bus passengers last seen on their way to a certain police station in Buenos Aires.¹⁶⁸ As with Zamorano, however, the investigation did not produce information helpful to Ollero, and the courts denied him relief.¹⁶⁹

The courts have reviewed some executive actions taken under siege conditions.¹⁷⁰ For example, in *Sofia* the Court agreed to determine whether executive acts were "clearly and obviously unreasonable, involving methods that have no relation at all to the purposes of Article 23."¹⁷¹ Even this review for reasonableness extended only to constitutional rights other than personal liberties. Since the *Sofia* case, review for rights abuses has most often been minimal.¹⁷²

The only successful petition for habeas corpus filed on behalf of those arrested under the Dirty War state of siege was brought for journalist and newspaper publisher Jacobo Timerman. Timerman was arrested in 1977 at the request of the army commander-in-chief, allegedly because of his association with a businessman who was suspected of having supported a left-wing terrorist group. After a period of interrogation and torture, Timerman was tried and acquitted by a military tribunal. Thereafter, the *junta* ordered his house arrest and denied him political rights and employment. Eventually, the Supreme Court ordered his release on the ground that his acquittal on the charge that he associated unlawfully with the businessman ended any justification for continued detention. He was being "punished" in a manner not authorized by article 23.¹⁷³

Timerman's exceptional "victory" was likely the product of intense international pressure for his release.¹⁷⁴ Even Timerman's vindication was hollow, however, as the generals "released" him only by expelling him from Argentina and stripping him of his citizenship.¹⁷⁵ Further,

168. *Id.* at 461.

169. See Snyder, *supra* note 148, at 517.

170. Judgment of May 22, 1959 (*Sofia*), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 243 Fallos 504 (Arg.).

171. See *id.* at 533-34.

172. See Garro, *supra* note 47, at 327-30.

173. Judgment of July 20, 1978 (Timerman), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 300 Fallos 816 (Arg.); Judgment of Sept. 17, 1979 (Timerman), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 301 Fallos 771 (Arg.).

174. See JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 128-29, 251 (Tony Talbot trans., 1981); ANDERSON, *supra* note 162, at 247-48, 285-86.

175. TIMERMAN, *supra* note 174, at 252.

since the *Timerman* case, the courts have continued to sustain state of siege detentions when the executive merely asserts that the detainee has a "subversive connection."¹⁷⁶

The Argentine Constitution protects individual rights to life, personal safety, and due process, and it forbids torture and inhumane imprisonment even during a state of siege. That Argentine judges have been largely unable or unwilling to curtail abuses of these rights is testament to the sweeping emergency powers of the executive in Argentina. Aided by chronic resort to the siege devices, personal threats to judges, and corruption, the executive has kept the courts firmly in check while it has used them to legitimate the seeming rationality of their actions. The single judge who, in 1981, ruled that a state of siege was unconstitutional immediately left Argentina.¹⁷⁷

As Fred Snyder wrote:

Legal process has . . . been singularly important in the mobilization of state terror in that it has enabled the junta to address society not only through the amplifier at the rally, the proclamation in the newspaper, the rifle butt on the street, and the electrode in the torture chamber, but through a vocabulary of reason and right as well. . . . [C]ourts stay open for business . . . draw[ing] the junta into the enviable world of formal rationality where it shares the benefits that only an apparatus of justification can confer.¹⁷⁸

3. Pardons

During the Videla military government, clandestine detention centers were established where persons suspected of being subversive or having connections to subversive groups were brought. Members of the military arrested the suspect first, after arriving at the person's residence late at night in plain clothes. Many were detained for long periods, many were tortured before being released, and, between 1976 and 1983, some 10,000 persons disappeared and were never seen alive again — the *desaparecidos*.¹⁷⁹

176. See Garro, *supra* note 47, at 334.

177. See R. Fernandez Taboada & J. Vidal, *Quién es Pedro Narvaiz [Who is Pedro Narvaiz]*, SOMOS, Feb. 11, 1983, at 6, 10.

178. Snyder, *supra* note 148, at 519.

179. The Findings of the National Commission of the Disappearance of Persons (CONADEP), established by Presidential Decree No. 157 (1983), are described in ANDERSON, *supra* note 162, at 9–12. CONADEP's report, submitted in 1984, confirmed the disappearance of 8,960 persons in Argentina from 1976 to 1983. 365 detention camps were identified, and more than 1,300 military and police officers were named as having committed human rights

After an elected government was returned to power, prosecutions of human rights abuses and investigations of the *desaparecidos* began. Upon taking office in 1983, President Alfonsín faced the question of how to punish military officials for the Dirty War, without provoking military retaliation and thus threatening the fragile return to civilian rule. Pleasing all sides was out of the question. Leniency would cause a public outcry and make the new government seem complicit in the atrocities. Harshness would not only alienate the military; it might cause them to try to hold on to power at all costs.¹⁸⁰

The Alfonsín government attempted to compromise with the military. President Alfonsín ordered military officers charged with Dirty War crimes to be tried by military tribunals under military law. Civilian courts could review the sentences and could decide any case for which no verdict was reached in six months.¹⁸¹ Although the Military Code of Justice clearly provided for military jurisdiction over the Dirty War trials, human rights activists knew that military trials would be shams and would provide opportunities to destroy damning evidence. They also argued that the Military Code was unconstitutional to the extent that it conferred jurisdiction on military courts over cases involving crimes against civilians. Indeed, the Criminal Court of Appeals in Buenos Aires had determined that the charges involving the *desaparecidos* fell outside military jurisdiction, and that pending kidnapping charges involving conscripts from the Military College could be tried by civilian courts under the new prospectively enacted penalties because, according to Argentine law, abduction remains a crime until solved.¹⁸²

On appeal, the Supreme Court admitted that the Military Code was probably unconstitutional. It nonetheless upheld the Alfonsín plan, citing its unwillingness to undermine a method chosen by Alfonsín and the Congress to respond to the Dirty War.¹⁸³ Thus, the President's political decision to steer a compromising course, endorsed after the fact by Congress and upheld by the Supreme Court, produced the beginnings of judicial proceedings in civilian and military courts. In 1985, the court of appeals convicted five of the nine members of the *junta* that ruled

abuses. See also NUNCA MÁS: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS [NEVER AGAIN: FINDINGS OF THE NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS] 8-10 (1984); ANDERSON, *supra* note 162, at 223-94.

180. See PONEMAN, *supra* note 11, at 141.

181. *Id.* at 141-42.

182. See *id.* at 217 n.17.

183. See 109 El Derecho—Legislación Argentina [hereinafter E.D.L.A.] 6037 (1984); Congress ratified Alfonsín's plan by enacting amendments to the Code of Military Justice, Ley No. 23.049 of Feb. 13, 1984, XLIV-A A.D.L.A. 8 (1984).

Argentina between 1976 and 1983.¹⁸⁴

The Alfonsín government also asked for and the Congress enacted legislation that first, set a statute of limitations for these crimes, and second, declared that all military officers below a certain rank were legally deemed to be following the orders of superiors, thereby exculpating them from any criminal liability.¹⁸⁵ Prosecutions languished in this fashion until October 1989, when the new government of Carlos Menem, as a result of pressure by the Argentine military, granted pardons to more than 200 military officers and other members of the armed forces who had been charged and were awaiting trial.

Menem's pardons were unprecedented in size and scope, and prompted widespread criticism.¹⁸⁶ The 1853 Constitution gives Congress the authority to "grant general amnesties."¹⁸⁷ It also allows the president to "pardon or commute penalties for crimes subject to federal jurisdiction, with a previous report from the competent tribunal."¹⁸⁸ In 1932, the Supreme Court said that the president's pardon power

implies the pardon of punishments, in order to suppress or alleviate in special cases the excessive rigor of the law. The [congressional] amnesty represents instead forgetting a criminal act, to establish calm and social coexistence The presidential pardon is particular and refers to a given individual or individuals; the amnesty is essentially general and extends to all those involved in a certain category of events.¹⁸⁹

The Court added that the pardon "eliminates the penalty adjudged" while the amnesty does "away with their effects."¹⁹⁰

The Menem pardons of the military officers raise questions besides prospectivity. The size of the group pardoned arguably usurped the congressional prerogative of granting amnesty and interfered with the

184. The Federal Court of Appeals that acted as trial court convicted the members of the *juntas* on December 9, 1985. 309 Fallos 33 (Arg.). Although some changes were made in the sentences imposed, those convictions were affirmed by the Argentine Supreme Court on December 31, 1986. 309 Fallos 1657 (Arg.).

185. See *Fuerzas Armadas y de Seguridad* [Armed and Security Forces], Ley 23.492, 1987-A E.D.L.A. 299 (1986); *Fuerzas Armadas y de Seguridad* [Armed and Security Forces], Ley 23.521, 1987-A E.D.L.A. 341 (1987).

186. See, e.g., E. Oteiza, *El Indulto* [The Pardon], 7337 *El Derecho* [hereinafter E.D.] (1989); D. Herrendorf, *Un Desparpado de Indultos* [A Scattering of Pardons], 7477 E.D. (1990).

187. CONST. ARG. art. 67(17).

188. *Id.* art. 86(6).

189. Judgment of July 15, 1932 (Hipólito Yrigoyen), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 165 Fallos 199, 211 (Arg.).

190. *Id.*

application of the Criminal Code.¹⁹¹ Further, torture is itself proscribed by the Argentine Constitution¹⁹² and is forbidden by the International Convention on Torture and Cruel Treatment which was ratified by Argentina in 1987.¹⁹³

Faced with Menem's decree, Congress and the courts buckled to political intimidation. While the Congress had not shown any leadership in responding to the *junta's* abuses, it had endorsed Alfonsín's compromise position and graced it with legislative approval after the fact. When Menem acted, Congress remained silent, notwithstanding the fact that Menem effectively repudiated Congress' prior action and, in doing so, may have invaded congressional power to "grant general amnesties."

When Menem's pardons of the military officers were challenged by the families of victims of the *desaparecidos*, the Supreme Court ruled that the victims' families lacked standing to sue.¹⁹⁴ Despite the fact that the pardon appeared to be an amnesty and that Congress neither initiated nor supported it, the Court practically validated the brutal torture and murder of thousands of Argentine citizens.

The Supreme Court's refusal to rule on the validity of the Menem pardons in *Riveros* called into question prior decisions invalidating prospective pardons,¹⁹⁵ as well as constitutional provisions protecting against torture and the application of the Criminal Code. In *Riveros*, the Court refused to grant standing to the victims' families after the prosecutors declined to appeal the pardons. Since the prosecutors received instructions from the Attorney General to abide by the pardons and request termination of criminal proceedings, it was absurd for the Court to rely on their inaction as a basis for denying relief to the families.¹⁹⁶

Still, President Menem faced a real crisis, not an imagined one. Threats from the military must not be taken lightly in Argentina. The situation in Argentina in 1989 was hardly secure as spiraling inflation,

191. See Alberto Bianchi, *Apostillas a la Amnistía Presidencial a Propósito del caso Riveros* [Notes on Presidential Amnesties through a Look at the Riveros Case], 7732 E.D. (1991).

192. CONST. ARG. art. 18.

193. Act 23.338, XLVII A.D.L.A. 1481 (1987).

194. *Riveros, Omar S. y otros* [*Riveros, Omar S. and others*], [1991-1] J.A. 306 (1991) (Arg.).

195. See Judgment of Aug. 6, 1868 (Simon Luego), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 6 Fallos 229 (Arg.) (decided by the first Supreme Court, whose members included José A. Gorostiaga, one of the framers of the pardons clause in the 1853 Constitution); Judgment of Mar. 8, 1932 (Yrigoyen), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 165 Fallos 199 (Arg.).

196. See Judgment of Nov. 12, 1990 (*Riveros*), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], [1991-1] J.A. 306 (1990) (Arg.).

other economic woes, labor strife, and general dissatisfaction with the government presented the new Menem administration with a precarious political and social environment.¹⁹⁷ Menem needed the support of the military and could not brook their opposition at such a tentative time in Argentina's political life. Thus, his pardons were a bold but possibly necessary action to avoid a potential military revolt, more violence, and yet another return to dictatorship.¹⁹⁸

So viewed, President Menem's pardons, like President Lincoln's actions in 1861, may have been unconstitutional but necessary.¹⁹⁹ The Argentine president does not have unlimited discretion to mete out pardons — the congressional amnesty power must be taken into account and, arguably, pardons before conviction are forbidden in Argentina, as are pardons that undermine another provision of the Constitution, such as the protection against torture. Because *Riveros* practically means that no one would have standing to challenge a pardon where the executive directs the prosecutors to drop the prosecutions, the Supreme Court improperly shirked its constitutional duty to measure the pardons against the Constitution.

Further, the president of Argentina has a duty to act constitutionally, regardless of the amenability of his actions to judicial review. The president of the United States may not pardon someone who has been impeached; he must exercise his apparently unreviewable discretion within constitutional limits.²⁰⁰ President Menem had an obligation to exercise his pardon consistent with the parallel power of Congress and the rights provisions of his Constitution. If he believed that he had to pardon the military officers to save the nation, he should have conceded the unconstitutionality of his actions, issued the pardons, and then sought ratification of his action by Congress.

The nearly 300 Menem pardons have more the character of amnesty than of pardon in Argentine law.²⁰¹ Menem's actions were more an attempt to "do away with [the] effects" of the Dirty War crimes than to "eliminate the penalty adjudged."²⁰² Although the individuals to be

197. See generally JAMES NEILSON, *EL FIN DE LA QUIMERA [THE END OF THE CHIMERA]* (1992).

198. See KATHLEEN DEAN MOORE, *PARDONS* 202 (1989).

199. See generally *supra* note 138.

200. See MOORE, *supra* note 198, at 198; see also H.R.J. Res. 32, 103d Cong., 1st Sess. (1993) (bill pending in the House Judiciary Committee would limit pardons to those convicted).

201. See *supra* text accompanying notes 189–90 (comparing pardon and amnesty in Argentine law).

202. See Judgment of Mar. 8, 1932, 165 Fallos at 199.

pardoned were named, no individualized attention was given to the severity of their crimes. Admittedly, it may be that to await trial in the individual cases would have been an untenable option in 1989. We will never know.

If the Menem pardons may be fairly compared to Lincoln's actions in 1861, in terms of the gravity and magnitude of the risk to each nation, then Menem's conduct differed only in not asking Congress to ratify his actions, and in not conceding the unconstitutionality of his essential act. Similarly, the Argentine Congress did not perform its responsibilities — it should have either supported the President's illegal act with a ratifying statute,²⁰³ or challenged the President politically or through impeachment proceedings. Lacking any indication of congressional intent, the Supreme Court's task was politically difficult in *Riveros*. The Court should nonetheless have decided the constitutional questions presented by the victims' families' claim. Conceivably, the full Court could have fairly proceeded, as two of its concurring justices would have, in upholding the pardons as consistent with the Constitution.²⁰⁴ Congress' failure to act could have been read as acquiescence in the President's actions and the rights questions could have been dismissed, as they were by the concurring justices,²⁰⁵ as not properly before the Court in this case. The alternative, ruling against the President, would have placed the Court in the unenviable position of being unable to enforce a decision that would surely have been resisted by the enforcers. Still, the Argentine Constitution and the prospects for the rule of law in Argentina would be improved if the Court had found the pardons unconstitutional, though perhaps necessary under the circumstances.

In October 1992, the full Supreme Court reached the merits in another challenge to the prospective pardons of 1989. In *Aquino*,²⁰⁶ the public prosecutor, disobeying instructions from the Ministry of Justice, joined relatives of the disappeared in challenging the pardons of members of the military. In reversing a court of appeals decision, the Court distinguished *Riveros* and found the prosecutor's challenge sufficient to confer jurisdiction, even though he had acted in defiance of his

203. See Judgment of Nov. 28, 1871 (Crisólogo Andrade), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 11 Fallos 405 (Arg.). A presidential action approving an official's grant of amnesty to rebels was itself an amnesty, but congressional ratification of his actions cured the constitutional defect. *Id.* at 415.

204. See *Riveros*, [1991-1] J.A. 306, opinions of Justices Petracchi & Oyhanarte.

205. *Id.* at 310-11.

206. Judgment of Oct. 14, 1992 (Aquino), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], [1993-1] J.A. 45 (1993) (Arg.).

instructions. On the merits, the Court relied on the concurring opinion in *Riveros* in affirming the constitutionality of prospective pardons.

4. Economic Emergencies

President Menem's pardons of officers accused of human rights violations only exacerbated the political troubles facing his government. During the same period, scandal plagued his administration and the infamous Argentine inflation was spiraling to historic highs.²⁰⁷ The value of the American dollar was skyrocketing, as Argentines queued before money changers to trade their Argentine currency for dollars in hopes of protecting their savings. Banks were forced to offer ridiculously high interest rates on short-term savings in Argentine currency, in order to lure customers. With seven day or shorter interest periods, customers would cash in their investments, buy more dollars with their profit, and force the value of the dollar higher, requiring the banks to offer even higher interest rates to attract depositors. Prices were, all the while, rising, as the value of the local currency deteriorated.

For Menem's government, the spiral was of immediate concern because of a federal law which made the government's central bank responsible for bank deposits in the event of bank default.²⁰⁸ Instead of proposing a legislative solution or even seeking congressional support for executive enforcement of existing laws, Menem issued a sweeping presidential decree.²⁰⁹ The decree provided that banks were relieved from paying all but a small portion of deposits to investors. The balance would be covered by government bonds, with a value fixed in dollars.²¹⁰

Deposit holders were outraged. First, the promised bonds had not been issued when the decree went into effect.²¹¹ When they were issued five months later, their market value was far less than their declared value. Second, accrued bond interest could not be collected for the first year of the life of the bonds. Third, only Argentines who maintained their savings in local currency were harshly affected by the decree; the wealthy kept their savings in dollars. Finally, the banks themselves

207. See Nathaniel C. Nash, *Argentina's President Turns Economics Into Poll Approval*, N.Y. TIMES, Feb. 16, 1992, at A20.

208. Act 21.256, XXXVII-A A.D.L.A. 121 (1977). The guarantee of the Central Bank for deposits in cases of default was eliminated by means of Act 24.144 passed on September 23, 1992, and published in the "Boletín Oficial" ["Official Bulletin"] of Oct. 22, 1992.

209. Presidential Decree No. 36/90, 2 E.D.L.A. 11 (1990).

210. *Id.*

211. See Alberto Bianchi, *La Corte Suprema ha establecido su tesis oficial sobre la emergencia económica* [*The Supreme Court has established its official thesis on the economic emergency*], [1991-C] L.L. 141 (1991).

suffered; instead of depositors' cash, they received only the bonds while the government took the money.

Commentators were quick to conclude that the government acted simply because it faced "a shortage of cash"²¹² and that the action was a sheer "confiscation."²¹³ The Argentine Constitution states that "property is inviolable" and that the "taking of property for public use will be preceded by legislation and previously compensated."²¹⁴ "Confiscation" or any other form of forcible acquisition of private property by the government is specifically outlawed.²¹⁵ Moreover, the government's economic powers are entrusted to the Congress.²¹⁶

Economic emergencies are familiar in Argentina, as are restrictions on the economic rights of citizens during crisis periods. Several times, for example, Congress enacted emergency legislation to help some economically disadvantaged group, such as tenants,²¹⁷ homeowners,²¹⁸ and consumers.²¹⁹ Typically, the judiciary has upheld these measures as being important to the public interest in a time of emergency.²²⁰

When presented with President Menem's bank savings decree in the *Peralta* case, however, the Supreme Court acknowledged that it could not simply rely on precedent; each of the earlier economic emergencies had prompted legislation, which had subsequently caused the hardship complained of in the lawsuit before the Court. Instead, after announcing that the doctrine of separation of powers should not be construed to "cause[] a total disruption of the State,"²²¹ the Court determined that it would not permit the "technicality" of the form and author of the decree to work "to the detriment of unity"²²² of the government.²²³

212. *Id.* at 165.

213. German J. Bidart Campos, *El Fallo de la Corté Sobre el Plan Bonex* [*The Court's Decision on the Bonex Plan*], 7726 E.D. (1991).

214. CONST. ARG. art. 17.

215. *Id.*

216. *Id.* arts. 67(2), (4), (10).

217. Act 11,157, 1920-1940 A.D.L.A. 79 (1922).

218. Act 11,741, 1920-1940 A.D.L.A. 486 (1933).

219. Act 20,680 of June 20, 1974, XXXIV-C A.D.L.A. 2006 (1974).

220. *See, e.g.*, Judgment of Dec. 5, 1934 (*Avico v. de la Pesa*), Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 172 Fallos 21 (Arg.).

221. *Peralta, Luis y otro c/Estado Nacional* [Ministerio de Economía y Banco Central] [*Peralta, Luis and another c/National State* [Economic Ministry and Central Bank]], [1991-C] L.L. 176 (1990) (Arg.).

222. *Id.*

223. Justice Oyhanarte concurred and said that the presidential decree had the same status as a congressional statute, being signed by the Executive for reasons of "necessity and urgency. . . . In matters like these substance must prevail over forms." [1991-C] L.L. at 140, 187. *See* Bianchi, *supra* note 191, at n.40.

The Court held that, during an economic crisis, the president is empowered to assume duties entrusted to the Congress, so long as the Congress does not affirmatively object.²²⁴ The Court's decision reflects the dangers of a relativist view of emergency powers. Purporting to rely on an earlier challenge to a presidential decree responding to an economic emergency,²²⁵ where Congress ratified the president's actions by statute prior to decision (thus rendering the case moot), the *Peralta* Court held that the decree is valid so long as Congress, having notice of the decree, "has not adopted a contrary decision" or "has not rejected its terms."²²⁶ The Court argued that Congress still had the final decision on such matters, that it had not rejected the decree, and that it had in fact given the decree "tacit" approval by mentioning it in subsequent legislation.²²⁷ Thus, congressional silence was equated with the affirmative enactment of a statute. Once this separation of powers question was resolved, the Court held that the emergency conditions permitted a reasonable interference with property rights, relying on the U.S. Supreme Court's *Blaisdell* decision.²²⁸

In this instance, the Argentine Congress failed to "prevent power from slipping through its fingers."²²⁹ Congressional acquiescence has in fact empowered the executive branch, whether or not inferring congressional authorization from inaction makes for good constitutional law.

B. *United States, 1890–Present*

1. The Rise of Inherent Emergency Powers

President Theodore Roosevelt was the first presidential spokesman for the expansive view of emergency power:

Occasionally great national crises arise which call for immediate and vigorous executive action, and in such cases it is the duty of the President to act upon the theory that he is the steward of the

224. *Peralta*, [1991-C] L.L. at 178.

225. *Porcelli v. Banco de la Nación Argentina* [*Porcelli v. Argentine National Bank*], 312 Fallos 555 (1989) (Arg.).

226. *Peralta*, [1991-C] L.L. at 178.

227. See Act 23.871, art. 16, L A.D.L.A 3718 (1990).

228. *Peralta*, [1991-C] L.L. at 181; *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 426 (1934).

229. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

people. . . . [The President has the] legal right to do whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it.²³⁰

Two seminal events, one before and one after Roosevelt, signalled and themselves furthered the emerging relativist theory of presidential emergency powers.

David Neagle was a U.S. marshal who had been assigned by the Attorney General to protect Supreme Court Justice Field while Field was travelling on circuit in California. Neagle killed David Terry, a disappointed litigant who attempted physically to attack Field. Arrested by California authorities and charged with murder, Neagle sought habeas corpus relief from a federal court on the ground that he had been imprisoned for performing his duties in pursuance of a law of the United States. In the Supreme Court, it was hardly surprising that the justices vindicated the efforts of Neagle to save Justice Field's life.²³¹ Although there was no federal statute authorizing bodyguard activities, the duty was implicit in a general statute giving federal marshals the same powers in executing federal laws as are enjoyed by state sheriffs in executing state laws. Since a California sheriff would have been obligated to protect Justice Field, the same duty was inferred to Neagle.

It was therefore unnecessary for the Court to say that the president's duty to enforce the laws reaches beyond positive law to include "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution[.]"²³² The Court implied that the president could have ordered the protection of Justice Field without statutory authority. In practical effect, the *Neagle* Court recognized an emergency lawmaking power in the president.

Five years later, a strike by the American Railway Union against the Pullman company obstructed interstate transportation and the delivery of mail on railroad cars operating in the Chicago area. After being informed that Eugene Debs, the leader of the union, and other labor officials failed to obey an injunction obtained on the President's orders by the Attorney General prohibiting conduct which interfered with interstate transportation, President Cleveland ordered federal troops into Chicago to restore order. Debs and others were arrested and charged

230. THEODORE ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY* 551-53 (1913).

231. *In re Neagle*, 135 U.S. 1 (1890). What is surprising is that two Justices, including the Chief Justice, dissented.

232. *Id.* at 64.

with disobeying the injunction and were sentenced to prison terms. On appeal, Debs unsuccessfully challenged the President's authority to sue to enjoin the strike.²³³ The Court said:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws. . . .

. . . .

[I]t is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals. . . .²³⁴

Once federal troops arrived in Chicago, commanding General Nelson Miles ordered his 10,000 men to run the railroads. The confrontations that ensued resulted in thirteen deaths and over fifty injuries. Even though Miles viewed the workers as insurgents rather than citizens on a labor strike, President Cleveland put Chicago under virtual martial law and put Miles in charge.²³⁵

With the arrival of World War I, emergency measures were once again necessary. In contrast to Lincoln, however, President Wilson acquired his vast emergency powers by statute and, instead of acting in the absence of or in spite of Congress as Lincoln had, Wilson cooperated with Congress.²³⁶ Yet World War I also brought with it the "concept of a continuing war with an internal enemy composed of civilians who could no longer be trusted, even in peacetime."²³⁷ Sparked by the

233. *In re Debs*, 158 U.S. 564 (1895).

234. *Id.* at 582-83. The current vitality of the dictum is doubtful. See FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWERS OF CONGRESS IN HISTORY AND LAW* 171-75 (2d ed. 1989).

235. Miles likely violated the Posse Comitatus Act, *supra* note 119.

236. ROSSITER, *supra* note 108, at 241-42. Statutes permitted the president to take over the railroads, water systems, and ship-building facilities, to regulate and forbid exports, to raise an army through a draft, to set transportation priorities, to control the conduct of aliens, to reorganize executive agencies, and to censor communications to and from foreign countries. *Id.* at 243.

237. JENSEN, *supra* note 90, at 178.

Bolshevik revolution in 1917 and the eventual urging by the Bolshevik leaders that workers everywhere revolt against capitalism and in favor of a socialist state, the U.S. Military Intelligence Division (MID) developed Emergency Plan White, a contingency plan for a war at home.²³⁸ MID believed that the radical labor movement was allying itself with foreign ethnic groups sympathetic to the Russian revolution.

Although the end of the war implied to most Americans that groups such as the MID would be disbanded, executive branch officials persuaded Congress to continue funding MID at a reduced level. After racial violence erupted in Washington, D.C. and Chicago in 1919, Congress determined that “radicals” caused the unrest and permitted expanded MID domestic activities.²³⁹ Fueled by continuing labor strikes and related violence,²⁴⁰ the MID began to issue “weekly situation reports” in which it gathered and presented information about dissident groups. As delusions about an imminent attempt to overthrow the government continued to guide army intelligence and the thinking of new Assistant Attorney General J. Edgar Hoover, MID engaged in raids on suspected radical groups and continued surveillance of a wide array of citizens.²⁴¹

With the Great Depression and the eventual election of President Franklin Roosevelt, a virtual revolutionary expansion of presidential emergency powers occurred. In part, Roosevelt benefitted from broad delegations of authority from Congress, endorsed by the courts. In part, he acted on his own when, in his words, “unprecedented demand and need for undelayed action may call for temporary departure”²⁴² from the Constitution. In the first 100 days of his presidency, President Roosevelt issued the second emergency proclamation in the nation’s history, in which he closed the banks and stopped all financial transactions.²⁴³

238. *Id.* at 178–79.

239. *Id.* at 185.

240. See BENNETT M. RICH, *THE PRESIDENT AND PUBLIC DISORDERS* 210 (1941) (unpublished Ph.D. dissertation, University of Michigan (Ann Arbor)).

241. See JENSEN, *supra* note 90, at 191–97. In 1921, after Congress officially declared the war at an end, General Pershing became the new head of MID and, within a few months, he rescinded all orders allowing army surveillance of civilians and turned over all law enforcement to the Justice Department. MID’s name was changed to G-2 and, although its formal role in surveillance ended, abuses continued, kept underground out of concern for public sentiment. G-2 still reported on alleged communists and activities of labor groups, while it maintained Emergency Plan White. *Id.* at 198–207.

242. Inaugural Address of Franklin D. Roosevelt (Mar. 4, 1933), in 2 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 15 (1938).

243. Proclamation No. 2039, 48 Stat. 1689 (1933).

Congress ratified the President's emergency actions within three days,²⁴⁴ establishing a pattern of executive initiative and legislative acquiescence that is still the norm today. Although the Supreme Court struck down two early sweeping delegations to Roosevelt,²⁴⁵ by 1937 the President's threatened Supreme Court packing, his landslide reelection, and new personnel on the Court produced a majority willing to endorse emergency measures.²⁴⁶

2. The Internment of Japanese Americans

When war broke out in Europe in 1939, President Roosevelt gave no indication that he perceived an inherent power in the Commander-in-Chief Clause of the Constitution.²⁴⁷ Roosevelt extended military and economic aid to the Allies only on the basis of statutory authority, and maneuvered U.S. armed forces for the strategic benefit of the Allies only in keeping with the traditional discretion accorded the commander-in-chief.²⁴⁸

Beginning in mid-1941, Roosevelt adopted a broader interpretation of his powers.²⁴⁹ He seized and operated defense plants where strikes had halted production,²⁵⁰ and established an Office of Price Administration which examined proposals for rationing and fixing prices of scarce resources. Neither of these measures was authorized by statute. Had the Japanese not "come to the rescue,"²⁵¹ Roosevelt might have provoked a constitutional confrontation with Congress.

Not surprisingly, racial animus followed the bombing of Pearl Harbor. However, the clamor for an evacuation program did not begin until the Japanese scored important military victories in the Pacific. Then, pressure from agricultural, business, and commercial interests, particularly in California,²⁵² and parts of the media and government combined to give impetus to General Dewitt's report to the President,

244. Bank Conservation Act, 12 U.S.C. §§ 201-213 (1988).

245. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

246. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936).

247. *See* U.S. CONST. art. II, § 2.

248. *Cf. JENSEN, supra* note 90, at 212-25.

249. *Id.*

250. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 245 (1957) [hereinafter CORWIN I].

251. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 33 (1947) [hereinafter CORWIN II].

252. *See* G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE 69-70* (1982) (describing then state Attorney General Warren's xenophobia after Pearl Harbor).

recommending some sort of internment program.²⁵³ On February 19, 1942, within ten weeks of the Japanese attack on Pearl Harbor, President Roosevelt issued an executive order conferring on the secretary of war authority to designate military areas from which any or all persons might be excluded.²⁵⁴ Eleven days later, General J.L. Dewitt, Commanding General of the Western Defense Command, designated California, Washington, Oregon, and Southern Arizona as military zones and, to prevent sabotage and espionage, again pursuant to executive order,²⁵⁵ ordered the relocation of persons of Japanese descent residing in these areas. Under the program, 112,000 persons of Japanese ancestry, including more than 70,000 U.S. citizens, were removed from their homes and confined in detention camps for periods of up to four years.

Apart from its racial discrimination, the internment of Japanese Americans abridged "their constitutional rights . . . to move about freely, to live and work where one chooses, to establish and maintain a home; and the right not to be deprived of these rights except upon an individual basis and after charges, notice, hearing, fair trial, and all the procedural requirements of due process. . . ."²⁵⁶ The most that can be said for the President's internment program is that Congress ratified it by statute a few days after it was announced.²⁵⁷ It was, nonetheless, the President's program, justified then as an exercise of emergency powers permitted by the Commander-in-Chief Clause. However, there was no evidence to support the claim that a detention and relocation program was necessary to prevent the feared sabotage and espionage.²⁵⁸ Prior to beginning the round-up of Japanese Americans, the Justice Department had compiled files on Japanese Americans considered dangerous and, by February 1942, more than 2,000 Japanese aliens had been taken into custody.²⁵⁹ While Justice Department hearing boards were reviewing individual cases and releasing suspects after the charges of disloyalty were dropped, the Attorney General promised that "[a]t no time . . . will

253. See PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES: 1918-1969*, at 233-34 (1972).

254. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).

255. Exec. Order No. 9102, 3 C.F.R. 1123 (1938-1943).

256. See JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* 2 (1954).

257. Act of Mar. 21, 1942, ch. 191, 56 Stat. 173.

258. See COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 4-8 (1982) [hereinafter *PERSONAL JUSTICE DENIED*].

259. MORTON GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* 232 (1949).

the government engage in wholesale condemnation of any alien group."²⁶⁰

Gordon Hirabayashi, an undergraduate student at the University of Washington, was convicted for ignoring an order to remain in his residence between 8 p.m. and 6 a.m. and to report to a "civilian control station" prior to leaving a designated military area. In *Hirabayashi v. United States*,²⁶¹ the Court upheld the curfew, concluding that "reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion."²⁶² Without any independent review of the factual basis for the judgment that a curfew was necessary or even reasonable, the Court assumed that the military would not have put a curfew into place unless it was necessary. Notably, the Court did not find independent presidential power for the curfew. Instead, Chief Justice Stone emphasized that the President's order had the support of Congress, albeit after the fact. Thus, the constitutionality of the curfew had to be determined by pitting Hirabayashi's rights against the whole of the war powers of the government, in a declared war against an enemy which had attacked the United States.²⁶³ Stone also conceded that during a war, "residents having ethnic affiliations with an invading enemy may be a greater source of danger"²⁶⁴ than others, thus legitimating racial discrimination by the government when national security is perceived to be at risk.

Fred Korematsu was an American citizen who could neither read nor write Japanese, who had been turned away from service in the U.S. military on account of ulcers, and who, because he refused to leave the Caucasian woman he planned to marry, was convicted for remaining in one of the military zones designated by the commanding general. In the Supreme Court *Korematsu* decision,²⁶⁵ Justice Black emphasized that "all legal restrictions which curtail the civil rights of a single racial group" must be subjected to "the most rigid scrutiny."²⁶⁶ But the "rigid scrutiny" did not include examining whether the threat of sabotage and

260. *Id.* at 233. If the reader is unpersuaded that the detention and relocation were conscious discrimination against Japanese Americans and not necessary reactions to an extreme emergency, consider the five decades of discrimination against Japanese Americans prior to Pearl Harbor, documented especially in California. *See id.* at 129-79; *see generally* PETER IRONS, *JUSTICE AT WAR* (1983).

261. 320 U.S. 81 (1943).

262. *Id.* at 94.

263. *Id.* at 91-92.

264. *Id.* at 101.

265. *Korematsu v. United States*, 323 U.S. 214 (1944).

266. *Id.* at 216.

espionage justified the exclusion program. Thus, exclusion was treated like curfew by the Court, upheld as reasonable based on the facts existing at the time the order was issued. "Rigid scrutiny" in theory became minimal review in fact.

Of the three dissenting justices, Murphy and Jackson concluded that the exclusion orders were not only unconstitutionally racist, but were also beyond the constitutional authority of any *civil* power to implement. Their view was that only military authority could take such extreme measures, and then only under a declaration of martial law and a suspension of the writ of habeas corpus.²⁶⁷ Justice Jackson made his point eloquently:

When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require a [military] commander to act as a reasonable man . . . a commander focusing the life of a community of defense is carrying out a military program; he is not making law in the sense the courts know that term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law. But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.

. . . .²⁶⁸

Indirectly, Justices Murphy and Jackson also chastised the Congress. By signing on to the executive's program in 1942 with a simple one sentence statute criminalizing violations of the military orders, Congress effectively permitted the military the luxuries of martial law without a declaration and, worse, graced the military program with the mantle of civil authority.²⁶⁹

From the perspective of constitutionalism, the decisions of the Court in *Hirabayashi* and *Korematsu*, and the related efforts of the elected branches, were abhorrent. There was no evidence to support the claim of necessity for the program.²⁷⁰ During the six months between Pearl Harbor and the Exclusion Order, interest in obtaining valuable Japanese

267. See *id.* at 243–44 (Jackson, J., dissenting); *id.* at 241 (Murphy, J., dissenting).

268. *Id.* at 244.

269. See CORWIN II, *supra* note 251, at 98. In a third case, *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court granted habeas corpus relief to a Japanese American woman whose loyalty had been conceded by the Relocation Authority.

270. See PERSONAL JUSTICE DENIED, *supra* note 258, at 4–8.

properties and general hysteria were certainly on the rise on the west coast, but a Japanese invasion of the west coast was no more imminent in May of 1942 than it had been the day after Pearl Harbor. As Corwin lamented, "[T]he sober fact is that neither on the west coast nor in the Hawaiian Islands was one single Japanese, citizen or non-citizen, convicted of one single act of sabotage or espionage in the entire course of the war."²⁷¹ Nearly all the Japanese American population remained in detention camps for the duration of the war.²⁷² Thus, one of the most blatant forms of military rule was not only permitted to stand; it was given constitutional legitimacy as a reasonable exercise of the president's commander-in-chief powers, and of the war powers of Congress and the president acting in concert, during a wartime emergency.

While Justice Jackson's eloquent dissent captures the dangers of constitutional relativity in times of emergency, even he fails to accept the task of judging the military's program by constitutional standards. Notwithstanding the Court's inability to assess fairly the military necessity for the exclusion program, it was not thereby excused from reviewing the consistency of the military orders with the Fourteenth Amendment.

3. Operations CHAOS and COINTELPRO

The National Security Act of 1947²⁷³ defined the duties of the Central Intelligence Agency (CIA) broadly, but in a context of concern about foreign intelligence. That the activities of the CIA were to be confined to foreign intelligence is supported by the legislative history²⁷⁴ and the Act's provision that "the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions."²⁷⁵ In addition, it was widely understood in 1947 that threats to "internal security" included those posed by domestic groups with foreign connections.²⁷⁶

Notwithstanding the fact that the Federal Bureau of Investigation (FBI) had assumed the responsibility for internal security investigations on order from the President, the CIA wasted no time embarking on its own domestic spying program. The CIA defended its actions in part by

271. CORWIN II, *supra* note 251, at 99.

272. See GRODZINS, *supra* note 259, at 232.

273. 50 U.S.C. §§ 401-405 (1988 & Supp. II 1991).

274. SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94TH CONG., 2D SESS. 136 (1976) [hereinafter CHURCH COMMITTEE REPORT].

275. 50 U.S.C. § 403(d)(3) (1988).

276. CHURCH COMMITTEE REPORT, *supra* note 274, at 138.

reference to another provision in the 1947 Act which charges the director of central intelligence with the responsibility of protecting intelligence sources and methods from unauthorized disclosure.²⁷⁷ Thus, according to CIA logic, it was permissible to investigate domestic groups and individuals because of any remote possibility that the activities of the groups might threaten a CIA installation, recruiter, or contractor.²⁷⁸ Although it is clear from the 1947 legislative record that the Agency was to be "virtually excluded from acting within the United States,"²⁷⁹ domestic surveillance and disruption programs emerged to serve the political aims of the executive branch.

During the Vietnam War, the CIA mounted an extensive program — Operation CHAOS — to identify and monitor domestic critics of the war, ostensibly for the purpose of ascertaining the extent of foreign influence on the antiwar movement. The Agency compiled computer files on approximately 7,200 Americans (and from these files, generated a computerized index of approximately 300,000 names) involved in antiwar activities, infiltrated organizations, opened mail, collected non-public information on activists within the United States, and monitored international phone, telegraph, and radio traffic.²⁸⁰

Originally established at the request of President Lyndon Johnson in 1967, Operation CHAOS was carried on jointly with the FBI. Although the project turned up no evidence of foreign involvement in the antiwar movement, the operation continued into the Nixon presidency, and CIA agents spied on American citizens at least into 1973.²⁸¹ As late as 1972, an internal report prepared by the CIA inspector general expressed concern

over what appeared to constitute a monitoring of the political views and activities of Americans not known to be or suspected of being involved in espionage. . . . [including] prominent persons . . . whose comings and goings were not only in the public domain but for whom allegations of subversion seemed sufficiently nebulous to raise renewed doubts as to the nature and legitimacy of the []CHAOS program.²⁸²

277. 50 U.S.C. § 403(d)(3) (1988).

278. CHURCH COMMITTEE REPORT, *supra* note 274, at 138.

279. *Id.* at 139.

280. *See generally* COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 131–50 (1975) [hereinafter ROCKEFELLER REPORT].

281. *See* JOHN RANELAGH, THE AGENCY 533–36 (1986). The program was officially terminated in 1974. ROCKEFELLER REPORT, *supra* note 280, at 148.

282. RANELAGH, *supra* note 281, at 534–35 (quoting SELECT COMM. TO STUDY

However, as former CIA agent John Ranelagh has written, "[t]here was a feeling . . . that Nixon . . . wanted to use the agency for partisan political purposes and that Chaos was an example of the agency prostituting itself to this end."²⁸³

In a lawsuit which sought damages for CIA violations of constitutional rights and of its charter in conducting Operation CHAOS, the government admitted that at least some of the plaintiffs were targets of the activities complained of. But when the plaintiffs sought through discovery to learn more about the particulars of the CIA actions, the Agency invoked the state secrets privilege²⁸⁴ to justify withholding the information, claiming that disclosure would seriously injure the national security.²⁸⁵

After a cursory review, the courts endorsed the CIA's state secrets argument. Because no individual could demonstrate a nexus between government activities and a personal injury without the withheld materials, the lawsuit was dismissed.²⁸⁶ Apart from the fact that the 1947 statute did not authorize CHAOS, the practical effect of the court's dismissal was to excuse violations of constitutional rights of citizens after a bare recitation of some national security consideration.

Congress did not intend to permit a program such as CHAOS. On the other hand, the executive branch, from President Johnson to President Nixon to CIA officials, when informed of the illegality of their actions, simply cloaked their actions in more secrecy to avoid exposure. The judiciary shares the blame for the abuses of emergency powers in CHAOS. The effect of the *Halkin* decision is to deny that the judicial power extends to remedy repeated and extensive violations of the Constitution. The state secrets privilege itself is a judicial construct, created to shield the courts from questioning national security decisions made by the executive.²⁸⁷

At about the same time that Operation CHAOS was carried out by the CIA, the FBI had undertaken COINTELPRO, a program intended

GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, U.S. SENATE, 94TH CONG., 2D SESS., FINAL REPORT, BOOK III, 705-06 (1976).

283. *Id.* at 535.

284. The state secrets privilege is an evidentiary rule which forecloses the discovery of evidence in litigation where the evidence sought "reasonably could be seen as a threat to the military or diplomatic interests of the nation." *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

285. *See Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982).

286. *Id.* at 987-88.

287. *See generally* Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840 (1989).

“to expose, disrupt and otherwise neutralize the activities”²⁸⁸ of people who opposed American involvement in the Vietnam War and people seeking improvement of civil rights for Black people. Persons involved in nonviolent political expression were targeted by the program, regardless of their involvement in disorders. Among the goals of COINTELPRO was the prevention of coalitions among Black and New Left groups. Thus, the FBI sought to create racial animosity between Blacks and Whites; to interfere with lawful demonstrations; to create disharmony within groups; and to intimidate the targets of surveillance.²⁸⁹

During COINTELPRO, special security precautions were taken to avoid public exposure. When the FBI recognized that what it was doing was unlawful, rather than terminating the abuses, it merely tightened the security surrounding the program. Examples of FBI activities include the preparation and distribution of false press releases calculated to tarnish the reputation of Black leaders and their organizations; the creation and distribution of a racially inflammatory leaflet, directed to Black activist groups and falsely attributed to New Left White groups; the infiltration of demonstrations, and attempts to interfere with them and to assume leadership roles in the groups and then to foment dissent within the groups; the conducting of harassing interviews to intimidate politically active people; and the creation of a bogus student newspaper, urging students to question the motives of those opposed to the war.²⁹⁰

The lawsuits spawned by the COINTELPRO²⁹¹ operation illustrate an attempt at a judicial corrective for executive branch abuses of emergency powers. In *Hobson*,²⁹² after remarking that “[t]he extraordinary nature of these charges makes this an easy case,”²⁹³ the court found violations of the plaintiffs’ First Amendment rights of association and Fifth Amendment right affording protection from emotional distress and impairment of reputation and earning capacity.²⁹⁴ Yet the court’s opinion leaves ample room for FBI activities where there is some evidence of

288. *Hobson v. Wilson*, 737 F.2d 1, 10 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (quoting memorandum prepared by FBI defendant, C.D. Brennan, to W.C. Sullivan, IV Joint Appendix at 1742, *Hobson* (Nos. 82-2159, 82-2160, 82-2221, 82-2226, and 82-2227)). See generally SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, U.S. SENATE, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II, FINAL REPORT, S. REP. NO. 755, 94TH CONG., 2D SESS. (1976) [hereinafter SENATE REPORT].

289. See *Hobson*, 737 F.2d at 11.

290. *Id.* at 12.

291. See *supra* text accompanying notes 288–90.

292. See *Hobson*, 737 F.2d at 1.

293. *Id.* at 27.

294. *Id.* at 27–29.

planned espionage or terrorism. If the Bureau has a proper investigative purpose in addition to an illegitimate goal of subverting expressive activity, its surveillance might be upheld in another case.²⁹⁵

It was apparently only the availability of critical evidence or lack thereof which permitted the plaintiffs to prevail in *Hobson* and caused them to fail in *Halkin*. Because the CIA has the easier time justifying a national security basis for withholding information, the FBI's activities may be more readily subject to judicial review. Moreover, in addition to the expense, slow pace, and uncertainty of litigation, damage remedies may provide little incentive for abusive officials to desist from their illegal behavior.

The similarities between these illegal surveillance examples and the Argentine experience are striking. When courts vindicate an individual or group harmed by the executive's exercise of emergency powers, the damages paid are a small price for the maintenance of the government's discretion. When this occurs, the courts contribute to a dialogue which only serves further to entrench emergency powers as part of the life of the nation and its laws. *Hobson* thus serves in the United States the same function that *Timerman* serves in Argentina — while most who suffer due to executive exercise of emergency powers have no remedy, the official record says that the occasional abuses were rectified, according to law.²⁹⁶

4. The Iran-Contra Affair²⁹⁷

The Iran-contra affair had its origins in two initially unrelated areas in which President Ronald Reagan had a deep personal interest — the plight of U.S. hostages being held in Lebanon, and the efforts of what Reagan called the “freedom fighters” or the “contras,” a guerilla group fighting to overthrow the leftist Sandinista government of Nicaragua. Although it remains unclear how deeply President Reagan himself became involved in the operations that eventually erupted in scandal, his aides took his emotional attachment to the hostages and to the contras seriously. Between early 1982 and November 1986, when a Beirut daily

295. *Id.* at 27.

296. See FRANK J. DONNER, *THE AGE OF SURVEILLANCE* xiii (1980).

297. Unless otherwise noted, this narrative is drawn from SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, U.S. SENATE AND SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, U.S. HOUSE OF REPRESENTATIVES, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, SEN. REP. NO. 216, 100TH CONG., 1ST SESS. (1987) and H.R. REP. NO. 433, 100TH CONG., 1ST SESS. (1987) [hereinafter IRAN-CONTRA REPORT]; THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* (1991).

broke the scandal, a series of covert operations were undertaken, authorized by executive officials, effectively to conduct foreign policy out of public and congressional view.

In the case of Nicaragua, the Congress initially went along with Reagan administration requests to fund CIA support for the contras, on the theory that the funds would be used to interdict arms which were allegedly being sent through Nicaragua on their way to leftist guerrillas fighting the government of El Salvador. When it became clear in 1982 that the real mission of the contras and their administration supporters was to overthrow the Sandinistas, Congress balked at such interventionist tactics and sought to use its appropriations power to facilitate regional peace agreements underway in the area. Congress first merely restricted contra aid but, for fiscal year 1985, it cut off aid to the contras altogether.

The President and his aides sought ways to circumvent the legal prohibition. When appropriated funds ran low or were insufficient to achieve desired levels of support for the contras, solicitations of foreign leaders and wealthy individuals were made on the contras' behalf. Then, sometime in late 1985 or early 1986, the secret contra resupply operation became intertwined with another secret operation in Iran, when profits from arms sales were diverted to the contras.

The Iranian venture began when U.S. officials approached Iranians about buying arms for use in Iran's war with Iraq, in return for Iranian assistance in securing the release of hostages being held in Lebanon. Arms sales took place in 1985 and 1986 with the cooperation of Israel. The transfers were undertaken secretly, in violation of the Arms Export Control Act,²⁹⁸ which forbade arms sales to countries that sponsor terrorism (Iran was named as such a country by the State Department at the time) and required the president to notify Congress of arms shipments.

Congress had provided for covert operations by statute, but it insisted that certain committee members be notified of covert operations either beforehand or, in rare circumstances, "in a timely fashion."²⁹⁹ There was not even a pretense of complying with the covert operations statute in either the Iran or Nicaragua operations.

Although Congress sought to control the kinds of abuses of executive power that dominated the Iran-contra scandal,³⁰⁰ Congress was far from blameless in the affair. When the media reported continuing CIA

298. 22 U.S.C. § 2753 (1988 & Supp. III 1991).

299. 50 U.S.C. § 413 (1988).

300. See *supra* text accompanying notes 297-99.

activities in Nicaragua after aid was curtailed, Congress failed to investigate and, intentionally or not, it may have signalled to the executive branch that it was not really concerned about what was happening.³⁰¹ Only after the scandal of diverted arms sales profits and arms for hostages was revealed by the Beirut newspaper did Congress take its investigative responsibilities seriously.

The congressional investigation itself was a circus of mismanagement, poor strategy, and missed opportunities. The investigators focused more on individual responsibility and morality than on a continuing pattern of executive circumvention of legislation, and they failed to recommend reforms that would make a recurrence less likely.³⁰²

The failed investigation also prejudiced the efforts to obtain criminal convictions against those engaged in wrongdoing. The immunized congressional testimony of Oliver North and John Poindexter and the attendant publicity was found by courts to have so tainted the later efforts at prosecuting them as to make it virtually impossible for them to be convicted.³⁰³ The congressional investigators were so intent in questioning North and Poindexter in making out a grand conspiracy, that they failed to highlight the obstruction of justice and false statement violations that were occurring all around them.

What the President and his subordinates effectively created in the Iran-contra affair was a secret government, extralegal and obedient only to the President. The cabal operated like the royal prerogative described by Locke and exercised by King George III. In the President's mind, the emergencies were at hand: hostages needed to be brought home at any cost, and communism could not gain a foothold in Central America, no matter what the Congress legislated.

5. The Bush Pardons

Of all the president's powers, the pardon power is perhaps the most controversial, because it is neither shared nor checked by another branch. From its monarchical origins in England,³⁰⁴ the pardon power was given by our framers to the president in an unstable time when it

301. See EUGENE ROSTOW, *PRESIDENT, PRIME MINISTER, OR CONSTITUTIONAL MONARCH?* 22-23 (1989).

302. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1274-76 (1988).

303. See *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992).

304. See MOORE, *supra* note 198, at 17.

was thought that the president may be able to employ the pardon as a means of quelling a rebellion.³⁰⁵ Nonetheless, when the pardon power is abused, the unavailability of a constitutional counterweight, short of impeachment, makes the abusive act all the more abhorrent.

The Constitution grants to the president the "power to grant . . . pardons for offenses against the United States, except in cases of impeachment."³⁰⁶ Most presidents have granted hundreds of pardons during their terms in office. A few, including Andrew Johnson and Jimmy Carter, have granted blanket amnesties to a class of people. Johnson granted amnesty for Confederate soldiers after the Civil War, Carter for draft resisters after the Vietnam War.

Pardons before conviction are apparently constitutional as well,³⁰⁷ although they are rarely given. In the Kennedy, Johnson, and Nixon administrations, only three of 2,314 pardons preceded conviction.³⁰⁸ President Ford's pre-conviction pardon of former President Nixon was thus exceptional.

A pardon is intended to prevent punishment of people who are innocent of wrongdoing, to correct an injustice.³⁰⁹ Normally, therefore, the criminal justice system should be permitted to run its course in all but extraordinary instances; only if the courts have tried and failed to do justice in an individual case should pardons be considered. A pardon before trial actually serves to obscure information coming to light that could justify the pardon.³¹⁰

After the years of secrecy, deception, and lying to the Congress and to the public about the Iran-contra affair through the better part of the Reagan and Bush presidencies, it came as a grave disappointment, though not a great surprise, that President Bush, with impeccable timing, chose to issue Christmas eve pardons to six officials indicted for Iran-

305. See *id.* at 25. Although the Framers recognized that the pardon power they granted was king-like, they apparently chose to ignore its undemocratic tendencies in favor of what they saw as its law enforcement benefits.

306. U.S. CONST. art. II, § 2, cl. 1.

307. See *Ex parte Grossman*, 267 U.S. 120 (1925). We say "apparently" because the constitutional text does not decide the issue, and good arguments support a requirement for conviction before pardon. However, a proposal at the Convention to limit pardons to the period after conviction was withdrawn after a rebuttal that the power should be unlimited so that presidents may use the pardon strategically to gain the testimony of accomplices. MOORE, *supra* note 198, at 218.

308. See *A Pardon For Nixon and Watergate is Back*, CONG. Q. WKLY., Sept. 14, 1974, at 2458.

309. MOORE, *supra* note 198, at 212-13.

310. *Id.* at 217-19.

contra wrongdoing, two of whom had not yet been tried.³¹¹ Among those pardoned was former Secretary of Defense Caspar W. Weinberger, whose pending trial on charges that he lied to Congress about his knowledge of the arms sales to Iran and efforts by other countries to help underwrite the contras in Nicaragua was expected by some to focus on President Bush's role in endorsing the secret arms sales to Iran.³¹² The special prosecutor in the cases, Lawrence E. Walsh, responded to the pardons this way:

President Bush's pardon . . . undermines the principle that no man is above the law. It demonstrates that powerful people with powerful allies can commit serious crimes in high office — deliberately abusing the public trust without consequence. . . . "The Iran-contra cover-up, which has continued for more than six years, has now been completed"³¹³

Walsh also hinted that the pardon could be related to Bush's own role in the scandal. He claimed that Weinberger's hidden notes may have "forestalled impeachment proceedings against President Reagan,"³¹⁴ and he criticized Bush for "his own misconduct" in failing to turn over his personal notes taken during the 1986 campaign.³¹⁵ Walsh revealed for the first time after the pardons that Bush himself was a subject of his investigation, on the basis of the President's failure to reveal or turn over relevant notes about Iran-contra.³¹⁶

President Bush attempted carefully to lay the foundation for his pardons. In his statement, he analogized the Iran-contra pardons, coming at the end of the Cold War, to others in U.S. history that have been granted "when . . . wars have ended." Thus, the emergency of war legitimates the "healing tradition" and the use of pardons "to put bitterness behind us and look to the future."³¹⁷ His analogues — Madison's pardon of Lafitte's pirates after the War of 1812, Andrew Johnson's pardon of Confederate soldiers, and Truman and Carter's amnesties for war resisters — are pitifully weak. First, the Cold War was neither a fighting war nor one which invoked emergency conditions in the United

311. David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover Up'*, N.Y. TIMES, Dec. 25, 1992, at A1.

312. *Id.*

313. Independent Counsel's Statement on the Pardons, *quoted in id.*

314. *Id.*

315. *Id.*

316. *Id.* at A22.

317. Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992) [hereinafter Proclamation 6518].

States, at least not in the 1980s. Second, the Iran-contra crimes had nothing to do with U.S.-Soviet shadow-boxing. Third, none of the supposedly analogous crimes were attempts to conceal illegal executive branch conduct from the Congress and the public. The danger of the executive deciding the justness of its own cause, especially when Congress has legislated to prevent the very actions that were taken, puts those accused and convicted of Iran-contra crimes in a very different category. Congress was unable to have a serious policy discussion with executive officials because it was denied access to critical facts. Most of those pardoned had concealed information that contradicted what the administration had earlier told the public.

President Bush created the appearance that he acted to save himself. Unlike President Ford, whose mistaken pardon of former President Nixon was at least undertaken by a sitting president who had two years remaining in office and a reelection campaign to take to the voters, and who had no complicity in the Watergate scandal that was the undoing of Nixon, President Bush waited until after the election, in the waning days of his term, to pardon someone who could have implicated Bush in the scandal.

Illustrating Nixon's statement that "when the President does it, that means that it is not illegal,"³¹⁸ President Bush's pardons of the Iran-contra actors once again signal that government officials may act illegally if their actions are good for the country. "Good for the country" is, in this rarefied sense, a judgment made by the executive without regard to the Constitution or laws.

Iran-contra typifies the contemporary usurpation of power by the executive branch in the United States and the extent to which executive claims of emergency effectively provide officials with immunity for their otherwise illegal conduct. The 1985 and 1986 arms sales to Iran, a supposed and hoped-for trade for hostages, violated the Arms Export Control Act, the National Security Act, and the President's own ban on arming terrorist nations.³¹⁹ The diversion of profits from the sales to the Nicaraguan contras was undertaken in the face of a congressional ban on aiding the contras.³²⁰ Throughout, a group of unelected officials — in the CIA, the National Security Council, and elsewhere — hired operatives and worked secretly in aid of the President literally to take over part of the nation's foreign policy machine and use it for ends and

318. See *supra* text accompanying note 1.

319. See *supra* text accompanying note 298; IRAN-CONTRA REPORT, *supra* note 297, at 415-16.

320. See *supra* text accompanying note 297.

through means expressly made unlawful by the Congress or forbidden by the Constitution. While the prosecution of these few individuals in a sense trivialized the scandal by pursuing charges not central to the wrongdoing,³²¹ the pardons are unexcusable efforts further to elevate executive hegemony over the government and people.

The only constitutional remedy against the President³²² for such abuses in the Iran-contra affair — impeachment — is not realistically available and is inadequate to protect against a very powerful president. First, the activities complained of were conducted in secret, and many of the details were then and some are still not known. Subordinates protected the President by lying about the facts when asked. An impeachment inquiry may well have failed for lack of information. Second, President Reagan was a highly popular president in 1986 and 1987, when the scandal broke. Citizens did not relish the thought of his impeachment, at least in part because they did not come to grips with the complexities of Iran-contra and could not bear the excruciating length and boredom of the congressional hearings. When Representative Henry Gonzales introduced six articles of impeachment against Reagan in 1987, his act merited only brief wire service news accounts.³²³ Nor was Congress equipped with the institutional will to take on Ronald Reagan, who perhaps lacked the requisite intent to commit an impeachable offense in any case.

6. Kidnapping Suspects Abroad

There is a consensus in international law condemning one nation's violation of the territorial integrity of a friendly neighboring nation.³²⁴ Indeed, according to the American Law Institute Restatement of Foreign Relations (Third),

[i]f a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes

321. See Linda Greenhouse, *Law Ill-Equipped for Politics*, N.Y. TIMES, Dec. 28, 1992, at A1.

322. For an argument that the president may be indicted for criminal conduct prior to impeachment, see Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 22-24 (1992).

323. *Id.* at D8.

324. See, e.g., Charter of the Organization of American States, Apr. 30, 1948, art. 18, 2 U.S.T. 2394, 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847; U.N. CHARTER art. 2, ¶ 4.

abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.³²⁵

As recently as 1985, the United States stood firmly by the traditional rule. When the legal adviser to the State Department was asked at a congressional hearing about kidnapping suspected terrorists on foreign soil, he replied:

Can you imagine us going into Paris and seizing some person we regard as a terrorist . . . ? [H]ow would we feel if some foreign nation . . . came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, . . . because we refused through normal channels of international, legal communications, to extradite that individual?³²⁶

In 1989, in the context of discussions of the Bush administration anti-drug policy, then-Assistant Attorney General William P. Barr opined that the FBI could legally seize suspects in foreign countries.³²⁷ Shortly thereafter, Drug Enforcement Agency (DEA) officials offered to pay a reward for the return of a Mexican doctor accused of taking part in the brutal torture and murder of a U.S. drug agent. On April 2, 1990, doctor Humberto Alvarez-Machain was abducted from his office in Guadalajara and delivered to U.S. officials in Texas. After the Mexican government protested his abduction and Alvarez-Machain challenged the jurisdiction of U.S. courts to try him in violation of the extradition treaty between Mexico and the United States,³²⁸ the trial court and court of appeals ordered that the murder indictment be dismissed and that Alvarez-Machain be repatriated to Mexico.³²⁹

The Supreme Court reversed.³³⁰ The Court admitted that the kidnaping may have been "shocking" and "in violation of general

325. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 cmt. c (1987).

326. *Bill to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad, 1985: Hearing on S.1373, S.1429, S.1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 63 (1985).*

327. *See FBI Authority to Seize Suspects Abroad, 1989: Hearing before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 4-5 (1989).*

328. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

329. *See United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), aff'd sub nom., United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).*

330. *United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).*

international law principles."³³¹ Nonetheless, said the majority, Alvarez-Machain may be tried for murder in the United States because the extradition treaty at issue says nothing explicit about the obligation "to refrain from forcible abductions."³³² The decision of whether to try him or return him to Mexico is, said the Court, "a matter for the Executive Branch."³³³ Thus, the treaty's extradition provisions — long, detailed, and solemnly negotiated by U.S. and Mexican diplomats — could simply be ignored in the interests of executive branch law enforcement aims. Its terms became merely "optional,"³³⁴ as noted by the dissenters.

In this instance, the Court did not invent a legal theory to justify state kidnapping. It merely upheld what the executive branch said the law was. State kidnapping makes the United States a "sponsor of vigilante values," according to a leading British weekly.³³⁵ The decision sparked widespread criticism internationally³³⁶ and in the United States.³³⁷ Apart from signalling to the world that consensus on principles of international law will not be honored by the United States (so that there is no gain in anyone else playing by the rules either), the Court's decision legitimated unbridled executive discretion to employ draconian police tactics.

Ironically, the DEA apparently sought revenge against the wrong man. After two weeks of testimony in his murder trial, Humberto Alvarez-Machain was acquitted by a federal judge, who characterized the case against Alvarez as based on "hunches" and the "wildest speculation."³³⁸

IV. SUMMING UP

A cynic may say that the modern presidency is simply too powerful to be effectively limited by the laws and institutions of a democracy.³³⁹

331. *Id.* at 2196.

332. *Id.* at 2193, 2195.

333. *Id.* at 2196.

334. *Id.* at 2199.

335. *America's Vigilante Values*, THE ECONOMIST, June 20, 1992, at 17.

336. David O. Stewart, *The Price of Vengeance*, 78 A.B.A. J., Nov. 1992, at 49-50; see also Tim Golden, *To Mexico, High Court Sounds Like a Bully*, N.Y. TIMES, June 21, 1992, § 4, at 3 (discussing Mexican criticism of the decision).

337. See, e.g., Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992); Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757 (1992); Anthony Lewis, *Whatever the King Wants*, N.Y. TIMES, June 21, 1992, at E17; Neil A. Lewis, *White House Tries to Quiet Storm Abroad Over Court's Right-to-Kidnap Ruling*, N.Y. TIMES, June 17, 1992, at A8.

338. Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

339. See generally Linz, *supra* note 7.

In Argentina, the government now functions essentially by presidential decrees.³⁴⁰ The Congress and judiciary have been rendered practically vestigial since the 1930s, as military and civilian executives have assumed ever greater powers, aided, when called upon, by endorsement from the courts. In the United States, the path to presidential hegemony has been different, but the bottom line is similar. As presidents beginning with Theodore Roosevelt pressed relativistic claims of constitutional emergency powers, the Congress delegated sweeping emergency powers to the president in hundreds of statutes, so broad in scope that only rarely have post-World War II presidents had to rely on independent executive power to justify emergency actions. Although Congress sought to impose controls on the executive in the 1970s, after the abuses of the Vietnam War and the Watergate scandal,³⁴¹ those efforts have either been dismantled or are circumvented by executive branch officials who behave as though legal restrictions should be ignored if they may impede obtaining the president's policy goal.³⁴²

An illustration of the extent of presidential power in the United States is provided by one of the executive orders issued during President Reagan's last months in office. It catalogues his emergency powers: the use of military personnel in civilian law enforcement, the regulation of aliens, the imposition of wage and price controls, the control of civilian transportation, the acquisition and lease of property, and the control of civilian nuclear plants, all triggered by "any occurrence . . . or other emergency, that seriously degrades or seriously threatens the national security of the United States."³⁴³ At the same time, because ever-greater swaths of governmental power are exercised by the executive branch, some reformers urge that to reduce conflicts among the branches, the presidency should be made stronger.³⁴⁴

In Argentina, a parallel trend is ongoing. Before Menem, only two presidents since 1930 completed their terms of office. Since 1930, coups d'état and de facto government have been the rule, and constitutional government the exception. Lawless abuses of power, clothed in claims of legal sanction, culminated in the 1970s in the Videla military

340. President Menem has issued 244 of the 269 emergency decrees issued since 1853. Don Podesta, *Argentine Vote May Become Referendum: Menem Asks Mandate to Seek Reelection*, WASH. POST, Sept. 2, 1993, at A19.

341. See Lobel, *supra* note 30, at 1412-18.

342. *Id.*; see also Koh, *supra* note 302, at 1305-06; Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 734-36 (1992).

343. Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (1988).

344. Lobel, *supra* note 30, at 1421-22.

government and its Dirty War. Once the nation was returned to civilian rule following the Dirty War, President Alfonsín sought in vain to rally the nation to adhere to constitutional values.³⁴⁵ Unable to finish his term, Alfonsín limped away with the classic Argentine inflationary spiral at its peak and the economy and public confidence in government at dangerous lows. President Menem took bold action, but much of it was of doubtful constitutionality — the freezing of bank deposits and substitution of government bonds for currency, the pardons of Dirty War officers, and the sacking of the Supreme Court.³⁴⁶ Even as Menem moved to tackle economic problems, Argentine army dissidents revolted and captured the Argentine army headquarters and four other installations, before being defeated by loyalist troops.³⁴⁷

Unwilling to concede the futility of law in this area, the remaining pages of this article offer a set of comparative assessments of presidential emergency powers in Argentina and the United States. It concludes by reflecting briefly on reforms that may help reverse the trend toward lawless executive rule in these two nations.

A. A Comparative Assessment of Presidential Emergency Powers

1. Traditions

Law has played fundamentally different roles in the development of Argentina and the United States. The political evolution of Argentina was determined by the power of autocrats and military might. Inherited Spanish authoritarianism and widespread inattention to rules limiting the government's power paved the way for the *caudillos*. In contrast, the North American colonial revolutionaries of 1776 were legalists, even in rebellion, and their break from England came only after failed attempts to claim what they perceived as their legal rights under English law. This European liberal legal tradition, along with the need to compromise in the colonies and states in order to defeat common foes and advance their collective enterprise, effectively steeped the fledgling United States in a tradition of the rule of law.

Of course, the legal cultures do not by themselves account for the imperial presidencies in our nations. From the beginning, Argentines

345. PONEMAN, *supra* note 11, at 141–47.

346. See Nathaniel C. Nash, *Justice Proves Sluggish in Argentine Scandals*, N.Y. TIMES, Dec. 15, 1991, at A19 (by decree, President Menem expanded the Supreme Court from five to nine members, enabling him to appoint six of its members).

347. Shirley Christian, *Argentine Army Revolt is Crushed Days Before Planned Bush Arrival*, N.Y. TIMES, Dec. 4, 1990, at A1.

have had a fascination with strong leaders. The early yearning, in Martín Fierro's famous lament, for "a real *criollo* to set things straight"³⁴⁸ was met by Rosas and perhaps resurrected by the "mystifying success of Perón and Peronism."³⁴⁹

The United States lived its first century with a generally more modest view of the presidency, in part nurtured early on by antipathy toward the English crown and the modest role played by the federal government in most spheres of society before the Civil War and Reconstruction. Toward the end of the nineteenth century, imperial ambitions, a changing world view, and strong personalities such as Theodore Roosevelt and Woodrow Wilson,³⁵⁰ transformed the presidency to one in which inherent power to meet crises became an essential component.

2. The Effect of Presidentialism

From such disparate constitutional foundations, and with so many cultural, social, and economic differences, the similarities of the two modern presidencies in their tendencies to assert legal authority to act outside of normal legal boundaries in emergency conditions appears incongruous. However, the characteristics of presidential systems may themselves account for the parallel accretion of executive emergency power in the nations, and for the concomitant atrophy of the legislative and judicial branches. These checking institutions and mechanisms have failed to a varying extent and for different reasons in Argentina and the United States, but a common cause has been executive disregard for the limits imposed by law.

3. The State of Existing Controls on the President

Due at least in part to European and Chilean influences, and to a desire to control the lingering power of the *caudillos*, Argentina framed its 1853 Constitution to establish a president as the "supreme head of the Nation" for six years. Moreover, the constitutional grants of power to intervene in the provinces and to declare states of siege contributed to a domineering presidency. Exploiting these open textured constitutional powers, the modern Argentine leaders, whether elected or *de facto*, have enveloped countless unilateral emergency actions in the discourse of constitutional rationality.

In the United States, the strong legalist tradition has led the Congress and judiciary to combine their efforts in delegating sweeping

348. Quoted in SHUMWAY, *supra* note 21, at 294.

349. *Id.*

350. See Lobel, *supra* note 30, at 1398-99.

emergency powers to the president, such that relatively few contemporary executive emergency actions have been clothed solely in claims of unilateral constitutional presidential power. Because the U.S. Constitution recognizes only a defensive emergency power for the president as commander-in-chief in responding to an armed attack on the United States, much of the blame for inadequate controls must be borne by the Congress and the courts.

4. Common Abuses of Authority: Economic Emergencies and Pardons

In spite of the differing constitutional and institutional settings for the exercise of emergency powers, our presidents have demonstrated some strikingly similar tendencies. For example, in unilaterally decreeing economic decisions of major significance to the well-being of the nation, our presidents have seized steel mills in the face of a labor dispute;³⁵¹ nullified citizens' bank savings in favor of government replacement certificates;³⁵² seized and transferred assets and suspended private legal claims;³⁵³ and traded arms for hostages in violation of limiting statutes.³⁵⁴

In Argentina, the Menem confiscation of bank assets is but the latest in a line of lawless and corrupt economic measures.³⁵⁵ In the United States, although President Truman lost the battle in the Supreme Court after he seized the steel mills without authority during the Korean War, the presidency has since won the war for virtually unchecked economic power, as is revealed by the bold and unrepentant instances of presidents ignoring statutory restrictions in carrying out favored policies.³⁵⁶

The recent Menem and Bush pardons also reveal the common effects of an uncontrolled presidency. Both sets of pardons — Menem's of the Dirty War officers and Bush's of the Iran-contra figures — threatened constitutional values. While the Argentine leader may have more clearly usurped the written limit of his powers — the congressional amnesty power and the constitutional prohibition of torture — the idea

351. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

352. See *supra* text accompanying notes 209–10 (describing President Menem's confiscation of bank assets).

353. See Koh & Yoo, *supra* note 342, at 744 (describing Presidents Carter's and Reagan's abuses of statutory authority in securing the release of U.S. hostages being held in Iran).

354. See *supra* text accompanying note 297 (describing Iran-contra affair hostage trading).

355. See PONEMAN, *supra* note 11, at 165–70.

356. See Koh & Yoo, *supra* note 342, at 742–50.

of the rule of law as a check on the executive suffered at least as great a blow in the United States, where the president's pardon power is not limited as it arguably is in Argentina.

Indeed, it is the unreviewability of the pardon decision in the United States which renders President Bush's pardons so dangerous. Although the Menem pardons were reviewed, the result was predictable, as the Argentine judiciary has demonstrated scant independence and little interest in applying constitutional law standards to presidential actions.

The common theme invoked in both pardon messages was the need to move on, to put the past period of war and national emergency behind. Each also recognized that the accused were doing what they thought was best for the nation. While the Argentine President may have violated explicit constitutional limits in granting his Dirty War pardons, President Bush abused limits on the pardon power which are equally important, if less explicit.

Just as Argentine citizens distrust their government and react cynically to scandals and official corruption, people in the United States reacted negatively to the Bush pardons, as they have to other recent scandals. By a two-to-one margin, those polled disapproved of the pardons and believed that the "main reason" for his action was "to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-contra."³⁵⁷

5. Democratic Institutions and Processes

The strong presidencies in Argentina and the United States have also served to weaken democracy, albeit in different ways. In Argentina, the existence of strong political parties and mandatory voting, along with proportional representation in the legislature, contributes to legislative stalemate and an inability to present strong opposition to presidential initiatives.³⁵⁸ Ironically, these strongly democratic features of Argentine

357. Adam Clymer, *Bush Criticizes Press Treatment of Pardons*, N.Y. TIMES, Dec. 31, 1992, at A16 (quoting a recent Gallup poll); see generally Daniel Schorr, *Will Bush Pardon Himself?*, N.Y. TIMES, Dec. 29, 1992, at A15 (proposing that there is nothing in the Constitution that would prohibit Bush from pardoning himself). The text of the pardon clause implies that a president could pardon himself, given its specific exception barring pardons "in cases of impeachment." He may not shield himself from Congress, but he could "protect himself from judicial action." *Id.* Schorr admitted that such a pardon was unlikely, and that, given Independent Counsel Walsh's statement that Bush is a subject of investigation, Bush may well spend some of his first months of retirement before a grand jury. *Id.*

358. See Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 152 (1989).

political life actually undermine democratic government.³⁵⁹

In the United States, a weaker party system, lower levels of electoral participation, and winner-take-all voting combine to ameliorate the legislative gridlock suffered in Argentina. Instead of confronting a hopelessly deadlocked Congress, presidents collect majorities from outside their party and, through initiative and congressional acquiescence, dominate government when they have only minority support within the Congress.³⁶⁰

6. Popular Distrust of Government

In seeking the mantle of the worshipped leader Juan Perón, Carlos Saúl Menem dies his hair and flaunts his prominent sideburns, fast cars, and glamorous women with a flamboyance sure to catch the public's attention. By early 1992, President Menem had approval ratings of seventy percent. His economic program reduced foreign debt, obtained new foreign loans, buoyed the stock market, stemmed inflation, and spurred foreign investment. All the while, however, Menem was further weakening the institutions that are capable of checking the misuse of official power, as he made personal decisions by decree without any involvement for the Congress, the cabinet, or the Economy Ministry.³⁶¹ As concerns about corruption in his government mount, and the economy improves enough to permit the public to focus on something other than its financial woes, Menem's personal control of the government, including the Congress and the courts, is an issue of increasing importance in Argentina.³⁶²

Yet the overriding public sentiment may be indifference, even cynicism. The 1991 trials of those accused of attempting a coup in December 1990 were not generally attended by the public, apparently because it was assumed that since many of the accused were pardoned by Menem in 1989, there would be no justice this time. Moreover, many apparently feel that if the corruption of the executive branch is fully exposed and Menem is forced to resign, the loss of another civilian president will only return Argentina to the uncertainties of military rule.³⁶³

359. *Id.* at 154.

360. *Id.* at 152.

361. See Nathaniel C. Nash, *Argentina's President Turns Economics Into Poll Approval*, N.Y. TIMES, Feb. 16, 1992, at A20; Don Podesta, *Argentine Vote May Become Referendum*, WASH. POST, Sept. 2, 1993, at A19.

362. See Nathaniel C. Nash, *Argentine Chief Suffers Setback as His Senate Candidate Loses*, N.Y. TIMES, June 30, 1992, at A8.

363. See Alma Guillermoprieto, *Letter from Buenos Aires*, THE NEW YORKER, July 15, 1991, at 64, 71-72.

In the United States, after the release of the Pentagon Papers uncovered decades of deceit and obfuscation directed by the executive branch at the Congress and the people, concerning U.S. involvement in Southeast Asia, a hardened disaffection with government developed. When the Iran-contra affair erupted a decade later, public cynicism was again fueled, reinforced more recently by the Lavoro Bank and Iraqgate scandals and President Bush's pardons of six Iran-contra figures.³⁶⁴

B. *Constitutional and Institutional Reforms*

Constitutional government has been a failure in Argentina. Owing to a combination of factors — among them the *caudillo* tradition, lack of a history of respect for constitutional rule, chronic economic problems, and the dominance of the military in civilian life — twentieth century Argentina has stumbled from crisis to crisis. For the most part, laws are enforced, streets are relatively safe, and the legal community operates effectively to assist business clients or defend against criminal charges. The problem is the government's disregard for the Constitution and its processes.³⁶⁵ It is not that the shortcomings in the Constitution itself account for the failure of the government to abide by its terms. Instead, it is simply that no tradition of respect for constitutional values has developed. Nevertheless, devoting attention to a few glaring structural problems in the 1853 Constitution may help move Argentina toward a norm of constitutional government and the rule of law.

First, the six-year presidential term and unfettered presidential power to appoint high ranking officials have increased executive power. The framers knew of that tendency; they wanted a strong executive. History has shown, however, that the longer term and unchecked appointment power only exacerbate the propensity of presidents to disobey legal restrictions. The presidential term should be shortened to three or four years, with a possibility for reelection.³⁶⁶ The absence of a congressional

364. See Gary Blonston, *Federal Government Mired in Era of Investigation*, CHI. TRIB., Nov. 26, 1992, at 48.

365. See PONEMAN, *supra* note 11, at 127–28.

366. An embarrassing defeat for the Radical Party in October 1993 congressional elections, along with the growing popularity of President Menem, apparently prompted former President and Radical Party leader Raúl Alfonsín to agree to support Menem's proposal to amend the Constitution to permit his immediate reelection to a second term in 1995. Under the agreement, still subject to the approval of the Radical delegation in Congress, the Constitution would be amended to permit two consecutive four-year terms for the president. (Two-thirds of the Congress must approve a resolution of constitutional reform for an amendment to take effect.) In return for their concession on the presidency, the Radicals gained promises from the Peronists to support constitutional changes that would create a prime minister-like position of coordinating minister of the cabinet, who would answer to the Congress, and to support transfer of the power to intervene in the provinces during times of fiscal crisis from the president to the Congress. Nathaniel C. Nash, *Argentine Leader Gains Support to Change Constitution to Allow 2d Term*, N.Y. TIMES, Nov. 16, 1993, at A5.

check on important appointments should be replaced by a provision like the Senate "advice and consent" clause in the U.S. Constitution.³⁶⁷ Cabinet members also wield power unaccountably. The Argentine Constitution requires that all presidential acts and orders be countersigned by a member of the cabinet.³⁶⁸ At a minimum, such power should not be possessed by officials whose appointments are not subject to review by the Congress.

Second, the state of siege mechanism, even if efficacious in the abstract,³⁶⁹ should be amended. Initially, a time limit is needed on the detention of citizens. When detention is extended unreasonably, the right to due process is violated, even under a lawfully declared state of siege. In addition, the prohibition against "punishments" and "conviction" has proven insufficient to prevent indefinite detention, torture, and disappearance. These forms of inhumane treatment are forbidden by the Constitution even during a state of siege. Thus, the executive power to control citizens' rights during a state of siege requires more specification, and the judges who are charged with reviewing siege abuses must be protected against becoming targets of ruthless attacks by the government.³⁷⁰

Third, the Constitution has failed to account for the powerful influence of the military in Argentine society.³⁷¹ To a large extent, however, the military has merely exploited the traditional authoritarian tendencies of executive rule in Argentina. When the elected representative of the people failed to abide by constitutional norms himself, it became easier for de facto powerful groups, such as the military, to influence society unduly, notwithstanding legal restrictions.³⁷² In the early 1980s, there were signs that military power would be curtailed. Besides attempting to bring the Dirty War officers to trial, President Alfonsín also dismissed high ranking officers; moved some of the forces out of Buenos Aires; imposed a requirement that members of the military promise allegiance to the Constitution; ended military jurisdiction over common crimes committed by members of the military; transferred much of the military-industrial complex to civilian control; and limited instances in which members of the military may claim their military mission as a defense

367. U.S. CONST. art. II, § 2, cl. 2.

368. CONST. ARG. art. 87.

369. See Garro, *supra* note 47, at 336-37 ("When the emergency situation is truly serious . . . respect for the rule of law does not preclude the adoption of extraordinary measures.").

370. See *id.*

371. PONEMAN, *supra* note 11, at 133.

372. See Nino, *supra* note 358, at 131.

to a criminal charges to those cases related to external attacks.³⁷³ However, the Menem pardons and recurring revolts illustrate the wavering commitment to civilian control of the military.

The antidote to excesses by the executive branches in the two nations is to strengthen the courts and the congresses. In Argentina, some progress has been made since 1983, at least in making the aggrandizement of executive power an important issue.³⁷⁴ Even as President Menem rescues the economy and pardons the Dirty War officers, the local press and influential Argentine citizens complain about his style of governing by decree. Official corruption is being policed more and criminal trials of corrupt officials are proceeding, albeit slowly.³⁷⁵ Perhaps the lower profile being shown by the military is merely a function of the leadership's basic agreement with the way the government is running the country and its economic program. In any event, if economic conditions remain stable or improve, there may be momentum for ever greater return to constitutional values, structures, and processes.

Ironically, the widespread public participation in electoral politics in Argentina has also exacerbated presidential hegemony and disserved constitutional government. Compulsory voting was introduced in Argentina in 1912.³⁷⁶ In each subsequent election, the middle class Radical Party or the working class Peronist Party has been the only winner. Conservative elements of society, which had controlled Argentina before 1916, were permanently displaced.³⁷⁷ The two parties have been kept strong by continuing battles over emotional issues, such as Peronism, while the winner-take-all presidential elections contributed to the tendencies of the displaced conservative elements to seek (often successfully) alternative paths to political power.³⁷⁸

In addition, a proportional representation system in the elected legislature, combined with the strong political parties in Argentina, has produced legislative gridlock. While these tendencies are ameliorated in the United States by weaker party discipline and a different electoral system, the legislative stalemate in Argentina further weakens its ability to control the president and to influence public policy. Thus, the highly participatory and democratic characteristics of Argentine politics actually

373. *Id.* at 137-38.

374. See Nash, *supra* note 362, at A8.

375. See Guillermprieto, *supra* note 363, at 71-72; see also Nash, *supra* note 346, at A19 (stating that it could be years before substantial convictions are brought).

376. Nino, *supra* note 358, at 151.

377. *Id.*

378. *Id.*

serve to undermine the separation of powers and the ability of the broadly representative legislature to govern.³⁷⁹

Strengthening the Argentine legislature has been the subject of serious proposals. Carlos Nino, a law professor and adviser to former President Alfonsín, has recommended a move away from presidentialism and more towards a mixed system of government, "one that combines a popularly elected president and his cabinet with some parliamentary responsibility."³⁸⁰ In a mixed system, the constitution assigns to the president the power to dissolve the lower legislative chamber, a limited veto power, and the authority to appoint high-ranking officials, including a prime minister who becomes (as in parliamentary systems) the chief of government.³⁸¹ Nino has claimed that such a reform is well-suited to Argentina and its infamous political and economic cycles. When the president has majority support in the lower house and among the electorate, the threat of removal of the prime minister assures the president control over government policies. When the president loses such support, the legislature becomes dominant as it uses its power to censure the prime minister in order to control policies and to negotiate with the president concerning the formation of a new government. In such a situation, the president is relegated to his official and circumscribed duties and powers.³⁸²

Reports commissioned by President Alfonsín proposed Nino's mixed system in 1982 and 1987.³⁸³ Although the Radical Party adopted the commission proposals, the premature end to Alfonsín's presidency and the early successes of President Menem in improving economic conditions in Argentina pushed constitutional reform to a far less prominent place on the government's agenda.³⁸⁴

In the United States, Supreme Court decisions like *Alvarez-Machain*, bungled congressional investigations such as that of the Iran-contra affair, and presidential behavior like President Bush's pardons of six

379. *See id.* at 152.

380. *Id.* at 156.

381. *Id.* at 157.

382. *Id.*; *see also* Linz, *supra* note 7, at 51-54 (recommending parliamentary reforms).

383. *See* Consejo para la consolidación de la democracia, reforma constitucional: dictamen preliminar del consejo para la consolidación de la democracia [Council for the consolidation of democracy, constitutional reform: preliminary pronouncement of the council for the consolidation of democracy] (1986); Consejo para la consolidación de la democracia, reforma constitucional: segundo dictamen del consejo para la consolidación de la democracia [Council for the consolidation of democracy, constitutional reform: second pronouncement of the council for the consolidation of democracy] (1987).

384. Some of the Radical Party reform proposals may soon be implemented as part of a deal to permit a second consecutive term for President Menem. *See* Nash, *supra* note 366.

Iran-contra operatives, offer little basis for expecting an improvement in the executive's obedience to law.

The best efforts of the Congress in the 1970s — the War Powers Resolution,³⁸⁵ the National Emergencies Act,³⁸⁶ and the International Emergency Economic Powers Act (IEEPA)³⁸⁷ — have been dismal failures in curbing executive branch emergency powers. Presidents have routinely ignored the War Powers Resolution requirements for consultation with Congress in advance of committing armed forces in dangerous deployments, as well as its timetable for removing forces, while simultaneously paying the statute lip service and asserting that it is unconstitutional. The National Emergencies Act's requirements for reporting emergency actions and for congressional oversight have also been largely ignored by the executive branch, while the IEEPA's delegation to the president of powers to act in an international economic emergency has merely provided cover for the president to declare national emergencies, triggering his statutory powers in situations where no real emergency exists.³⁸⁸

Congress has been perhaps its own worst enemy concerning enforcement of the War Powers Resolution; neither the House nor the Senate has taken the president to task for his unilateral introduction of the nation's armed forces into hostile situations.³⁸⁹ The courts have also contributed to the failure of the War Powers Resolution,³⁹⁰ the National Emergencies Act, and the IEEPA. A series of judicial decisions has construed the executive emergency power under the IEEPA broadly, while holding that congressional oversight attempts to limit the president's discretion in defining emergency conditions under the two statutes are unenforceable.³⁹¹

The failures of these reforms and the ongoing abuses of emergency

385. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1988)).

386. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1601 (1988)).

387. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1706 (1988)).

388. See Lobel, *supra* note 30, at 1415.

389. See generally Walter Pincus, *Senate Authorizes Troops to Somalia*, WASH. POST, Feb. 5, 1993, at A10. The failure of the president to comply with the consultation requirements of the War Powers Resolution before committing forces to Somalia in December 1992, along with the absence of a congressional reaction to his failure to share that important decision, may have effectively rendered the War Powers Resolution a dead letter. *Id.*

390. See, e.g., *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (challenges to executive action as violative of the War Powers Resolution are unjusticiable).

391. See Lobel, *supra* note 30, at 1416-18.

powers in recent years indicate that a comprehensive effort, similar to but more systematic than the 1970s reforms, should be undertaken to insert effective mechanisms for controlling the exercise of emergency powers by the executive branch. At one level, the objective is simple: to restore the traditional relationship between constitutional law and emergency powers. As was the case before the ascendancy of the United States as a world power in this century, emergency conditions should be viewed as aberrant, not normal. The occasional need to act with extraordinary powers to combat a serious emergency should be recognized as exceptional and lawless. Where time permits, extraordinary powers should be requested from the Congress and actions should be taken only when authorized. When circumstances do not permit a request for authorization, the actors should seek ratification of the actions after the fact.³⁹²

If the traditional dichotomy between emergency and lawfully exercised executive power were reestablished, the nature and scope of the reform task would also be clear. One set of reforms would come from the Congress in the form of a revised process for making decisions about emergency matters. For example, Professor Harold Koh has proposed a national security "charter" that would provide ways for Congress and the courts to become more involved in making emergency decisions which affect the national security.³⁹³ Other statutory requirements for consultation in advance of executive action, and notification and reporting of actions taken, could similarly enhance congressional involvement in decisions about emergency conditions and responses. Another procedural change could involve legislating judicial review in areas where justiciability doctrines have typically been invoked effectively to foreclose judicial oversight of executive action.³⁹⁴

Although substantive controls could and perhaps should also be considered — for example, to supply a comprehensive statutory definition of what constitutes an "emergency" within the meaning of the National Emergencies Act, the IEEPA, and other statutes which confer discretion to act in an emergency — the better approach is simply to

392. See FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR, THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 14–15 (1986).

393. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION, SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 156–84 (1990).

394. See John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1405–19 (1988). The federal courts would be bound to abide by the statutory directive only to the extent that to do so would not violate the requirement that the courts decide only "case or controversies" under Article III of the Constitution. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

repeal the grants of discretionary authority in favor of requiring that the executive seek specific congressional authorization before acting in an emergency situation.³⁹⁵ Thus, other than defending against an armed attack by another nation, the president would be forced either to come to the Congress before acting in an emergency, or to act lawlessly. Although redrawing the sharp boundary between lawful and lawless executive conduct could merely encourage ongoing lawless conduct by the government,³⁹⁶ the crisis undercurrent of the Cold War which facilitated executive branch claims of the need to act outside of ordinary limits has passed. The world may not actually be a less dangerous place than it was before the breakup of the Soviet Union, but such claims have been made by our elected leaders.³⁹⁷ Barring the development of a freshly minted wartime mindset in our nation, a system which supplies bright line rules and does not anticipate the need to act with extraordinary power may work once again.

CONCLUSION

The presidents of Argentina and the United States are institutionally similar to executive officials generally — they may seize initiative because they are structured to be able to do so. Legislatures, in contrast, are constituted to be cumbersome and slow.³⁹⁸ Yet one of the premises of the separation of powers and of presidential systems is that critical policy decisions are vested in the relatively larger deliberative legislatures, in order to gain the benefits of deliberation and to check the executive's initiative.

Taking their institutional limitations into account, the legislatures of Argentina and the United States have failed to stop the growth of presidential emergency powers. When they have been capable of focusing on limiting presidential excesses, the congresses have usually lacked the political wherewithal to challenge a popular president. When our congresses have risen to the occasion, loopholes in the statutes, their definitional ambiguities, and presidential challenges in court have gutted

395. For example, the National Emergencies Act could be amended to provide for executive emergency authority only when the nation has been attacked by another nation or when the United States has declared war. See Lobel, *supra* note 30, at 1429 (noting a failed amendment to this effect proposed by Rep. Drinan in 1975).

396. *See id.*

397. *See* President's State of the Union Address, WEEKLY COMP. PRES. DOC. 170 (Jan. 28, 1992) ("[C]ommunism died this year . . . America won the cold war . . . There are still threats. But the long, drawn-out dread is over.").

398. *See* Charles L. Black, *The Workings of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17, 20 (1974).

attempted reforms. Some of these problems are endemic in presidential systems. Conflict between the executive and the legislature, paralysis of the legislature, and judicial politics permeate presidential governments.³⁹⁹ These features are especially aggravated in Argentina, where the Congress never developed a power base and the presidency never developed a respect for the Constitution. In the United States, a tradition of compromise, historical experience with elected assemblies, and a unique two political party system have ameliorated only the extreme manifestations of these problems.

Our judiciaries have also performed badly. Arguments based on national security interests and on emergency conditions have trumped virtually every legal limitation on executive power in the courts; decisions either defer to or affirm executive action taken in the name of the emergency or national security shibboleth.⁴⁰⁰ Given the institutional constraints in finding facts and enforcing decisions, it is tempting to excuse these shortcomings. However, while the primary institutional responsibility for checking the president remains with congress, the courts fail to protect the constitution's separation of powers and individual rights by declining to measure executive branch actions against constitutional standards, or do so with the president's thumb on the scale. While the Argentine judiciary long ago sacrificed its independence and succumbed to presidential supremacy, its U.S. counterpart has retained at least the trappings of autonomy and legitimacy, in part by avoiding battles with the president that it would likely lose.⁴⁰¹

Historical experience belies the notion that the United States and its constitutional law of the presidency should serve as a model for Argentina or any nation. This article has shown that the excesses of executive branch emergency powers are as apparent, if not as omnipresent and draconian, in the United States as in Argentina. Argentine reformers should not look to the U.S. experience for models in solving this vexing problem. At the same time, would-be reformers in the United States should take a hard look at Argentina and listen to those who can tell of its experience with centralized rule and a powerful presidency. Do not be surprised if the stories sound familiar.

399. See Riggs, *supra* note 7, at 247, 249.

400. See Koh & Yoo, *supra* note 342, at 735-36; Snyder, *supra* note 148, at 512-20.

401. Riggs, *supra* note 7, at 269.