

EXECUTIVES IN CRISIS: AN EXAMINATION OF FORMAL AND INFORMAL EMERGENCY POWERS

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ABSTRACT

This Article examines the ways in which various constitutional structures grant and constrain emergency powers. Specifically, the Article examines how a country defines the emergency powers of its chief executive and whether that definition is formal or informal. The Article also explores what effect the distinction between formal and informal powers has on a constitutional system's ability to prevent a devolution of constitutional norms. The Article undertakes this inquiry by examining the use of emergency powers in different countries and at different times. It examines the constitutions of Germany's Weimar Republic, Charles de Gaulle's Fifth French Republic, and Indira Gandhi's rule in India, as well as specific examples from United States history. While there are comparative aspects to this exploration, this is not a truly comparative piece of scholarship. Rather, it is a series of case studies aimed at identifying the advantages and disadvantages of the United States' constitutional treatment of emergency powers. The Article also attempts to highlight recurring patterns, such as legislative inaction, that lead to democratic devolution in constitutional systems. This Article ultimately takes the position that while an informal system of emergency powers, like that used in the United States, provides the flexibility necessary for a constitutional government to address legitimate emergencies

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without permanently stretching the separation of powers needed to limit executive overreach, this system can only function if an executive is sufficiently guided by informal constraints and sanctions.

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I. INTRODUCTION

On April 16, 2017, Turkish voters went to the polls and approved a referendum significantly changing their country's constitution.¹ The main thrust of the amendment was to provide President Recep Tayyip Erdogan sweeping new powers.² Although he had acted as the leader of the Government since 2014, President Erdogan had no constitutional authority to do so.³ Rather, the Turkish Constitution envisioned an "impartial [President] without full executive authority."⁴ One of these new powers included the sole authority to declare states of emergency or to dismiss a sitting parliament.⁵ This concentration of power in the hands of a president who had, over the past eighteen months, fired or suspended over 130,000 people and arrested another 45,000 in response to a failed coup attempt,⁶ made many observers nervous that Turkey would slip inevitably into dictatorship.⁷

In February 2018, Chinese President Xi Jinping moved to consolidate power within the Communist party.⁸ President Xi successfully proposed eliminating presidential term limits, in effect paving the way for "upending a model of collective leadership that was put in place after the excesses of one-man rule" that plagued the Chinese government after its inception.⁹ This action followed on the

¹ Mark Lowen, *Why Did Turkey Hold a Referendum?*, BBC (Apr. 16, 2017), <http://www.bbc.com/news/world-europe-38883556> [https://perma.cc/9L7L-2LU8].

² *Id.*

³ Patrick Kingsley, *Erdogan Claims Vast Powers in Turkey After Narrow Victory in Referendum*, N.Y. TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/world/europe/turkey-referendum-poll-s-erdogan.html> [https://perma.cc/QD7A-KF9N].

⁴ *Id.*

⁵ Lowen, *supra* note 1.

⁶ Kingsley, *supra* note 3.

⁷ Lowen, *supra* note 1.

⁸ Salvatore Babones, *Leader for Life: Xi Jinping Strengthens Hold on Power as China Communist Party Ends Term Limits*, FORBES (Feb. 25, 2018), <https://www.forbes.com/sites/salvatorebabones/2018/02/25/leader-for-life-xi-jinping-strengthens-hold-on-power-as-china-communist-party-ends-term-limits/#3759c18ce466> [https://perma.cc/X4DN-QNUS].

⁹ Austin Ramzy, *President Xi Jinping's Rise in China, as Covered by The Times*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/world/asia/xi-jinping-career-highlights.html> [https://perma.cc/F2NW-NCWL].

heels of the Chinese party “enshrin[ing] ‘Xi Jinping Thought on Socialism with Chinese Characteristics in a New Era’ in the constitution,” a move described in the press as “elevat[ing] President Xi Jinping to the same status as . . . Mao Zedong and Deng Xiaoping.”¹⁰

A year later, in February 2019, President Donald Trump declared that a national emergency existed at the U.S.-Mexican border.¹¹ He then announced that he was using the authority granted to the President by the National Emergency Act of 1976,¹² to order that funds be allocated to build a wall along the border, to address the declared emergency.¹³ This announcement followed the longest government shutdown in U.S. history, a shutdown precipitated in no small part by Congress’ unwillingness to appropriate money for a border wall.¹⁴ When congressional leaders and members of the press questioned the legality of President Trump’s actions, he announced that he believed he had the “absolute right” to declare a National Emergency.¹⁵ Journalists, pundits, commentators, and scholars responded with varying degrees of criticism or support for the President’s actions reigniting a debate on presidential emergency powers that has surfaced repeatedly.¹⁶ Many questioned

¹⁰ Simon Denyer, *China’s Leader Elevated to the Level Mao in Chinese Communist Pantheon*, WASH. POST (Oct. 24, 2017), https://www.washingtonpost.com/world/chinas-leader-elevated-to-the-level-of-mao-in-communist-pantheon/2017/10/24/ddd911e0-b832-11e7-9b93-b97043e57a22_story.html [https://perma.cc/57XT-7VKR].

¹¹ Jordan Fabian, *Trump Declares National Emergency at Border*, HILL (Feb. 15, 2019), <https://thehill.com/homenews/administration/430092-trump-signs-emergency-declaration-for-border> [https://perma.cc/DZ8L-72EJ].

¹² See 50 U.S.C.A. § 1601 *et seq.* (West 2016).

¹³ Damian Paletta, Mike DeBonis, & John Wagner, *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html [https://perma.cc/R38C-SSK5].

¹⁴ See *id.*

¹⁵ Catherine Lucey, *Trump Says He Has ‘Absolute Right’ to Declare Emergency*, CHI. TRIB. (Feb. 19, 2019), <https://www.chicagotribune.com/nation-world/ct-trump-border-wall-emergency-20190219-story.html> [https://perma.cc/8V97-6EGR].

¹⁶ See, e.g., Elizabeth Goitein, *The Alarming Scope of the President’s Emergency Powers*, ATLANTIC (Jan/Feb 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [https://perma.cc/WPR9-JNL7].

not only the existence of an actual emergency but also whether the President himself truly believed that an emergency existed.¹⁷

Both the U.S. House of Representatives and the U.S. Senate, employing procedures from the National Emergency Act, voted to block the President's emergency declaration.¹⁸ This was the first time in the Act's history that Congress had attempted such action.¹⁹ And while the resolution attracted some support from Republican legislators, it did not command the two thirds support necessary to override President Trump's veto and the declaration remained in place.²⁰

The Trump Administration's decision to invoke the statutory powers granted to the President by Congress, for a purpose specifically rejected by Congress, sparked significant debate and commentary. This Article, however, proposes a broader look at the use of executive emergency powers beyond those canonized by statute. This Article examines the ways in which a country's constitutional structure may grant or deny emergency powers to its Executive and what methods of shaping emergency powers have been more successful. Specifically, this Article looks at the distinction between "formal" and "informal" grants of emergency power.

The idea of the archetypal strong man as a necessity to successfully navigate troubled times in a nation's life span has a long history. From tribal leaders, to kings, to dictators, the rule of one has been a recurring theme in human government. The question this

¹⁷ See, e.g., Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [https://perma.cc/7JTF-LQU5]. Critics argued that President Trump "may have undercut his own argument that the border situation was so urgent that it required emergency action. 'I didn't need to do this, but I'd rather do it much faster,' he said. 'I just want to get it done faster, that's all.'" *Id.*

¹⁸ Jacob Pramuk, *Trump Tweets 'VETO!' After Senate Votes to Block His Border Emergency Declaration*, CNBC (Mar. 14, 2019), <https://www.cnbc.com/2019/03/14/senate-votes-to-block-trump-border-wall-national-emergency-declaration.html> [https://perma.cc/7WQR-Q7D4].

¹⁹ Sarah Binder, *The Senate Voted to Block Trump's National Emergency Declaration. Now What?*, WASH POST (March 15, 2019), <https://www.washingtonpost.com/politics/2019/03/15/senate-voted-block-trumps-national-emergency-declaration-now-what/> [https://perma.cc/6JTB-FP86].

²⁰ Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html> [https://perma.cc/7ERF-7JQQ].

Article seeks to explore is what happens when a government designed to prevent the rise of a strongman, such as a constitutional democracy or republic, faces the type of external or internal crises that seem tailor-made for the strong hand of a dictator? How have other constitutional governments handled such situations and what type of constitutional system has been most successful in both navigating crises and restraining the rise of a dictator? Is a constitutional system which explicitly allows for the suspension of constitutional restraints in the face of an emergency better able to cope with crisis than one that makes no such exceptions? And, alternatively, which system rebounds to a proper constitutional order more effectively when the crisis has passed? This Article attempts to explore these questions by looking at the actual experiences of four separate constitutional governments in crisis: Weimar Germany,²¹ France's Fifth Republic,²² Indira Gandhi's India,²³ and the United States during the Civil War,²⁴ the Great Depression, World War II,²⁵ and the War on Terror.²⁶

Before beginning the analysis, it is important to note what this paper is not. It is not a comparative constitutional study, in the true sense of those words. I am not and do not pretend to be a comparativist. Much of the documentation I have relied upon for non-English sources are translations, which means that any nuanced analysis of language is hindered by those translations. Nor does this Article seek to recommend a "best" solution for the constitutional questions explored. Rather, it seeks to explore the strengths and weaknesses that have emerged in different constitutional designs when various countries have undergone extremely volatile situations.

Instead of being a truly comparative analysis, this Article is primarily aimed at examining why the United States has not, over its two-hundred-and-forty-year history, devolved into a true dictatorship and what effect the lack of a formal, emergency power "safety valve" has had on the role of the U.S. President over time. Accordingly, the countries examined in this Article were not chosen because they are representative of different styles of constitutional

²¹ See *infra* Part III.

²² See *infra* Part IV.

²³ See *infra* Part V.

²⁴ See *infra* Section VI.a.

²⁵ See *infra* Section VI.b.

²⁶ See *infra* Section VI.c.

systems. Rather, the examples of Weimar Germany, the French Fifth Republic, and Indira Gandhi's India were chosen because the constitutions in place at the time each of these countries faced significant national emergencies included explicit emergency powers provisions and, in each one, the use of those emergency powers allowed a dictatorial regime to come to power, at least temporarily. This Article will contrast these experiences with those of the United States (whose Constitution lacks any explicit emergency powers clause) and evaluate whether the United States would have been better off had its constitution allowed for the temporary suspension of constitutional constraints.

It is also important to note that this Article does not claim that the existence of explicit constitutional emergency powers always leads to "executive domination" or that such a constitutional provision is the *only* reason why such "constitutional dictatorships" emerged in the countries analyzed.²⁷ Rather, it focuses on the narrow question of whether explicit or implicit emergency power regimes provide a better check against tyranny. Ultimately, this Article contends that while both systems can be manipulated to expand executive power, an implicit model such as the U.S. Constitution has proven to be less susceptible to being used to extend an individual's hold on power. This conclusion comes with a significant caveat: because an implied system of emergency powers makes no formal distinction between the powers that can be exercised within and without the confines of any particular emergency, many of the restrictions in place in an implied system rely on a respect for informal methods of checking institutional power.

Part II briefly surveys the literature surrounding constitutional dictatorship. This will help provide context for the country-specific analysis to follow. Parts III-V will examine the use of emergency powers in Weimar Germany, the French Fifth Republic, and Indira Gandhi's India, as well as provide some context regarding the crisis situations which allowed these governments to justify the use of emergency powers. These Parts will also look at the aftermath of

²⁷ See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 616 (2003) ("Many constitutions contain explicit provisions for emergency powers, either in text or in judicial doctrine. Sometimes executive domination has overtaken the relevant polities, sometimes it has not; other variables probably dominate, such as the nation's stage of development, or its susceptibility to economic shocks, or the design of legislative and judicial institutions." (footnote omitted)).

emergency power use, primarily focusing on the ways in which executive power was affected. Part VI will recount the ways in which the U.S. President used the executive power when faced with substantial crises, focusing on Abraham Lincoln during the Civil War, Franklin Delano Roosevelt during the Great Depression and World War II, and George W. Bush during the War on Terror. Part VII will argue that including an emergency powers provision in a constitution invites executive overreach—especially as a means to maintain political powers—and is unnecessary to enable a constitutional democracy to respond to national crises. It will also analyze the resulting effects on executive power and explore whether informal expansions of power have a greater lasting effect than formal suspensions of constitutional protections. The Article then briefly concludes.

II. EMERGENCY POWERS AND CONSTITUTIONAL DICTATORSHIP: A THEORETICAL OVERVIEW

The question of whether a constitutional democracy can survive a crisis without sacrificing the ideals enshrined in its constitution has plagued constitutional drafters and theorists alike.²⁸ In the immediate aftermath of World War II scholars such as Clinton Rossiter questioned the very possibility that a constitutional democracy could survive without a properly structured emergency system, which he termed a “constitutional dictatorship.”²⁹ While various arguments emerged in the subsequent three quarters of a century, the core component of this inquiry still remains an important topic among constitutional designers and scholars.

But what is the import of all this theoretical discussion? Why has it so fascinated scholars of constitutional design and comparative constitutionalism alike? What is the significance of this dilemma? The question is really one of the legality of emergency

²⁸ See, e.g., Benjamin A. Kleinerman, “In the Name of National Security”: Executive Discretion and Congressional Legislation in the Civil War and World War II, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 91, 92 (Jeffrey K. Tulis & Stephen Macedo eds., 2010) (“[H]ow best does a constitutional republic respond to threats to its existence? Should it legalize those new powers that have now become necessary? Or should it merely exercise these powers outside the legal order during the seemingly temporary and extraordinary security threat?”).

²⁹ CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948).

action: Can a constitution adapt or “stretch” to fit the needs necessary for its own survival? Or must it be altered to avoid losing legitimacy? And if it can stretch, what mechanisms must be in place to shrink executive powers back to their proper place? Or, if it must be changed, how can a constitution that needs to be altered to survive an emergency avoid alteration that defeats the entire constitutional purpose?

As might be imagined, these questions have been tackled in countless ways by countless scholars with countless different views. This Article does not attempt to provide a definitive answer to these questions, nor is it intended to add yet another voice to this voluminous discussion. Rather, it will look at a selection of real-world experiences with various forms of constitutional emergency powers and attempt to draw a few modest conclusions about our own constitutional mechanisms for responding to external and internal emergencies. While this Article is not, primarily, a theoretical discussion, it is necessary to frame the theoretical landscape in order to make the most of the historical examples that follow.

First, we must define what we mean by “emergency powers.” For purposes of this Article emergency powers are the tools that are available to a constitutional government when faced with varying crises. These may be expressly allowed by constitutional provisions designed to be triggered only in the case of an emergency,³⁰ or they may be implied by vague or ambiguous language designed to be in effect at all times.³¹ Examples of the “explicit” brand of emergency powers that will be discussed in this Article are the state of emergency provided for in Article 48 of the Weimar Constitution,³² the “state of siege” in France’s Fifth Republic,³³ and the emergency powers provision in the Indian Constitution.³⁴ “Implicit” emergency power is exemplified by the ways in which the U.S.

³⁰ See *infra* Parts III-VI.

³¹ See *infra* Section VII.c.

³² See *infra* Part III.

³³ See *infra* Part IV.

³⁴ See *infra* Part V.

President has used his “Commander-in-Chief” powers³⁵ and the equally ill-defined “executive power” vested by Article II.³⁶

While both types of emergency powers have proven effective in the face of nation-threatening emergencies, they also each present their own unique dangers. While explicit emergency powers are typically accompanied by constitutionalized protective measures, if those measures fail, explicit powers allow for the suspension of constitutional protections which can allow the executive to exercise essentially dictatorial powers. Implicit constitutional powers, by contrast, must remain within the constitutional structure. The ways in which executive power can be stretched, however, may not be clearly defined which may in turn lead to a gradual expansion of executive powers as each crisis expands the executive without an equal and opposite rebound effect at the end of the crisis. The remainder of this Part will lay out some of the key points that mark the boundaries of the scholarly debate on implicit versus explicit emergency powers before the Article turns its attention to a more focused look at the experiences of individual countries.

a. Theoretical Frameworks

Professor Jules Lobel has provided a useful, if perhaps overly-simplified, breakdown of the views regarding constitutional emergency powers, dividing the arguments into three main frameworks: Absolutist, Relativist, and Liberalist.³⁷ According to Professor Lobel, absolutists argue that there are no emergency powers outside a country’s written constitution, and they point to existing constitutional provisions as evidence that no others are available.³⁸ This position essentially boils down to the idea that the powers granted in the Constitution are sufficient to protect the nation even in emergencies; but if they turn out to be inadequate, suspending protections of individual rights is not worth the cost to

³⁵ U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . .”).

³⁶ U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

³⁷ Jules Lobel, Comment, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1386-92 (1989).

³⁸ *Id.* at 1386-87.

constitutional government.³⁹ This view of constitutional powers is dangerously close to the “suicide pact” critiqued by Professor Michael Stokes Paulsen,⁴⁰ and would threaten the survival of nearly any constitutional democracy. While this view has some support in the legal academy, it is not widely accepted by judicial or executive actors.

By contrast, relativists “argue[] that the Constitution is a flexible document that permits the President to take whatever measures are necessary in crisis situations.”⁴¹ This relativist position seems to be the one that has been most widely accepted by U.S. Presidents. Lincoln’s defense of his suspension of the writ of *habeas corpus* that it was necessary that “all the laws but one” should be enforced to ensure the survival of the country aligns with the relativist position.⁴² Similarly Professor Lobel highlights that “President Franklin Roosevelt articulated the [relativist] view that the President has the constitutional power to ignore statutory provisions when ‘necessary to avert a disaster which would interfere with the winning of the war.’”⁴³

Scholarly support for the relativist position can go too far, sometimes appearing to contend that *any* executive action to combat a national emergency is constitutional provided that it does not provoke a response from the other branches of government. Professor Paulsen, for example, seems to take this approach by locating implied emergency powers within the Presidential oath to “preserve, protect and defend the Constitution of the United

³⁹ *Id.* at 1387.

⁴⁰ Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258-59 (2004) (“The alternative [to locating implicit emergency powers in the U.S. Constitution] is near-absurdity: that the parts should be construed, and given effect, even at the expense of preservation of the Constitution as a whole, with the logical consequence that adherence to the Constitution might require destruction of the Constitution.”).

⁴¹ Lobel, *supra* note 37, at 1388.

⁴² Abraham Lincoln, Address to Congress (July 4th, 1861); *see also* Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges, U.S. Senator (April 4, 1864) in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 585 (Don E. Fehrenbacher ed., 1989) (“I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”). For a more complete discussion of Lincoln’s suspension of *habeas corpus* see *infra* Section VI.a.

⁴³ Lobel, *supra* note 37, at 1388 (quoting E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 250-51 (4th ed. 1957) (quoting Roosevelt’s Speech to Congress, September 7, 1942)).

States.”⁴⁴ Professor Paulsen’s argument that this broad reading of the Presidential Oath was its original understanding proves too much. First, this focus on the power granted by the oath overlooks the obligation imposed by it. One could just as easily argue that the Constitution, which the President must preserve, protect, and defend, requires the President to preserve it “intact.” In other words, if the Constitution must be violated to the extent that it no longer protects its own inherent central tenants and ideals to “preserve” the Union, the oath has already been violated.

Moreover, Professor Paulsen places the obligation to control executive power on the other branches of government, writing:

Both the judiciary, through the power of constitutional interpretation it possesses in deciding cases arising under the Constitution, and the Congress, through the power of constitutional interpretation it possesses in exercising its legislative powers and the check of impeachment, have a duty of independent constitutional review over the judgment of necessity.⁴⁵

This position, however, ignores important separation of powers principles. By arguing that the President can exercise whatever power he wants *until* the other branches step in, Professor Paulsen is implicitly arguing that either the executive can exercise powers which it does not constitutionally possess, or that the judicial and legislative branches can, by taking affirmative actions, restrict the use of constitutionally permissible executive power. The logical end of this argument is that there is no limit placed on the executive by the Constitution and the outer extent of the executive power is simply as much as he can get away with before Congress and the Courts step in.

Finally, Professor Paulsen perhaps overlooks the Framers’ understanding that they were engaging in a “first-of-its-kind” experiment. In the context of a “national experiment,” it might be acceptable for the experiment to fail if it could not protect the Lockean ideals on which the country was founded. While this does not mean that a reasonable mind could not find the language of the oath broad enough to support the meaning urged by Professor

⁴⁴ Paulsen, *supra* note 40, at 1258 (“In short, the Constitution either creates or recognizes a *constitutional law of necessity*, and appears to charge *the President* with the primary duty of applying it and judging the degree of necessity in the press of circumstances.”).

⁴⁵ *Id.* at 1259.

Paulsen, it does undermine his claim that the Framers intended the oath to carry such significance.

Professor Lobel's third and final classification attempts to split the difference between the absolutists and the relativists. His liberalists (which refers to the traditional idea of "liberal constitutionalism") recognize a distinction between "normal" and "crisis" times for purposes of government.⁴⁶ Under the liberalist model, a constitution does not contain the elasticity championed by the relativist framework.⁴⁷ Those exercising executive authority, however, may act outside of the constitutional framework if an emergency situation necessitates such action.⁴⁸ A key component of the liberalist framework is that the executive must acknowledge that it is acting without legal or constitutional authority.⁴⁹ In such situations, officials could be sued in court for their actions and held liable even if the actions were deemed necessary. The legislature could then indemnify the official for such actions if it believed that the official had acted properly, even though unconstitutionally.⁵⁰ Professor Lobel argues that this was the initial view of emergency powers held by the Framers.⁵¹

An important distinction between the liberalist and relativist models is that while the extent of "allowable" executive action may be similar in both frameworks, the liberalist model would recognize that action as illegal or unconstitutional and would hold the executive liable, while the relativist would deem such actions to be fully legal and constitutional provided they were necessary to confront the emergency. An in-depth inquiry into which of these models may be "best" for an implied emergency powers regime is beyond the scope of this Article. Rather, this overview attempts to merely delineate the theoretical battlegrounds and provide the reader with a digestible way of approaching some of the important questions that are raised in the literature and discussed below.

⁴⁶ Lobel, *supra* note 37, at 1388.

⁴⁷ *Id.* at 1388-89.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1389-90 ("Courts could impose personal liability on those executive officials who undertook unconstitutional actions, even when such officials acted pursuant to good faith motivations to defuse a crisis. Subsequent to a court's declaration of the unlawfulness of an exercise of emergency power, however, Congress could decide to indemnify the official if it believed the official's actions really were justified by extreme necessity.").

⁵⁰ *Id.* at 1390.

⁵¹ *Id.*

b. Key Questions: Ratcheting, Toggling, and Legality

Considering the basic framework outlined in the preceding Section, this Section will examine a few of the key questions that continue to predominate the academic discussion. The first point of contention in this debate that is essential to this Article's analysis is whether executive power under an implicit emergency powers system experiences a "ratcheting effect."⁵² That is, whether each expansion of executive power in the face of a national crisis results in a permanent expansion of the role of the executive. Or does executive power ebb and flow in parallel with the crisis? Future Judge Scott Matheson described this idea in his 2009 book as a repeating pattern, writing that: "The pattern in a crisis often is executive action, legislative acquiescence, and judicial tolerance that reflects the institutional characteristics of the branches."⁵³

Professor Kim Lane Scheppele, focuses on this question of elasticity in an implied emergency powers system like the United States and argues that such a system allows the executive to gradually move the "baseline" of executive power.⁵⁴ She bases this argument on a theory of "small emergencies"⁵⁵ and posits that the United States has been operating under an emergency government since the end of World War I.⁵⁶ The danger in this type of emergency power structure is that with each "small" emergency, executive power is expanded and the end of a small emergency does not result in a concomitant reduction in the scope of executive power. This

⁵² Posner & Vermeule, *supra* note 27, at 609 ("The institutional argument is that emergencies work like a ratchet: With every emergency, constitutional protections are reduced, and after the emergency is over, enhancement of constitutional powers is either maintained or not fully eliminated, so that the executive ends up with more power after the emergency than it had before the emergency. With each successive emergency, the executive's power is ratcheted up."); *see also id.* at 610.

⁵³ SCOTT M. MATHESON, JR., *PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES* 14 (2009).

⁵⁴ Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 840 (2006).

⁵⁵ *Id.* at 835 (defining "small emergencies" as "problems that are deemed worthy of exceptional solutions, but are simultaneously deemed too minor to warrant a full-fledged reassessment of constitutional structures and constitutional aspirations").

⁵⁶ *Id.* at 836 ("America is now – and has been since the First World War – virtually always in a state of emergency, one way or another.").

expanded power is then “absorbed and rationalized” by an implied emergency power system.⁵⁷

In contrast to Professor Scheppele, Professors Eric Posner and Adrian Vermeule have argued that the notion of the executive power ratchet is simply not true because “institutional change displays no consistent trend or mechanism and is determined differently in different contexts by a complex mix of political, economic, and technological forces.”⁵⁸ In rejecting the idea of an executive powers “ratchet,” Vermeule and Posner find individual expansions of executive power to be less problematic. Rather than a one-way ratcheting up of executive power, they describe emergency executive action as having a spillover effect.⁵⁹ This spillover effect may change the balance of power between the executive and the other branches, but it may be cleaned up if the other branches resist this acquisition of executive power.⁶⁰

Alternatively, Posner and Vermeule posit that even if the spillover effect turns into a more or less permanent increase in executive power, that increase would be “in itself, neither good nor bad.”⁶¹ Rather, they assert that “[t]he only question is whether the new state of affairs is an improvement on the status quo ante or not; if it is an improvement, then the spillover was a benign event.”⁶² This “no harm no foul” approach to shifts in the balance of governmental power, however, ignores a serious potential for abuse. It does not take into account the fact that, while the “new state of affairs” created by a spillover may appropriately reconfigure the security-liberty balance, this rebalancing often occurs in an informal way that may not be recognizable at the time. This informal barrier may be exploited in the future if an executive who is willing to break through informal barriers gains control of these increases in executive discretion.

In addition to the question of whether increases in executive power “ratchet” up in an inexorable expansion, another key question regarding emergency power is whether it is or should be legal. Professor Benjamin Kleinerman argues that we should

⁵⁷ *Id.* at 837.

⁵⁸ Posner & Vermeule, *supra* note 27, at 619.

⁵⁹ *Id.* at 622.

⁶⁰ *Id.* at 619.

⁶¹ *Id.* at 622.

⁶² *Id.*

distinguish between a “legal order” and a “constitutional order.”⁶³ In other words, though an action may in fact be extralegal, that does not necessarily mean that the action is unconstitutional. Professor Kleinerman’s theory arises from the dangers he sees in requiring that every action taken by a constitutional government must be sanctioned by law.⁶⁴ This focus on the legality of the action, according to Professor Kleinerman, requires that a constitutional government must be given the authority to adjust its own laws when faced with an emergency to which the current legal structure cannot respond.⁶⁵ This will result in a constitutional paradox of sorts: “The difficulty is that, precisely by creating the legal authority to exercise extraordinary powers, one runs the risk that they will become both routinized and institutionalized.”⁶⁶ Rather, Professor Kleinerman would read into a constitution the inherent ability to respond to crises regardless of the “legality” of the means exercised.

The difficulty with Professor Kleinerman’s model is that he undervalues the role that executive precedent plays in the expansion of executive power. Kleinerman writes: “I would say that the temporary, extralegal, nonprecedential, and explicitly impeachable quality of executive discretion prevents it from creating [a] dangerous principle . . . while the legal, precedential, and representative character of legislative action does create such a principle.”⁶⁷ Experience, however, would indicate that executive precedent actually plays a significant role in defining the limits of presidential authority. This role of executive precedent will be examined below, particularly in the contexts of Weimar Germany and the U.S. system.⁶⁸

Professor Scheppele provides a different approach to this position as well and argues that it is this exact lack of a “toggle” between emergency and non-emergency action that has led to what she describes as a continuous expansion of executive power. She describes the problem as follows:

America has not in general had a toggle-switch approach to crises, where normal constitutionalism continues until a switch is flipped to stop it, and then the emergency continues

⁶³ Kleinerman, *supra* note 28, at 92-93.

⁶⁴ *Id.* at 92.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 102-03.

⁶⁸ *See infra* Parts III, VI.

until the switch is flipped back. Instead, the United States has tended to normalize its emergencies. As a result, normal governance is at least in part always emergency governance, even when a crisis is not looming.⁶⁹

In essence, Professor Scheppele argues that by trying to legitimize emergency powers as a proper exercise of constitutional authority, there is no mechanism in place to “take back” the expanded powers exercised by the executive during an emergency. Rather, the government should acknowledge the extra-constitutional nature of its actions. This position will remind readers of the “liberalist” camp outlined above. Once again, a definitive answer to these questions is beyond the scope of this Article, but it is important for the reader to keep these questions in mind when evaluating the strengths and weaknesses of the emergency power regimes discussed in the following Parts.

III. EMERGENCY POWERS IN WEIMAR GERMANY

The Weimar Republic is the prime example of the dangers of constitutional emergency powers and is a favorite punching bag of those who argue that a constitution that allows for emergency powers outside the traditional constitutional process is a constitution which invites its own usurpation. Indeed, the fact that the collapse of the Weimar Republic allowed Hitler and the Nazi Party to seize control of the German government seems to provide all the evidence necessary to show that emergency powers are too dangerous to be allowed. The Weimar Republic has also served as a cautionary tale for advocates of constitutional emergency powers, a bright warning sign showing the necessity of providing proper checks and restrictions on an otherwise desirable tool of constitutional governance.⁷⁰ Neither opponents nor proponents of emergency powers can avoid discussing the stark example of the Weimar Republic and the role that emergency powers played in the collapse of the fragile interbellum constitutional structure.

The Weimar Constitution was drafted by members of the National Constituent Assembly. The National Constituent

⁶⁹ Scheppele, *supra* note 54, at 839.

⁷⁰ See, e.g., FREDERICK MUNDELL WATKINS, *THE FAILURE OF CONSTITUTIONAL EMERGENCY POWERS UNDER THE GERMAN REPUBLIC 16* (1939).

Assembly was elected on January 19, 1919⁷¹ and promulgated the Constitution on August 14, 1919.⁷² A full discussion of this constitutional drafting process is well beyond the scope of this Article, but there are a few important concepts to note. First, it seems clear that the Weimar Constitution was, from the outset, a compromised document. The left wing Social Democratic Party wanted far greater protections for workers than they received; and right-wing aristocrats wanted to restore the monarchy and resented the idea of constitutional government at all.⁷³

To assuage the fear of “parliamentary absolutism” held by those on the right, a Reich President was created by the Constitution and endowed with “extensive powers”⁷⁴ including the ability to declare a state of Emergency “[i]f the public safety and order” were “seriously disturbed or endangered.”⁷⁵ The powers granted by a state of emergency were outlined in Article 48 of the Weimar Constitution,⁷⁶ and allowed the President to take the measures

⁷¹ See DETLEV J. K. PEUKERT, *THE WEIMAR REPUBLIC: THE CRISIS OF CLASSICAL MODERNITY* 4 (Richard Deveson trans., 1989).

⁷² *Id.*

⁷³ EBERHARD KOLB, *THE WEIMAR REPUBLIC 19* (P.S. Falla & R. J. Park trans., 2d ed. 2005).

⁷⁴ *Id.*

⁷⁵ ROSSITER, *supra* note 29, at 31 (translating Article 48 of the Weimar Constitution).

⁷⁶ The full text of Article 48, as translated by Clinton Rossiter in his book *Constitutional Dictatorship*, reads,

If a state does not fulfill the duties incumbent upon it under the national Constitution or laws, the President of the Reich may compel it to do so with the aid of the armed forces.

If the public safety and order in the German Reich are seriously disturbed or endangered, the President of the Reich may take the measures necessary to the restoration of the public safety and order, and may intervene with the armed forces. To this end he may temporarily suspend in whole or in part the fundamental rights established in Articles 114 (inviolability of person), 115 (inviolability of domicile), 117 (secrecy of communication), 118 (freedom of opinion and expression thereof), 123 (freedom of assembly), 124 (freedom of association), and 153 (inviolability of property).

The President of the Reich must immediately inform the Reichstag of all measures taken in conformity with section 1 or 2 of this Article. The measures are to be revoked upon the demand of the Reichstag.

In cases where delay would be dangerous, the state government may take for its territory temporary measures of the nature described in section

“necessary to the restoration of the public safety and order.”⁷⁷ This included the ability to suspend certain constitutional protections such as freedom of the press, freedom of association, and inviolability of persons and property, as well as the power to use the armed forces “if necessary” to restore order and to create special military courts.⁷⁸

The checks which the Weimar constitution placed on the use of emergency powers proved to be startlingly inadequate. First, the language of Article 48 was vague and failed to provide much in the way of guidance in determining when a state of emergency existed and what powers the government could exercise during an emergency. For example, Article 48 authorized emergency action whenever “public safety and order in the German Reich is *materially disturbed or endangered*.”⁷⁹ What constituted a material disturbance was not defined anywhere else in the document. Additionally,

2. The measures are to be revoked upon the demand of the President of the Reich or the Reichstag.

A national law shall prescribe the details.

ROSSITER, *supra* note 29, at 31 (translating Article 48 of the Weimar Constitution). Another helpful translation is reprinted in Frederick M. Watkins’ *The Failure of Constitutional Emergency Powers under the German Republic*. It reads,

If any state fails to perform the duties imposed upon it by the federal constitution or by federal laws, the president may hold it to the performance thereof with the aid of the armed forces.

If public safety and order in the German Reich is materially disturbed or endangered, the president may take necessary measures to restore public safety and order, intervening if necessary with the aid of the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights established by Articles 114 [personal liberty], 115 [inviolability of dwelling places], 117 [secrecy of postal, telegraphic and telephonic communications], 118 [freedom in the expression of opinion], 123 [freedom of assembly], 124 [freedom of association] and 153 [private property].

The president must immediately inform the Reichstag of all measures adopted by authority of the first or second paragraphs of this Article. These measures are to be revoked upon demand of the Reichstag.

In cases where delay would be dangerous the cabinet of a state government may for its own territory take provisional measures as specified in paragraph 2. These measures are to be revoked on demand of the president or of the Reichstag.

Further details will be regulated by federal law.

WATKINS, *supra* note 70, at 15 (translating Article 48 of the Weimar Constitution).

⁷⁷ ROSSITER, *supra* note 29, at 31.

⁷⁸ WATKINS, *supra* note 70, at 15, 32.

⁷⁹ *Id.* (emphasis added).

Article 48 authorized the use of all necessary measures to restore order and public safety.⁸⁰ As the contemporary political science scholar Frederick Watkins noted in 1939, this was a remarkable grant of power to the government with little in place to limit its scope.⁸¹

Second, in addition to the use of vague language to grant exceptionally broad powers to the government acting in an emergency, Article 48 also limited the role of the Reichstag to that of a negative veto on emergency actions, requiring only that “[t]he president must immediately inform the Reichstag of all measures adopted by . . . this Article. These measures are to be revoked upon demand of the Reichstag.”⁸² By removing Parliamentary assent as a requirement for the effective exercise of emergency authority, Article 48 provided an easy way for the legislature to avoid making difficult decisions during crisis situations. Rather, the Reichstag could play a passive role allowing the executive to carry out the unpopular measures necessary to resolve a crisis. While this may have been politically convenient for the legislature, it allowed for legislative abdication during an emergency, which effectively removed the legislature as a check on emergency action.

Finally, Article 48 provided no specific role for the judiciary to serve as a check upon emergency government action. While the judiciary could review specific actions taken by the government during a state of emergency to see if that action was within the powers granted by Article 48, this rarely proved to be a significant check upon the executive.⁸³ The language of Article 48 was remarkably vague, giving little guidance which the courts could rely on to interpret the outer limits of the powers granted therein. But, perhaps more importantly, even though the courts could occasionally review a specific action taken under the Article 48 powers, the executive was given sole discretion to decide when circumstances sufficiently justified a declaration of emergency.⁸⁴

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *But see id.* at 104-05 (citing an important counterexample to this general judicial passivity in the supreme court’s ruling that “the appointment of state representatives by a federal commissioner was a wholly illegal act”).

⁸⁴ *See id.* at 21 (“Since the custom of the German judiciary had always been to accept findings of the government in matters of fact, the courts were consistent throughout the lifetime of the Republic in their refusal to inquire into the actual necessity of any measures taken on the basis of Article 48.”).

Therefore, the courts played almost no role in checking the ability of the government to invoke the powers of Article 48, even though they may have limited the use of those powers at the margins.

Historians of the Weimar period (including Professor Watkins) have focused on the use of emergency powers in three semi-distinct periods: First, in response to coup attempts in the immediate aftermath of World War II; second, to deal with the deflationary crisis of 1922-1923 that was triggered by Germany's inability to meet the harsh reparation requirements imposed by the Treaty of Versailles; and third, in an effort to combat the devastating effects of the worldwide depression which began in 1929. Scholars are split on the effectiveness of Article 48 to combat crises in the early years of the Weimar Republic, but there is consensus that by the time Article 48 was used to prop up failing government after failing government during the Depression, emergency powers had become the source of constitutional collapse.

a. Article 48 and Armed Uprisings

The emergency powers granted by Article 48 were used almost immediately after the creation of the Weimar Republic. Socialist and Communist uprisings were not a regular occurrence, but they were not all that infrequent either.⁸⁵ Reactionary *putsch* attempts from disaffected right-wing members of the recently disbanded military were also a constant threat.⁸⁶ The Reich government was responsible for ensuring the continued viability of the Weimar Republic in the face of these anti-constitutional actions.

One limitation on the effectiveness of the emergency powers granted by Article 48 was revealed by the drastically different ways the emergency-empowered government acted in response to both right- and left-wing-led civil unrest. Because the tools provided by Article 48 to respond to armed insurrection primarily incorporated a military response, Article 48 measures were only available if the military could be counted on to support the federal government.⁸⁷ Because the upper echelons of the German military were largely populated with right-leaning supporters of the pre-war Imperial

⁸⁵ See *id.* at 25-26 (discussing the Communist insurrection of 1920 and the peak influence of Marxist revolutionaries in Germany immediately following WWI).

⁸⁶ See ROSSITER, *supra* note 29, at 40

⁸⁷ See *id.* at 40-41.

government, the Reich could rarely invoke the powers of Article 48 to confront reactionary violence. For example, a right-wing *putsch* attempt in Berlin began on March 13, 1920.⁸⁸ The government was unable to respond because the military presence in Berlin was sympathetic to the coup attempt.⁸⁹ Fortunately for the young republic, the *putsch* was not well organized, was opposed by the Unions in the city, and quickly collapsed even without federal intervention.⁹⁰

Perhaps the most (in)famous example of federal impotence in the face of right-wing extremism was the tepid federal response to Adolf Hitler's Beer Hall *putsch* in Munich in 1923. Briefly, this coup attempt commenced on November 8, 1923, when Adolf Hitler extracted at gunpoint various National Socialist concessions from the local government.⁹¹ The actual armed threat was put down the following day, but notably it was the Bavarian state government that effectively dealt with the crisis and not the Reich government itself.⁹² German historian and political scientist Eberhard Kolb described the events with significant understatement noting that the Reich government had "acted much less energetically against right-wing insurgence in Bavaria in November 1923 than they had done against left-wing Saxony and Thuringia in the previous month."⁹³

In contrast to the relative ineffectiveness of the Article 48 powers to confront reactionary uprisings, the Reich government made extensive use of its Article 48 powers to suppress Socialist uprisings during the early 1920s. Unlike during the Berlin *putsch* attempt, for example, the Reich government relied extensively on its Article 48 powers to put down a threatened Communist Insurrection in the early spring of 1920.⁹⁴ Because the military was staunchly anti-Communist, the question of divided loyalties, which restrained federal use of emergency powers during right-wing insurrections, posed no similar obstacle to crushing left-wing unrest. Threatened strikes in January of 1920 and 1921 were quickly and harshly

⁸⁸ KOLB, *supra* note 73, at 37-38.

⁸⁹ *Id.* at 38.

⁹⁰ *Id.*

⁹¹ *Id.* at 50.

⁹² *Id.*; WATKINS, *supra* note 70, at 38.

⁹³ KOLB, *supra* note 73, at 50.

⁹⁴ WATKINS, *supra* note 70, at 28-30.

suppressed by military forces authorized to take action under Article 48.⁹⁵

Then, in the Fall of 1923, the government learned that preparations for an armed Communist uprising in Saxony and Thuringia (both left-leaning German states) were well underway.⁹⁶ The Reich government took immediate and extensive emergency actions. Professor Kolb described the events as follows:

[A]s the political crisis became acute, the government had proclaimed a state of emergency throughout Germany, whereby executive power was transferred to regional military commanders as representatives of the Ministry of Defence. When the Saxon Prime Minister, Erich Zeigner (SPD) [Socialist Party], refused to carry out the orders of the regional commander and disband the proletarian defence units, the central government sent Reichswehr troops into Saxony on 23 October and, a few days later, categorically ordered Zeigner to drop the communists from his Cabinet.⁹⁷

The federally appointed commissioner then instituted military tribunals to hear cases brought against those accused of aiding the insurrection and acted swiftly to censor publications that were sympathetic to the Communist parties.⁹⁸ Once order was restored, the military control of these provinces was lifted. But these experiences demonstrated the significant amount of control the government could exert over individual liberties using only the authority of Article 48. This authority would soon be expanded even further when the Republic faced a new kind of emergency in 1923.

b. Article 48 and Emergency Legislation

A significant shift in the use of Article 48 occurred during the deflationary crisis of 1923. After France invaded the Ruhr Valley, Germany declared a massive general strike and attempted to subsidize its work force.⁹⁹ As the strike wore on, however, and

⁹⁵ KOLB, *supra* note 73, at 36, 45-46.

⁹⁶ *Id.* at 49.

⁹⁷ *Id.*

⁹⁸ WATKINS, *supra* note 70, at 31-34.

⁹⁹ *Id.* at 74.

France remained in occupied territory, the German economy reached the verge of collapse with inflation making its currency essentially worthless.¹⁰⁰ Between December 1922 and August 1923, the German Mark went from an already appallingly unhealthy 8,000 to 1 ratio against the dollar to an essentially valueless 1 million to 1 ratio.¹⁰¹ In order to combat this economic crisis, significant federal action was needed. The governing coalition in the Reichstag, however, was made up of such a wide variety of pro-constitutional groups that the diversity of opinion on how to handle the crisis made concerted action impossible.¹⁰² While Article 48 had initially been used primarily to deploy the federal army in response to armed uprisings (a traditional use of emergency powers), the Stresemann government claimed for the first time that Article 48 gave it the authority to issue emergency *legislation* and issued “a round dozen or so of decrees” to combat the economic crisis.¹⁰³

It is important to note, however, that the Cabinet did not feel comfortable relying solely on Article 48 for the issuance of emergency decrees and soon sought additional authorization from the Reichstag in the form of an enabling act which explicitly authorized such actions.¹⁰⁴ The enabling act specifically tied its longevity to the stability of the Stresemann government and when the Social Democrats pulled out of the Cabinet on Nov. 2, 1923 in

¹⁰⁰ *Id.*

¹⁰¹ KOLB, *supra* note 73, at 48.

¹⁰² WATKINS, *supra* note 70, at 75.

¹⁰³ *Id.* at 75.

¹⁰⁴ Ermächtigungsgesetz [Enabling Act], Oct. 15, 1923, RGBl. I at 943, §§ 1, 2 (Ger.), *translated in* WATKINS, *supra* note 70, at 76. The full text of the enabling act reads:

The federal government is authorized to take those measures which it considers to be absolutely necessary in the financial, economic and social realms. Fundamental rights guaranteed in the Weimar Constitution may be disregarded in the process.

This authorization does not extend to regulations affecting hours of labor, nor to the reduction of pensions, social insurance or unemployment insurance.

Decrees issued on this basis shall be reported without delay to the Reichstag and to the Reichsrat. On demand of the Reichstag they are to be revoked immediately.

This law goes into effect on the day of promulgation. It shall cease to operate at the very latest on March 31, 1924, and shall lapse even before that time with any change in the party composition of the present government.

Id.

response to federal treatment of the rebellions in Bavaria, Saxony, and Thuringia, the enabling act came to an end.¹⁰⁵ When a new government was formed under Chancellor Marx, however, a new enabling act was passed authorizing similar emergency powers.¹⁰⁶ As Professor Watkins notes, many of the emergency decrees undertaken during this period were not only necessary due to the ever-increasing splintering in the Reichstag but also effective at combating the economic crisis gripping Germany, writing that “[t]he events of the inflation period may well be taken . . . as a typical illustration of the benefits to be derived from emergency legislation.”¹⁰⁷ The precedent set by these enabling acts, however, and the expansion of emergency powers in the hands of the executive Cabinet laid the groundwork for the opponents of the Weimar Republic to destroy the constitutional order from within.

c. Article 48 and the Fall of the Weimar Republic

After the emergency response to the deflationary crisis of 1923 proved to be successful, the period between 1924-1929 was relatively

¹⁰⁵ WATKINS, *supra* note 70, at 79.

¹⁰⁶ Ermächtigungsgesetz [Enabling Act], Oct. 15, 1923, RGeBl I at 1167, § 1 (Ger.), *translated in* WATKINS, *supra* note 70, at 80. The full text of the Marx enabling reads:

The federal government is authorized to take those measures which it considers to be absolutely necessary in view of the distressing circumstances of the people and of the Reich. Fundamental rights guaranteed in the Weimar Constitution may not be disregarded. Before being issued, all ordinances are to be discussed in secret session with committees chosen by the Reichstag and by the Reichsrat, each to consist of 15 members.

Decrees issued on this basis shall be reported without delay to the Reichstag and to the Reichsrat. They are to be revoked on demand of the Reichstag or of the Reichsrat. In the Reichstag two readings separated by an interval of at least three days shall be necessary for the completion of such a demand.

The Reichstag committee mentioned in paragraph I shall also be authorized, at the discretion of the Reichstag, to consider proposals relative to ordinances issued under the law of October 13, 1923 [the Stresemann enabling act].

This law goes into effect on the day of promulgation. It shall cease to operate on February 15, 1924.

Id.

¹⁰⁷ WATKINS, *supra* note 70, at 85.

stable.¹⁰⁸ But, as world-wide depression hit at the end of the 1920s, the deepening dysfunction of the Weimar Reichstag led to the worst instance of emergency power abuse in the history of a constitutional republic.

After several unsuccessful governments in 1926 and 1927, the election of May 1928 saw significant decreases in the number and percentage of Reichstag seats held by center and center-right parties, coupled with significant increases for the Socialist and Communist Parties and the rise of splinter groups which supported narrow interests.¹⁰⁹ The increasingly fractured Reichstag became less and less capable of forming a governing coalition.¹¹⁰ With the onset of the worldwide depression in 1929, Germany once again found itself in the midst of an economic crisis. As with the deflationary crisis, emergency powers both under Article 48 and authorized by delegation acts provided the basis for German government. As the Reichstag continued to splinter, however, the inability to form an effective governing coalition meant that there was no opposition to the extent of power exercised by the executive. Emergency decrees became the normal mode of governance as legislation continued to decrease and the Reichstag sat for fewer days each year between 1930 and 1932.¹¹¹

Then, in the Reichstag election on July 31, 1932, the Nazi and Communist Parties gained enough seats (230 and 89, respectively, out of a total of 608) to block any other parties from forming a governing coalition.¹¹² This Reichstag was dissolved after a vote of no confidence in the Papen government and a new election was held on November 6, 1932. But, once again, no governing coalition could be formed.¹¹³ This effectively put an end to the ability of the legislature to function under the Weimar Constitution. Without a functioning legislature, the only working office in the government was that of the Presidency, held by former general Paul von Hindenburg, who favored a return to a more imperial style of

¹⁰⁸ KOLB, *supra* note 73, at 68.

¹⁰⁹ *See Id.* at 78-79.

¹¹⁰ *See id.* at 78-80.

¹¹¹ *See, e.g., id.* at 121 (“The Reichstag sat on 94 days in 1930 (including 67 after the resignation of the ‘great coalition’), 42 in 1931 and only 13 in 1932. Ninety-eight laws were passed in 1930; 34 in 1931, only 5 in 1932. On the other hand, the number of emergency decrees rose from 5 in 1930 to 44 in 1931 and 66 in 1932.”).

¹¹² *Id.* at 128.

¹¹³ *Id.* at 129.

government.¹¹⁴ With the dissolution of each successively elected Reichstag before a vote of no-confidence could be called, each new Chancellor after 1930 required the support of President Hindenburg.¹¹⁵ Each Cabinet then governed exclusively through emergency decrees authorized by Article 48. In an attempt to create a governing right-wing coalition, which would need support from the Nazi Party to achieve a governing majority, President Hindenburg and his advisers turned to Adolf Hitler and supported his bid for chancellor.¹¹⁶ Once installed as a presidentially approved Chancellor, Hitler relied on the precedent set by the Stresemann and Marx Cabinets during the deflationary crisis and augmented his Article 48 authority through the completely legal means of a new enabling act.¹¹⁷ Though the means employed did not violate the Weimar Constitution itself, the content of the act clearly brought an end to the Weimar Republic:

National laws may be enacted by the national cabinet as well as in accordance with the procedure established in the Constitution. This applies to the laws referred to in Article 85, paragraph 2 and in Article 87. [These articles provide for parliamentary control of the budget.]

The national laws enacted by the national cabinet may deviate from the Constitution in so far as they do not affect the position of the Reichstag and of the Reichsrat. The powers of the president remain unchanged.

The national laws enacted by the national cabinet are to be prepared by the chancellor and published in the *Reichsgesetzblatt*. They come into effect, unless otherwise stipulated, upon the day following publication. Articles 68 to 77 of the Constitution do not apply to laws enacted by the national cabinet. [These articles were the ones governing procedure in the enactment of national legislation.]

Treaties of the Reich with foreign states which concern matters of national legislation do not require the consent of the bodies participating in legislation. The national cabinet

¹¹⁴ See WATKINS, *supra* note 70, at 96-97.

¹¹⁵ See *id.* at 99-101.

¹¹⁶ *Id.* at 109-10.

¹¹⁷ *Id.* at 118, 123.

is empowered to issue all provisions necessary for the execution of such treaties.

This law becomes effective on the day of publication. It becomes invalid on April 1, 1937; it also becomes invalid when the present national cabinet is replaced by another.¹¹⁸

As Professor Watkins notes, the lack of restrictions placed upon the Article 48 powers, allowed the constitution itself to be used to bring about the downfall of the Weimar Republic. He writes:

From a purely external standpoint, however, there was never any need to depart from the norms of absolute legality. Since the courts refused at all times to pass on the need for emergency measures, the ultimate right of decision remained for the time being in the hands of the executive. Executive power in turn was vested in a National Socialist chancellor. Under these circumstances there was nothing to prevent Article 48 from becoming an effective legal agency for the destruction of the Republic.¹¹⁹

This exploitation of an explicit system of emergency powers to destroy the very foundations of constitutional government remains the strongest historical cautionary tale against the employment of explicit emergency powers. The subsequent examples of de Gaulle in France and Indira Gandhi in India, to which this Article next turns, provide less extreme historical incidents which are worthy of investigation to see if they offer us any common threads from which we can begin to draw a few modest conclusions.

IV. EMERGENCY POWERS IN FRANCE'S FIFTH REPUBLIC

Article 16 of the 1958 French Constitution grants the President of the Republic the ability to invoke a state of emergency upon consultation with specified members of Parliament and the Constitutional Council.¹²⁰ Such an invocation grants the President

¹¹⁸ *Id.* at 123 (translating Reichsgesetzblatt [RGL], Nov. 19, 1923, pt. 1 (Ger.)).

¹¹⁹ *Id.* at 118.

¹²⁰ 1958 CONST. art. 16 (Fr.) ("When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is

broad powers to address whatever “crisis” is at hand, including power to unilaterally promulgate laws.¹²¹ The story of both executive and emergency powers under the Fifth Republic is largely the story of Charles de Gaulle.¹²² Until the 2016 Paris terrorist attacks, Charles de Gaulle was the only French President to have invoked an Article 16 Emergency, and his 1962 referendum drastically strengthened the position of the president. Therefore, this Part will sketch out the actions of the Gaullist government from the formation of the Constitution through the 1961 Emergency and up to the 1962 referendum which established direct election of the President. These events had an outsized impact on the role of the French executive and should provide sufficient context to analyze how the use of emergency powers works under the 1958 Constitution.

The 1958 Constitution emerged from the inability of the Fourth Republic to deal with a crisis in Algeria and the inclusion of executive emergency powers likely stems from these troubled origins. On May 13, 1958, French Army officers led by General Jacques Massu formed a “Government of Public Safety” which named Massu President of Algeria.¹²³ Eleven days later, Algerian forces invaded Corsica and plans for an invasion of the French mainland were in place.¹²⁴

The government structure under the Fourth Republic seemed incapable of responding to the crisis. Largely, this incapacity was due to the response to the Vichy regime and to some extent the “de facto dictatorship”¹²⁵ of the provisional government put in place

interrupted, the President of the Republic shall take the measures commanded by these circumstances, after official consultation with the Premier, the Presidents of the assemblies and the Constitutional Council. He shall inform the nation of these measures in a message. These measures must be prompted by the desire to ensure to the constitutional governmental authorities, in the shortest possible time, the means of fulfilling their assigned functions. The Constitutional Council shall be consulted with regard to such measures. Parliament shall meet by right. The National Assembly may not be dissolved during the exercise of emergency powers by the President.”).

¹²¹ *Id.*

¹²² See DAVID S. BELL, PRESIDENTIAL POWER IN FIFTH REPUBLIC FRANCE 1, 1 (2000) (“De Gaulle was a ‘political artist’, of such power that he gave French political life a momentum which it was easier to adapt to than to turn.”).

¹²³ JULIAN JACKSON, CHARLES DE GAULLE 72-73 (2003).

¹²⁴ *Id.* at 74.

¹²⁵ *Id.* at 42.

after the liberation of Paris.¹²⁶ In the aftermath of World War II the drafters of the Fourth Republic placed severe limitations on executive power and created a system of parliamentary supremacy.¹²⁷ Due to deep divisions within French political parties, however, a stable government never developed. During the twelve years of the Fourth Republic, from 1946-1958, there were twenty-one different governments.¹²⁸ In this way the Fourth Republic appeared to be repeating the cycle of powerless Parliaments which had plagued and ultimately destroyed the Weimar Republic.¹²⁹

While the government remained in a state of near paralysis in the face of the Algerian *putsch*, Charles de Gaulle announced that he would be willing to return to political life to confront the crisis.¹³⁰ In response to public outcry to bring de Gaulle back, the existing government resigned, allowing for the appointment of de Gaulle.¹³¹ But de Gaulle conditioned his return to public life on the drafting of a new constitution, one based on the vision he had elaborated twelve years before, but which had been rejected by drafters of the constitution of the Fourth Republic.¹³²

De Gaulle initially laid out his ideas for the post-war constitution in a now-famous speech at Bayeux on June 16, 1946.¹³³ He envisioned an executive completely independent of parliamentary control, who acted in the defense of the nation as a whole and rose above the political in-fighting of the parliamentary system. He urged that “over and above political contingencies, there be established a national arbiter to assure continuity amidst shifting political arrangements.”¹³⁴ De Gaulle warned of the dangers of a divided government without a strong central leader saying: “the internal unity, cohesion, and discipline of the Government of France must be sacrosanct, or else we will soon see the very management

¹²⁶ See SOPHIE BOYRON, *THE CONSTITUTION OF FRANCE: A CONTEXTUAL ANALYSIS* 16-17 (2013).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *supra* Section III.c.

¹³⁰ See JACKSON, *supra* note 123, at 73 (describing de Gaulle’s “calculated intervention[] . . . announcing his readiness to assume the Powers of the Republic”).

¹³¹ *Id.* at 74-76.

¹³² See BOYRON, *supra* note 126, at 18.

¹³³ Charles de Gaulle, President of the Provisional Government of the French Republic, Speech at Bayeux of June 16, 1946, in MARTIN A. ROGOFF, *FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS* 37-39 (2011).

¹³⁴ *Id.* at 38.

of the country powerless and discredited.”¹³⁵ The recent and traumatic disasters of strong executive governments prior to World War II, however, influenced the drafters of the 1946 constitution far more than de Gaulle’s words, and they largely disregarded de Gaulle’s warnings. But de Gaulle’s fears appeared nearly prophetic when the events in Algeria proved beyond the capacity of the Fourth Republic.

Considering the circumstances bringing de Gaulle back into national political life, it is perhaps unsurprising that the new Constitution created in 1958 would more closely follow de Gaulle’s earlier vision than did the 1946 constitution.¹³⁶ This still did not go far enough for de Gaulle. As his Bayeux speech clearly showed, de Gaulle envisioned a powerful, independent president.¹³⁷ On its face, however, the constitution of the Fifth Republic, did not necessarily create a “President-centered” system. For example, the President was elected indirectly, instead of through direct universal suffrage.¹³⁸ Additionally, while the President appointed the Prime Minister, the Prime Minister’s government was still responsible to Parliament, and the constitution split the executive power between the Prime Minister and the President, creating a dual executive.¹³⁹

Article 16 of the 1958 Constitution, however, did grant the President the ability to declare a state of emergency to respond to periods of national crisis. It should be noted that De Gaulle’s political style grated on multiple important constituencies.¹⁴⁰ Perhaps in recognition of this, de Gaulle encouraged his surrogates to downplay the risks such a powerful provision posed. Michel Debré, for example, who drafted most of the 1958 Constitution, pointed to the retention of parliamentary supremacy in the new constitution and the requirement that the parliament would have to approve any invocation of Article 16.¹⁴¹ In large part due to the

¹³⁵ *Id.* at 38-39.

¹³⁶ MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS 5-6 (2011).

¹³⁷ de Gaulle, *supra* note 133, at 37-39.

¹³⁸ 1958 CONST. art. 6 (Fr.) (prior to the 1962 Referendum).

¹³⁹ BRICE DICKSON, INTRODUCTION TO FRENCH LAW 48-49 (1994).

¹⁴⁰ JACKSON, *supra* note 123, at 111-12 (noting that under de Gaulle’s leadership certain politicians “progressively bec[a]me alienated from him ... conservatives by his Algerian policy, Socialists by his economic policy, liberals by his anti-Americanism, and the Catholic centrists by his disparagement of European unity”).

¹⁴¹ Michel Debré, Speech Before the Council of State of August 27, 1958, *in* ROGOFF, *supra* note 136, at 44.

continued threat of an Algerian Civil War, the 1958 Constitution was accepted with Article 16 intact and took effect on October 4, 1958.¹⁴²

While the beginning of the Algerian rebellion had brought de Gaulle back into national leadership and led to the creation of the 1958 Constitution, over the next three years the Algerian situation continued to plague the Gaullist government and eventually led to de Gaulle's invocation of a state of emergency under Article 16. On April 22, 1961, military leaders in Algeria attempted another coup.¹⁴³ De Gaulle sought and received approval from the Prime Minister, the Presidents of the legislative chambers and the Constitutional Council to declare a state of emergency.¹⁴⁴ He then immediately went on national radio and appealed to the loyalty of the Army.¹⁴⁵ The coup failed almost instantly and the danger had passed by April 25th, yet de Gaulle maintained a state of emergency for six more months.¹⁴⁶

During the Emergency, de Gaulle used his Article 16 authority to pass several directives, which likely could not have made it through a divided legislature. Additionally, while de Gaulle followed the letter of Article 16, which explicitly prohibits dissolution of the legislature during an Emergency, he prohibited the sitting assembly from debating any measures related to the Emergency.¹⁴⁷ By removing any potential check on his power from the legislature, de Gaulle had essentially given himself free reign to govern as he saw fit, because prior to the *Freedom of Association Case*, the Constitutional Council rarely exercised judicial review.¹⁴⁸ This meant that, in reality, the Gaullist government operated with almost complete dictatorial power between April 23 and September 29, 1961.¹⁴⁹

While de Gaulle's use of Article 16 caused many to fear increases in executive power, a later action using a different portion of the

¹⁴² BOYRON, *supra* note 126, at 18.

¹⁴³ *Id.* at 60.

¹⁴⁴ *Id.*

¹⁴⁵ See JACKSON, *supra* note 123, at 114-16 (explaining the modernization and development de Gaulle's speeches).

¹⁴⁶ BOYRON, *supra* note 126, at 60.

¹⁴⁷ *Id.* ("[D]e Gaulle interpreted the constitutional provision as prohibiting Parliament to debate any issues or decisions relevant to the use of article 16.").

¹⁴⁸ See Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 16, 1971, Rec. 29 (Fr.), reprinted in ROGOFF, *supra* note 136, at 191; see also ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 94 (1992).

¹⁴⁹ BOYRON, *supra* note 126, at 60.

1958 Constitution made perhaps the greatest alteration to the government structure of the Fifth Republic. As discussed above, de Gaulle firmly believed that the President of the Republic should bear responsibility for the security of the nation. But the 1958 Constitution had granted the Parliamentary government a nominal supremacy.¹⁵⁰ In spite of this, de Gaulle believed that a democratically “legitimate” President could gain the upper hand. However, as discussed above, Article 6 established an indirect election for the President.¹⁵¹ To change this election procedure, de Gaulle would need to change the constitution.

Article 89 specified the procedure for amending the constitution and under the requirements of the amendment process, in order to implement direct national election of the president, de Gaulle would need parliamentary approval.¹⁵² Leftists in the legislature still feared a Gaullist dictatorship and could prevent the passage of the desired amendment.¹⁵³ Instead of following this prescribed amendment process, de Gaulle appealed directly to the French electorate and called for a national referendum on direct Presidential election.¹⁵⁴

Article 11 of the 1958 Constitution allowed for direct referenda to change the “organization of the public authorities,”¹⁵⁵ and de Gaulle claimed that changing the electoral structure to allow direct universal suffrage for the President fell into this Article 11 category.¹⁵⁶ Legal scholars and commentators almost universally condemned de Gaulle’s referendum as it would alter the constitutionally prescribed method for selecting the president and therefore could only be accomplished through an Article 89 constitutional amendment.¹⁵⁷ Despite these legal objections, de Gaulle’s referendum was approved by sixty-two percent of voters.¹⁵⁸

The transition to direct national election of the president has had a much longer lasting effect on constitutional allocation of powers than the 1961 Emergency period. While this perhaps shows that emergency powers are less effective at accumulating executive

¹⁵⁰ Debré, *supra* note 141, at 44-45.

¹⁵¹ 1958 CONST. art. 6 (Fr.).

¹⁵² *Id.* art. 89.

¹⁵³ BOYRON, *supra* note 126, at 61.

¹⁵⁴ *Id.*

¹⁵⁵ 1958 CONST. art. 11 (Fr.).

¹⁵⁶ BOYRON, *supra* note 126, at 61.

¹⁵⁷ See JACKSON, *supra* note 123, at 112.

¹⁵⁸ *Id.*

power over the long term, the severe impact on civil liberties demonstrated during the six-month de Gaulle Emergency shows that emergency powers lend themselves to executive abuse. This theme will emerge even more clearly in the following analysis of emergency powers in India.

V. EMERGENCY POWERS IN INDIRA GANDHI'S INDIA

As with de Gaulle in France, the Indian story of emergency power largely revolves around a single individual: Indira Gandhi. Gandhi's use of emergency powers to quell political opposition and maintain her hold on national leadership traumatized the country and led to significant reforms in the Indian concept of emergency powers. This Part will focus primarily on the events leading up to and during the so-called "Internal Emergency" of 1975-1977.

Under the initially adopted Indian Constitution, the president of India could declare a state of Emergency under Article 352 in cases where "the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance."¹⁵⁹ A declaration of Emergency suspended prohibitions on federal actions within the states;¹⁶⁰ imposed a duty on the federal government to protect the states from "external aggression and internal disturbance";¹⁶¹ suspended the protections for fundamental freedoms guaranteed by Article 19 of the Constitution;¹⁶² and allowed the President to close the courts to any challenges against emergency actions brought under any of the fundamental rights guarantees in Part III of the constitution.¹⁶³ This Part describes how, as a direct result of the Internal Emergency, the constitution was amended to more clearly define the situations

¹⁵⁹ India Const. art. 352. As discussed below after the Internal Emergency, this Article was amended so that the phrase "internal disturbance" was replaced with "armed rebellion."

¹⁶⁰ India Const. art. 353.

¹⁶¹ India Const. art. 355.

¹⁶² India Const. art. 358.

¹⁶³ See India Const. art. 359 ("[When] a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force . . .").

which would justify a declared Emergency and to expand the role of the courts in checking emergency actions.¹⁶⁴

a. Drafting History

While the emergency powers described above are quite sweeping and remained relatively unchanged for the first thirty years of constitutional government in India, not all members of the Constituent Assembly favored including such dramatic allocations of authority to the government in times of crises. In fact, during the drafting convention, several assembly members voiced extensive opposition citing the dangers posed by explicit approval of emergency powers. For example, one member of the Constituent Assembly, H. V. Kamath, objected to the proposed emergency provisions in the draft constitution based on the role the abuse of such powers played in the fall of the Weimar Republic:

I find no parallel to this Chapter of Emergency Provisions in any of the other Constitutions of democratic countries in the world. The closest approximation to my mind is reached in the Weimar Constitution of the Third Reich which was destroyed by Hitler, taking advantage of the very same provisions contained in that Constitution

It has been recognized by students of politics that the very provisions in the Weimar Constitution . . . contributed to the rise of Herr Hitler and paved the way to his dictatorship. Compared to that art 48 of the Weimar Constitution, the provisions we are making under Chapter XI are far more drastic . . . [sic] We should alter and revise this Chapter to see that the liberties guaranteed in this Constitution are real.¹⁶⁵

Another member, Professor K. T. Shah, objected to the limitations emergency powers would place on the proposed Supreme Court:

The moment you introduce a provision like this in our Constitution, the moment you provide that the right to move the Supreme Court which has been guaranteed by a previous

¹⁶⁴ India Const. Part III, amended by The Constitution (Forty-Fourth Amendment) Act, 1978.

¹⁶⁵ Anil B Divan, *Emergency Powers and the Indian Constitution*, in *DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW: ESSAYS IN HONOUR OF NANI PALKHIVALA* 49, 52-53 (Venkat Iyer, ed., 2000).

article shall be suspended by an Order of the President, by an Order of the Executive, that moment you declare that your entire Constitution is of no effect.¹⁶⁶

These objections succeeded in defeating the initial push for an emergency powers provision. The issue reappeared later in the drafting process, however, and was included in the final constitution apparently without any further difficulty.¹⁶⁷

b. Early Uses of Emergency Powers

Prior to Indira Gandhi's Emergency of 1975-1977, Article 352 had only been invoked in the face of external military conflicts. In the Fall of 1962 in response to an "armed conflict with China," the Indian government declared its first Emergency under the new Constitution.¹⁶⁸ The government used its emergency authority to issue the "Defence of India Ordinance" and the "Defence of India Rules."¹⁶⁹ These acts—coupled with a Presidential Order suspending the ability to mount certain challenges to unconstitutional detentions—allowed the government to detain individuals without any judicial process.¹⁷⁰

Despite the jurisdictional bar imposed by the Presidential Order, the Indian Supreme Court entertained a challenge by detainees arrested under the Defence of India Act.¹⁷¹ In *Makhan Singh*, the Court ruled that while Article 359 allowed the President to prohibit challenges to emergency actions if those challenges were based on specified constitutional guarantees located within Part III of the constitution, such a bar did not prohibit detention challenges brought on other grounds.¹⁷² Mr. Singh then filed a subsequent petition alleging bad faith prosecution (*mala fides*) and was granted release by the Supreme Court.¹⁷³

¹⁶⁶ *Id.* at 54.

¹⁶⁷ *Id.* ("[The emergency powers provision] surfaced again later on and was passed without any substantial amendments that would have met the criticism.").

¹⁶⁸ *Id.* at 58.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Makhan Singh v. Union of India*, AIR 1964 SC 381 (India).

¹⁷² *Id.*

¹⁷³ *Makhan Singh v. State of Punjab*, AIR 1964 SC 1120 (India).

As with the French Emergency in 1961, the danger of armed hostilities passed quickly, but the State of Emergency continued long after the threat. The *Makhan Singh* cases were heard in 1963, but the Emergency continued and was still in place in August of 1965 when armed hostilities erupted between India and Pakistan.¹⁷⁴ The government simply adapted the existing emergency to the new conflict and although once again the actual skirmishes receded within a few weeks, the Emergency remained in place until January 1968, when sufficient public pressure had mounted to convince the government to end the Emergency.¹⁷⁵

The second Emergency declared under the 1948 Constitution arose from another armed conflict with Pakistan. In December 1971, a civil war between West Pakistan and the eastern portion of Pakistan, which would become Bangladesh, spilled over the border into India when Pakistani planes bombarded Indian air bases.¹⁷⁶ Indira Gandhi (who had been elected Prime Minister in 1967),¹⁷⁷ engaged the Pakistani military immediately and declared an Emergency to deal with the crisis.¹⁷⁸ Acting under this emergency authority the government passed the "Maintenance of Internal Security Act 1971" (MISA), which once again allowed the government a relatively free-hand in detaining would-be dissenters.¹⁷⁹ The government used its authority under MISA extensively and detained "tens of thousands of persons, including communist leaders, students, peasants and industrial workers."¹⁸⁰

Once again, the military engagement ended quickly, as one of Gandhi's many biographers put it: "The well-oiled Indian war machine performed brilliantly . . . and the lightning campaign to free Bangladesh was over in exactly fourteen days."¹⁸¹ In what had become a familiar pattern, however, the government continued to operate under a State of Emergency for years, even reaffirming the

¹⁷⁴ Divan, *supra* note 165, at 59-60.

¹⁷⁵ *Id.* at 60.

¹⁷⁶ INDER MALHOTRA, *INDIRA GANDHI: A PERSONAL AND POLITICAL BIOGRAPHY* 138 (1989).

¹⁷⁷ See Aubrey Menen, *Indira Gandhi is Sort of the de Gaulle of India*, N.Y. TIMES, Dec. 31, 1972, at SM8 (describing Gandhi's rise to power including her political fight with the "old guard" of the Congress Party which she won decisively in the election of 1972). While thoroughly interesting history, that story is beyond the scope of this essay.

¹⁷⁸ Divan, *supra* note 165, at 60.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ MALHOTRA, *supra* note 176, at 139.

Emergency by Presidential Order in November of 1974, despite the cessation of hostilities nearly three years earlier and the completion of a peace treaty between Pakistan and India (with recognition of the new government of Bangladesh) in July of 1972.¹⁸²

c. The Internal Emergency

In the spring of 1974, student protests erupted in the state of Bihar.¹⁸³ A retired socialist leader named Jayaprakash (J. P.) Narayan returned to political life and organized the unrest in Bihar into a growing opposition movement.¹⁸⁴ The government, still under the control of Prime minister Gandhi, used its authority under the continued Pakistan Emergency to harshly crack down on this movement but protests continued to gain momentum.¹⁸⁵ Various political parties in state “by-elections” began nominating joint candidates who shared only the trait of opposing Gandhi’s Congress Party (CPP).¹⁸⁶ In election after election throughout the last half of 1974 and the first half of 1975, the CPP suffered electoral declines, pointing towards a strong likelihood that the CPP would lose the upcoming national elections.¹⁸⁷

In addition to mounting political opposition, the Prime Minister faced rebuke in the courts as well. On June 24, 1975, the High Court of Allahabad issued a judgment against Gandhi in an election corruption case which had been filed after her victory in the 1972 elections.¹⁸⁸ The judgment prohibited Gandhi from participating as a member of Parliament for six years, essentially preventing her from governing as Prime Minister.¹⁸⁹ The court stayed the order for twenty days in order to allow for an orderly transition of power but refused a permanent injunction while the government appealed the case to the Supreme Court.¹⁹⁰

¹⁸² Divan, *supra* note 165, at 60-61.

¹⁸³ NAYANTARA SAHGAL, *INDIRA GANDHI: HER ROAD TO POWER* 113 (1982).

¹⁸⁴ *Id.* at 113-20.

¹⁸⁵ *Id.* at 119-20.

¹⁸⁶ *Id.* at 127.

¹⁸⁷ *Id.*

¹⁸⁸ *Smt. Indira Nehru Gandhi v. Raj Narain* (1975) 2 SCC 159 (India).

¹⁸⁹ *Id.* ¶ 28.

¹⁹⁰ *Id.* ¶ 27.

Rather than step down, however, Gandhi declared a new Emergency, this time based on “internal disturbances” as allowed under the original wording of Article 352.¹⁹¹ While previous emergencies had lingered long after armed hostilities with external threats had ceased (and, in fact, the Pakistan Emergency was technically still in effect), this was the first time an Emergency had been declared based solely on alleged internal threats.¹⁹² Gandhi’s government immediately began arresting opposition leaders, including J. P. Narayan¹⁹³ and other prominent political figures.¹⁹⁴ Professor Divan characterizes the detentions as targeted against “anyone deemed ‘unfriendly’ to Gandhi and the ruling Congress party.”¹⁹⁵ Additionally, the government halted the publication of “opposition” newspapers and imposed stringent new censorship requirements on the remaining media outlets, including making it a crime to criticize the government.¹⁹⁶

As it had done during the Chinese Emergency, the judiciary took some steps to check exercises of emergency powers, particularly in response to emergency detentions. This response reached all the way to the State High Courts, who continued to hear and grant *habeas* relief in the initial stages of the Emergency. Once the government appealed these cases to the Supreme Court, however, the judiciary no longer posed a barrier to most of the government’s emergency actions.¹⁹⁷

After the Supreme Court ruled against the government’s initial attempts at economic nationalization, Gandhi set out to “tame” the judiciary.¹⁹⁸ When Chief Justice Sikri retired the day after handing down this decision, Gandhi appointed A. N. Ray to replace him.¹⁹⁹ Prior to this, the customary practice was to appoint the next most senior justice to the Chief Justice position. J. M. Shelat, the next in line for the job, had ruled against the government in the *Kesavananda*

¹⁹¹ See SAHGAL, *supra* note 183, at 149-50.

¹⁹² See *id.*

¹⁹³ See *id.* at 153.

¹⁹⁴ See *id.* at 149-50.

¹⁹⁵ DIVAN, *supra* note 165, at 62-63.

¹⁹⁶ SAHGAL, *supra* note 183, at 151-57.

¹⁹⁷ DIVAN, *supra* note 165, at 64.

¹⁹⁸ MALHOTRA, *supra* note 176, at 152. The case, *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 (India), has become one of the most famous cases in Indian constitutional law.

¹⁹⁹ *Id.* at 152-53.

Bharati case, as had the next two most senior justices.²⁰⁰ Gandhi bypassed all three of these justices and named Ray as the new Chief Justice.²⁰¹ Although only the fourth most senior justice on the court, he was the most senior justice who had ruled in her favor in *Kesavananda Bharati*.²⁰² The passed-over justices promptly resigned in protest, essentially allowing Gandhi to “pack” the Court with friendly justices.²⁰³ It was this government-friendly Court which passed on the legality of the Internal Emergency detentions, as well as other emergency power actions taken by the government, and which upheld most of those government actions.

With the president firmly under the thumb of the parliamentary government and with the judiciary removed as an obstacle, Gandhi continued to use the Internal Emergency to her advantage and pushed through several constitutional amendments designed to solidify her power grab. These amendments further restricted the ability of the courts by: taking away jurisdiction to hear election disputes; raising over one hundred statutes to constitutionally protected status including MISA; restricting the ability of state High Courts to issue certain writs under Article 226 of the constitution (including writs of *habeas corpus*); implementing a requirement of a two-thirds majority of Supreme Court justices in order to declare a law unconstitutional; and restricting judicial review of laws aimed at “anti-national activities.”²⁰⁴ These amendments themselves were also declared to be unreviewable by the courts.²⁰⁵

In spite of her near total control of the Indian government, Gandhi believed she needed to reintroduce an element of democratic legitimacy in order to secure her position.²⁰⁶ Confident in the belief that her crackdown on the press and the opposition leaders had effectively destroyed her political adversaries, she called a snap election in the Spring of 1977.²⁰⁷ Gandhi had vastly underestimated the popular anger engendered by the Internal

²⁰⁰ *Id.* at 152.

²⁰¹ *Id.* at 153.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ DIVAN, *supra* note 165, at 65-66 (describing the Amendments passed during the Emergency).

²⁰⁵ *Id.* at 66.

²⁰⁶ *Id.* at 67-68.

²⁰⁷ *Id.* at 68.

Emergency and, to her apparent surprise, she and the Congress Party suffered a crushing electoral defeat.²⁰⁸

The newly elected government immediately went to work reversing the constitutional amendments passed during the Emergency. In less than a year it had passed the Constitution (44th Amendment) Act 1978, which altered the procedures for declaring emergencies and restricted the powers granted during an emergency.²⁰⁹ For example, the ability to declare an Article 352 emergency for an "internal disturbance" was replaced with a more limited ability in response to an "armed rebellion." Additionally, the Amendment required that an emergency declaration be approved by a majority in Parliament and two-thirds of the voting members present in order to remain effective. To extend an emergency, it would need to be reaffirmed by Parliament every six months. And, in response to the attacks on the judiciary, the Amendment prohibited stripping jurisdiction from the Courts to hear challenges to detentions of more than two months or challenges to emergency action which were claimed to violate Articles 21 and 22 of the constitution, which protect the "fundamental rights" to life, liberty, and protection against arbitrary arrest, respectively.²¹⁰

It would not be an exaggeration to say that the Internal Emergency of 1975-1977 came close to destroying constitutional democracy in India. The constitutional reforms which resulted from the experience, however, have greatly restrained the temptation to invoke formal states of emergency. Subsequent emergencies have been called only in response to direct military threat, such as armed hostilities in Kashmir.²¹¹

VI. EMERGENCY POWERS IN THE U.S. CONSTITUTION

Unlike the Weimar, French, and Indian constitutions, the U.S. Constitution has no explicit "emergency powers" clause. Instead, it contains a Vesting Clause which grants the President the noticeably

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 68-69 (describing the effects of the 44th Amendment).

²¹⁰ *Id.*; India Const. arts. 21-22.

²¹¹ See John F. Burns, *India Extends Emergency Powers in Kashmir*, N.Y. TIMES, Aug. 9, 1994, at A9.

undefined “executive power,”²¹² along with the authority of the “Commander in Chief of the Army and Navy of the United States.”²¹³ Additionally, the U.S. Constitution anticipates the potential for military conflicts and allows Congress the authority to call up the state militias to “suppress Insurrections and repel Invasions.”²¹⁴ One further important distinction between the U.S. Constitution and those discussed above is that, instead of allowing for the suspension of fundamental rights during a declared state of emergency, the Constitution allows only the writ of habeas corpus to be suspended and seems (at least arguably based on the placement of the Suspension Clause in Article I) to confine such suspensions to the legislature in a few narrowly delineated circumstances.²¹⁵

As the drafting history of Article II and the executive powers has been thoroughly described elsewhere, this Part will refrain from that well-trodden (though endlessly fascinating) ground and will instead provide a short glimpse at executive responses to three of our nation’s most dire national crises. Abraham Lincoln, Franklin Delano Roosevelt, and George W. Bush each faced national threats which could potentially have destroyed the country. All three reacted by making expansive uses of executive power, basing their authority to take such actions in the vague wording of Article II. While examinations of the constitutionality of these actions has filled volumes of scholarly works, this Part will avoid such questions (though they will surface to some extent in Part VII) and instead will use the experiences of these three Presidents to show that, even absent an emergency powers clause, a constitution which provides for a sufficiently strong executive can survive times of national crisis.

This brief historical account is not meant to imply that these were the only U.S. Presidents to make use of expansive executive powers during national emergencies. The actions of George Washington in the face of the Whiskey Rebellion,²¹⁶ Thomas Jefferson’s decision to

²¹² U.S. CONST. art. II, § 1, cl. 1 (“The executive power shall be vested in a President of the United States of America.”).

²¹³ U.S. CONST. art. II, § 2, cl. 1.

²¹⁴ U.S. CONST. art. I, § 8, cl. 15.

²¹⁵ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus *shall not* be suspended, *unless* when in Cases of Rebellion or Invasion the public Safety may require it.”) (emphasis added).

²¹⁶ JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 68-71 (2009).

unilaterally authorize the Louisiana Purchase,²¹⁷ Andrew Jackson's battle with the National Bank,²¹⁸ Woodrow Wilson's efforts to promote extensive censorship during World War I,²¹⁹ and many of the measures used during the Cold War and by modern presidents provide numerous opportunities to examine emergency executive action. The time and space constraints of this Article, however, make it prudent to focus on the extreme examples of Lincoln during the Civil War, FDR during the Great Depression, and George W. Bush in prosecuting the War on Terror. The real threat to the continued viability of the country faced by these presidents demonstrates most clearly that the United States' model has allowed the executive to respond to national emergencies despite lacking an emergency powers provision. Whether this implied structure presents a greater threat to individual liberties than the explicit structures discussed above will be examined in Part VII.

a. Abraham Lincoln

Perhaps the most well-known use of United States executive powers to combat a national emergency were the actions taken by Abraham Lincoln *during* the Civil War. Historians almost universally credit Lincoln with saving the Union, and such claims merit consideration in large part because of the extraordinary measures Lincoln took throughout the War, measures which seemed to disregard practice and precedent as well as traditional understanding of the limits on executive powers. Just over a month after his inauguration, Lincoln authorized the military to suspend the writ of habeas corpus;²²⁰ he authorized military detention of civilians;²²¹ he openly defied an order from a U.S. Supreme Court Justice;²²² and he unilaterally ended slavery in the states still "in

²¹⁷ *Id.* at 117-23.

²¹⁸ *Id.* at 165-76.

²¹⁹ ROSSITER, *supra* note 29, at 241-50.

²²⁰ Order, Abraham Lincoln, President of the United States, to Winfield Scott, The Commanding Gen. of the Army of the United States, in WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 25 (1998) (authorizing the Commanding General of the Army of the United States to suspend the writ of habeas corpus "[i]f at any point . . . you find resistance which renders it necessary").

²²¹ WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 25-26 (1998)

²²² *Id.* at 38.

rebellion” against the Union.²²³ While Congress subsequently provided retroactive approval for many of these actions, Lincoln initially undertook such measures on his own under the umbrella of his executive power as commander-in-chief. Yet despite this extensive use of executive power, the mechanisms of our constitutional republic continued to function to some extent. For example, elections were never suspended even as Lincoln faced potential defeat in the election of 1864. This is a common theme in the use of emergency powers under the U.S. Constitution. Not once have presidential elections been suspended even in the face of a national emergency.

This Article will not attempt a detailed analysis of the litany of Lincoln’s war-time maneuvers; however, a brief survey will help provide context for the way in which the U.S. constitutional model allows for extraordinary responses to extraordinary situations in the absence of an explicit emergency provision.

i. Habeas Corpus

On April 27, 1861, Lincoln authorized General Winfield Scott to suspend the writ of habeas corpus and detain individuals suspected of “resisting” the Union government near vital Maryland rail lines necessary to supply the Capitol with troops and supplies.²²⁴ One such detainee challenged his detention in the famous case of *Ex parte Merryman*.²²⁵ Chief Justice Taney, riding circuit, heard Merryman’s petition for a writ of habeas corpus and ordered General George Cadwalader (who was in charge of the garrison where Merryman was being held) to produce Merryman before the court.²²⁶ The General refused to produce Merryman, and Taney issued an opinion from the bench declaring that the President did not have the authority to suspend the writ of habeas corpus and that the military could not arrest civilians.²²⁷ Taney recognized that little could be done to enforce his order as any attempt by civil law enforcement to bring the disobedient general into court would be met with the

²²³ Abraham Lincoln, President of the United States of America, Emancipation Proclamation (Jan. 1, 1863).

²²⁴ REHNQUIST, *supra* note 221, at 25.

²²⁵ 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487).

²²⁶ *Id.* at 148.

²²⁷ *Id.* at 152.

armed resistance of the U.S. military.²²⁸ Nevertheless, Taney sent his opinion to President Lincoln, who promptly ignored the ruling and defended his suspension of the writ in a message to Congress given July 4th of that year.²²⁹

Scholars have long debated whether Lincoln had the constitutional authority to suspend the writ without Congressional approval. This question will be discussed in more detail in Part VII. For now, it is sufficient to note that even in the absence of an express emergency powers provision, and regardless of the legality or illegality of Lincoln's action, the writ remained suspended despite resistance from the Court. Congress eventually retroactively sanctioned Lincoln's actions by "officially" suspending the writ for the duration of the war.

ii. *The Emancipation Proclamation*

Lincoln continued to take strong executive action throughout the course of the Civil War and always justified such actions in the context of the crisis threatening to rip the nation apart. A second dramatic instance demonstrating this approach was the issuance of the Emancipation Proclamation. Lincoln issued the preliminary Emancipation Proclamation in September of 1862 after the costly Union victory at the Battle of Antietam.²³⁰ The Proclamation went into effect on January 1, 1863 and declared free all slaves held in bondage in any of the states then still "in rebellion" against the Union.²³¹ Congress played no part in the Proclamation, and Lincoln rooted his authority to issue it in his powers as commander-in-chief.²³² Critics of the Proclamation declared it a federal taking of personal property in violation of the due process clause.

As jarring as it is to discuss the emergence from bondage of millions of enslaved souls as a "taking of property," the prevailing understanding at the time supported the critics' claims. Even Lincoln, the "Great Emancipator," treated the Proclamation as a

²²⁸ REHNQUIST, *supra* note 221, at 34.

²²⁹ *Id.* at 38.

²³⁰ YOO, *supra* note 216, at 219.

²³¹ See generally Lincoln, *supra* note 223 ("[A]ll persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free . . .").

²³² YOO, *supra* note 216, at 201.

deprivation of property.²³³ But because the laws of war allowed for confiscation of enemy property, he felt justified in issuing the Proclamation under his executive powers. Scholars can (and do) debate whether the laws of war actually applied. Lincoln's refusal to acknowledge the Confederacy as a sovereign nation and his constant references to the "Rebellion," instead of a state of Civil War, are offered as evidence that no official state of war existed.²³⁴ Whether Lincoln should have justified the Proclamation as a "necessary" measure for suppressing an internal rebellion, however, is irrelevant to the central inquiry of this Article, because in either situation Lincoln would have been exercising implied emergency powers. What is relevant for our purposes is the vast expansion of executive authority claimed with the stroke of Lincoln's pen. Congress had struggled with the issue of slavery for decades prior to the Civil War, with little to show for it. Lincoln's Proclamation had put a virtual end to legal slavery (though it did not technically apply to the Border States) by sheer force of executive will. Once again, Lincoln's actions were subsequently given tacit approval with the passage of the Thirteenth Amendment.²³⁵

b. Franklin Delano Roosevelt

The presidency of Franklin Delano Roosevelt presents an interesting look at emergency powers under the U.S. Constitution because of the unique series of crises which occurred during his administration. Not only was FDR the first U.S. President to make extensive use of implied emergency powers to confront a domestic emergency outside the more traditional context of war, rebellion, or invasion, but he also faced the extreme military crises presented by the lead-up to and actual outbreak of World War II. During this period, FDR used his Commander-in-Chief powers to a greater extent than any previous President with the possible exception of Lincoln.

²³³ *Id.* at 220.

²³⁴ See Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1869-72.

²³⁵ U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

i. The New Deal and Domestic Use of Emergency Power

Perhaps the greatest expansion of executive power in U.S. history occurred, not during a time of war or “rebellion,” but rather amid the worst financial crisis the country (and the world) had ever seen. FDR’s New Deal programs arguably had little effect on stemming the tide of the Depression, and many scholars contend that it was only the munitions manufacturing boom caused by World War II which reengaged the U.S. economy. Regardless of their efficacy, however, the New Deal represented an indefatigable attempt to reverse the country’s financial collapse and along the way grew the powers of the executive branch beyond anything even Alexander Hamilton would have dared imagine. Additionally, FDR clearly viewed his actions during the New Deal as an exercise of emergency authority, stating in one national address that:

[I]n the event that the Congress shall fail [to do something to fix the crisis] . . . and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.²³⁶

Telling in this statement, however, is FDR’s admission that such a use of executive power during a domestic crisis needed Congressional approval.

Rossiter, writing shortly after the end of World War II recognized “five . . . crisis techniques” to combat the Great Depression: “executive initiative, executive leadership of legislation, an abbreviated legislative process, the delegation of powers by stature, and an expansion of the administrative branch.”²³⁷ Because of this variety of tools employed during the emergency, the New Deal presents an exceptional model to examine the way in which all three branches of government must cooperate over the long run in order to allow for an extension of executive

²³⁶ S. SPECIAL COMM. ON NAT’L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES: A WORKING PAPER 56 (Comm. Print 1974) (quoting 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1938)).

²³⁷ ROSSITER, *supra* note 29, at 256.

power. Rather than rehash the well-trod ground of President Roosevelt's daunting list of executive actions during the New Deal, this Part will provide a brief look at the responses made by the other branches of government to emergency action. As would be expected in the face of such a dire emergency, Congress (the branch most closely tied to the voters) fell right in line with FDR's plan and the majority worked together with the Administration to pass a breathtaking number of monumental legislative programs in FDR's first one hundred days.²³⁸ During this time FDR "became a prime minister" and was responsible to an unprecedented degree for setting the domestic legislative agenda.²³⁹ Because of the rapidity with which FDR rolled out his efforts to combat the ever-deepening depression, Congress had little time to re-assert control over the legislative process.²⁴⁰ But, even given more time, the pattern of legislative acquiescence in the face of a present emergency would likely have repeated itself.

The Supreme Court, however, initially proved an insurmountable obstacle to many of the First New Deal programs. When challenges to these new agencies reached the Court in 1936-1937, it struck down the National Industrial Recovery Act,²⁴¹ the Agricultural Adjustment Act,²⁴² and the actions of the newly formed SEC,²⁴³ to name a few examples. This judicial resistance is in line

²³⁸ YOO, *supra* note 216, at 263.

²³⁹ ROSSITER, *supra* note 29, at 259 ("To a degree never before matched in American history, the President became a prime minister. He proposed to Congress a complete and detailed program of emergency legislation, and, although this program entailed unprecedented grants of legislative and administrative power, he was able to obtain its enactment substantial without change and in record time." (footnote omitted)).

²⁴⁰ *Id.* at 259-60 ("The Congress of the Hundred Days was practically a wartime legislature. The forms of lawmaking were observed, but all along the line there was a sensible abbreviation of the many steps in the legislative process. In both House and Senate debates were shortened and kept to the point. The average debating time in the House for each of the eleven most important bills was three and two-thirds hours.").

²⁴¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act an unconstitutional delegation of legislative authority).

²⁴² See *United States v. Butler*, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act an unconstitutional encroachment upon states' power to regulate agricultural production).

²⁴³ See *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1, 23 (1936) ("The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest . . .").

with the previously established pattern that a significant gap in time between executive action and a challenge to that action in another branch of government typically weighs against the legitimacy of that executive action. As the Depression wore on, however, the Court began to face mounting political pressures, including of course FDR's infamous court packing scheme. And, eventually, the Court's intransigence to FDR's expansive new programs dissolved. By the time the Second New Deal programs, such as the National Labor Relations Act, came up for review in 1937, the judiciary reversed course and upheld these expansions to the administrative state.²⁴⁴ This is perhaps more attributable to the fact that the emergency was still ongoing and therefore is not necessarily a break from our previously established patterns.

ii. Emergency Power in a World at War: Japanese Internment

In addition to the unprecedented expansion of executive power in domestic policy, FDR's use of emergency powers at home during World War II resulted in one of the U.S. government's greatest intrusions on the civil liberties of its people: the internment of hundreds of thousands of Japanese Americans. After the attack on Pearl Harbor, a mild form of hysteria gripped the West Coast of the United States leading to an ever-increasing suspicion of residents of Japanese descent.²⁴⁵ Local politicians (particularly in California) began agitating for the "relocation" of Japanese immigrants and even citizens of Japanese descent.²⁴⁶ By February of 1942, FDR had signed off on a military plan to send over 100,000 first- and second-generation Japanese residents on the West Coast to relocation centers.²⁴⁷ The constitutionality of this action was challenged repeatedly in the courts. In the first case, *Hirabayashi v. United States*,²⁴⁸ the Court essentially punted on the constitutionality of the detention camps themselves and held only that an accompanying

²⁴⁴ See *Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that the National Labor Relations Act of 1935 was constitutional).

²⁴⁵ REHNQUIST, *supra* note 221, at 188-89.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ 320 U.S. 81 (1943) (holding that the President's enactment of the curfew was constitutional).

curfew was constitutional under the national power to “wage war.”²⁴⁹

Subsequently however, in the much-maligned decision of *Korematsu v. United States*,²⁵⁰ the Court infamously upheld the constitutionality of the internment camps writing: “There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”²⁵¹ Yet this is exactly the role that the courts had previously played when evaluating challenges to executive actions. It is precisely this gap in time which had allowed the courts to exercise a check on the executive. Unlike previous incidents of judicial restriction of emergency powers, however, *Korematsu* came to the Court while the crisis of World War II was still ongoing. While this does not excuse the Court’s failure to protect the civil liberties of hundreds of thousands of Americans, it does situate the *Korematsu* decision within a familiar pattern that demonstrates the difficulty of requiring only post hoc review from the other branches of government: If a crisis still exists it is much more difficult to restrain the governmental branch that is actively attempting to resolve the crisis.

Rather, in such situations it is easier for the other branches (particularly the courts) to place limits at the margins of emergency powers and then gradually continue to restrict executive power after the crisis passes. In the case of Japanese internment, this is precisely what happened in *Ex parte Mitsuye Endo*,²⁵² decided at the same time as *Korematsu*. While the Court was unwilling to declare unconstitutional the massive governmental action of evacuating and detaining hundreds of thousands of Japanese-Americans, it was willing to take the minor step of granting relief on an individual basis to those who appealed the legality of their *continued* detention.²⁵³ In doing so, the Court left in place the initial evacuation

²⁴⁹ *Id.* at 93 (“[The] war power of the national government is ‘the power to wage war successfully.’”).

²⁵⁰ 323 U.S. 214 (1944) (holding that Executive Order 9066, ordering Japanese-Americans to relocation camps, was constitutional).

²⁵¹ *Id.* at 223-24.

²⁵² 323 U.S. 283 (1944) (holding that the detention of loyal U.S. citizens is unconstitutional).

²⁵³ *Id.* at 302.

order but planted the seed for further restrictions on governmental power to restrict the liberty of a citizen based solely on race, writing:

A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.²⁵⁴

The combined agreement of the Executive, Legislative, and Judicial branches on the creation of the modern administrative state and the unprecedented level of “war powers” exercised on domestic soil represents the greatest expansion of executive power in U.S. history. Perhaps because FDR took these actions in the absence of a defined “emergency power,” they have had a more lasting impact on the separation of powers than any of the emergency actions taken by Indira Gandhi or Charles de Gaulle? This question will be addressed more fully in Part VII below, but first let us look at one more example of emergency action under the implied powers structure of the U.S. Constitution.

c. George W. Bush and the War on Terror

President George W. Bush’s actions taken in response to the terrorist attacks on September 11, 2001 and the ensuing war on terror sparked a renewed interest in executive powers and resulted in countless pages of scholarship debating the legality and constitutionality of his actions.²⁵⁵ This Article is not aimed at reinvigorating that debate or focused on critiquing the strengths and

²⁵⁴ *Id.*

²⁵⁵ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 405-15 (2008); MATHESON, *supra* note 53, at 16-32; Sanford Levinson, *Constitutional Norms in A State of Permanent Emergency*, 40 GA. L. REV. 699, 736-48 (2006); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1837-38 (2010); see generally Posner & Vermeule, *supra* note 27 (discussing the legality of Presidents’ use of emergency powers); Scheppele, *supra* note 54, at 836-37 (“In this Comment, I argue that the ‘normal’ American constitutional order can be seen as thoroughly shot through with emergency law and that this constant sense of emergency has fundamentally shaped the possibilities of American constitutionalism.”).

weaknesses of the various positions staked out. Rather, this Section will simply remind the reader of some of the more public uses of emergency power undertaken during the Bush Administration.

As memos prepared within the Bush Department of Justice show, the administration believed that the Commander-in-Chief powers and the Vesting Clause of the Constitution provided him with the inherent authority to engage in many of these acts.²⁵⁶

While this overview will be brief, it is important to note that once again we see a familiar pattern in response to a national crisis: The legislature, charged with reacting quickly to the needs of the nation and the desires of the electorate is often unable or unwilling to provide a significant check upon emergency executive action. While the judiciary, with the advantage of time and some protection from political pressures, can act as a more appropriate check further down the line.

After the destruction of the September 11th terrorist attacks, Congress responded to President Bush's request for greater authority to combat terrorism by passing the Authorization for Use of Military Force (AUMF).²⁵⁷ The statute authorized extensive use of executive powers including giving the President the authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."²⁵⁸ While legislators eventually began to criticize the Bush administration's use of this delegated authority, they failed to take any affirmative action to restrict the sweeping powers granted by the Authorization or other similar statutes such as the Patriot Act.²⁵⁹

The Supreme Court, by contrast, had the advantage of a separation in time between the initial crisis triggered by the attacks and challenges to executive action. Additionally, as more time passed between each subsequent challenge the Court took steps to further restrict executive actions. The primary example of this appears in the Court's responses to the detention of "enemy combatants" housed in Guantanamo Bay, Cuba. Detainees were initially held in "GITMO" outside of both the judicial and military

²⁵⁶ Scheppele, *supra* note 54, at 859.

²⁵⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁵⁸ *Id.* at § 2(a).

²⁵⁹ USA PATRIOT ACT, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.").

tribunal system.²⁶⁰ Appeals to this process worked their way through the courts and eventually resulted in incremental steps restricting executive authority over such individuals. For example, while the Court initially declined to do more than acknowledge jurisdiction to hear claims raised by GITMO detainees,²⁶¹ each subsequent challenge imposed more restrictions on executive authority. In *Hamdi v. Rumsfeld*,²⁶² the Court required at least some type of quasi-judicial proceedings regarding enemy combatants and by the time *Boumediene v. Bush*²⁶³ was decided in 2008, the Court was willing to declare that detainees were entitled to full judicial review of habeas proceedings. Had the executive merely required approval of his actions in the immediate aftermath of 9/11, there would likely have been little resistance and executive detentions could have continued unchecked. However, because the U.S. system does not remove power from the other branches even when the executive uses more of his own, the ability for subsequent review allows for protections of civil liberties even if those protections come far too late (as, for example, in the aftermath of *Korematsu*).

It seems difficult to imagine that either Congress or the Supreme Court would have had the ability or political will to deny President Bush the use of emergency powers in the immediate wake of 9/11. Indeed, Congressional passage of the Authorized Use of Military Force indicated a legislative acquiescence to the expansion of executive power.²⁶⁴ Similarly, the Court's tepid responses to executive detentions at Guantanamo Bay, Cuba between 2001-2008 arguably show that the judiciary tacitly assented to Bush's actions. But as time passed and the shock of the initial attacks began to fade, the courts became increasingly skeptical of certain executive actions, such as executive detentions.

²⁶⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11 (noting that the government classified detainees like Hamdi as "enemy combatants" and held them "indefinitely – without formal charges or proceedings – unless and until it ma[de] the determination that access to counsel or further process [was] warranted").

²⁶¹ See *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal courts had jurisdiction to hear some challenges to detention brought by foreign nationals incarcerated at Guantanamo Bay).

²⁶² 542 U.S. 507 (2004) (holding that enemy combatants must be given meaningful opportunity to contest the factual basis of their detention).

²⁶³ 553 U.S. 723 (2008) (holding, among other issues, that enemy combatants have the right to challenge their detention under habeas corpus).

²⁶⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the use of the United States military force against those responsible for the September 11, 2001 attacks).

This ability for the various branches of government to have multiple opportunities to check executive emergency action is a hallmark of an implied emergency powers system and is perhaps the most important reason for such a system's effectiveness in preventing executive branch dictatorship. This claim will be examined in the following Part.

VII. COMPARATIVE ANALYSIS OF EMERGENCY POWERS

The selected uses of emergency powers provided above demonstrate that a country's executive will often be required to act in extraordinary ways when facing extraordinary circumstances. Crises will arise in the lifespan of a nation, and governments must react to the threat. Due to the inherent ability of the executive to respond more quickly in these situations, pending national danger tends to result in increased executive power. The wisdom of such a system is beyond the scope of this Article. Rather this Part will attempt to answer only the following question: Does a constitutional structure explicitly allowing for the use of emergency powers provide better protections for individual liberty and separation of powers than a structure lacking such explicit allowances? While valid arguments exist on both sides of the question, this Part will argue that the inclusion of an explicit emergency powers provision seems to be more susceptible to abuse, particularly by an executive faced with an impending loss of power.

a. Inter-Branch Interaction

One of the key differences between the U.S. model and an explicit emergency power model seems to be the role left for the remaining branches of government. For example, under the French model the constitution requires the explicit acquiescence of the other branches of government before an emergency can be declared.²⁶⁵ This "consultation," however, must happen at the outset of an emergency, when fear is at its highest and the political pressures to grant sweeping powers to the executive to combat the crisis are typically also at their apex. Under the U.S. Constitution, by contrast,

²⁶⁵ 1958 CONST. art. 16 (Fr.).

executive actions taken to confront an emergency do not require prior acquiescence from the judicial or legislative branches. Instead, they can be *subsequently* reversed through legislation or held unconstitutional by the judiciary upon review. This delay between the onset of an emergency and when cooperation of the other branches is required allows for a “cooling off” period which may help counteract the immediate political pressures of the crisis.

It is possible however, that the passage of time may actually benefit the executive if the crisis which inspired the initial “emergency” actions continues or worsens. As we saw with the Court’s initial response to the New Deal, the lapse of time between action and review may relieve some of the initial “panic” impulse to go along with dramatic executive action.²⁶⁶ Then, once it becomes clear that the actions enjoy the support of the people, the cooperation of the judicial branch can help solidify actions taken outside of the traditional understanding of executive powers. This highlights one of the potential dangers of emergency responses without a clearly defined procedure delineating when the emergency has ended and when the “role” of the executive should return to a non-emergency state. While the danger of such systematic expansion rarely materialized prior to World War II, the constant “emergency” of the Cold War²⁶⁷ and then the War on Terror²⁶⁸ have allowed for dramatic expansions of executive power unchecked by a post-emergency return to the “normal” limits of such power.

Alternatively, the Indian framework as it existed during the “Internal Emergency” granted the executive the authority to declare emergencies but made the president responsible to the parliamentary government. Thus, the legislature and the executive worked in tandem during declared emergencies, rather than acting as a check on each other. Additionally, emergency declarations in India could exempt emergency actions from judicial review for violations of civil liberties including wrongful detentions and violations of “fundamental rights.” As discussed above, the High

²⁶⁶ See *supra* Section VI.b.i.

²⁶⁷ MATHESON, *supra* note 53, at 9-10 (“The Cold War, which lasted more than forty years, was characterized as a constant national security threat to justify perpetual crisis measures that contributed to the transfer of power from Congress to the President.” (footnote omitted)).

²⁶⁸ *Id.* at 10 (“And the war on terror—an irregular and seemingly endless conflict where the ‘world as battlefield’ is the war theater and the enemy wears no uniform and is not formally tied to a nation-state—calls for fresh thinking about the nature, scope, and duration of our current emergency.” (footnote omitted)).

Courts in India attempted to find ways around these restrictions on their jurisdiction during the Chinese, Pakistani, and the 1975-1977 Emergencies. By the time of the Internal Emergency, however, the composition of the Supreme Court had been manipulated into a near “rubber stamp” for the Indira Gandhi government. The Supreme Court repeatedly refused to reach the merits of constitutional challenges to emergency actions.

Such an all-out assault on separation of powers would be difficult to imagine under the U.S. Constitution. While the courts and Congress have often approved of executive actions or deferred to executive judgment (especially in regard to foreign affairs), such agreement does not equate to the Indian model which allows the emergency government unchecked authority to govern as it sees fit. Rather, such agreement can perhaps signal cross-branch agreement on the proper course of action or might represent a knee-jerk reaction to the immediate crisis, which can later be re-examined as conditions change.

Once again, more recent history provides an appropriate example. In the immediate aftermath of the 9/11 terrorist attacks, Congress passed the AUMF, which granted sweeping powers to the President allowing him “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks.”²⁶⁹ As Professor Yoo points out, this grant was “unlimited as to time or geography.”²⁷⁰ The AUMF fell in a gray area between the constitutional command that Congress had the sole authority to declare war and the constitutional grant of Commander-in-Chief powers to the President, essentially giving the President something akin to emergency powers at least in the area of counterterrorist activity. While Congress remained technically independent of the executive, its initial deference to the executive in times of crisis allowed the President the authority to confront the threat of Al Qaeda. The drafting of the AUMF, however, perhaps indicates a panicked response to a national threat as the legislation delegated essentially unfettered authority to the executive without placing corresponding checks on the duration or scope of that authority.

²⁶⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

²⁷⁰ YOO, *supra* note 216, at 411.

b. Balance

Emergency powers may be dangerous but that does not mean a country does not benefit from or should not design its constitution to produce a strong executive. For example, while de Gaulle's use of emergency powers threatened the rise of a presidential dictatorship, subsequent French experience showed the contradictory danger posed by an executive too weak to govern. The 1958 Constitution created a five-year term for legislators but a seven-year term for the President.²⁷¹ This gap made it possible for a President of one party to have a government of a separate party voted in during his term. While divided government is nothing new in constitutional democracies, the manner in which executive power was split between the president and the prime minister made it very difficult for the government to function effectively during these periods of so-called "cohabitation."²⁷²

The Fifth Republic has experienced several cohabitations since 1958, during which time the government slipped into a state of near-paralysis similar to that experienced during the rotating governments of the Fourth Republic and even somewhat analogous to the impotence of the Reichstag towards the end of the Weimar Republic.²⁷³ Because the president had the potential to call a state of emergency during these periods of stagnation, he tended to have the upper hand in pursuing his agenda, at least to some degree. This cycle of showdowns between a president armed with the ability to essentially suspend constitutional protections and a government with the backing of the latest electorate, eventually led to a constitutional amendment in 2000 which changed the term of office of the president to five years to match legislative elections.²⁷⁴

The U.S. model addresses this balance through the creation of a "unitary" executive with sufficient authority to address periods of crisis without diminishing the powers vested in the other branches of government. Professors Steven Calabresi and Christopher Yoo have compiled an exhaustive look at a particular aspect of the Executive Power, the Removal Power, in their 2008 work, *The Unitary Executive*.²⁷⁵ While the authors clearly disclaim an attempt

²⁷¹ BOYRON, *supra* note 126, at 62-63.

²⁷² *Id.*

²⁷³ *Id.*; see also *supra* Part IV.

²⁷⁴ See BOYRON, *supra* note 126, at 67.

²⁷⁵ CALABRESI & YOO, *supra* note 255.

to discuss the extent of the President's "war powers,"²⁷⁶ a relevant thread emerges which sheds light on the emergency power discussion. The debate over the scope and breadth of the "Executive Power" under the U.S. Constitution has consistently involved a back-and-forth between the executive, the legislature and the judiciary. Regardless of which branch was "winning" the argument, the debate itself served, to some extent, to constrain the executive. Had the Constitution included an explicit grant of emergency powers to the President, this may have potentially altered the permanent balance of the argument and served as an "ace in the hole" in the debate.

This "debate" is only an informal restraint on the executive, albeit a restraint that has proven fairly effective for nearly two-and-a-half centuries. What happens when the executive no longer cares about informal checks remains to be seen. Will the legislature and judiciary show sufficient resolve in these cases? Additionally, elections themselves can serve as a check on executive overreach and an emergency powers system that does not provide for the suspension of elections may, in fact, provide an internal structural check. For example, as professors Steven Calabresi and James Lindgren have noted, the U.S. President may be far less powerful domestically than is often assumed.²⁷⁷ Because a President's party often suffers electoral defeats in both federal and state off-year elections, it can often be difficult for the executive to significantly shape domestic policy beyond the first two years of an administration even within a system that provides the executive extensive emergency authority.²⁷⁸ But this pattern of electoral defeat does not have an equally restrictive effect on the Executive's military or foreign affairs powers which are often the most fertile ground for emergency powers. This is especially true as Congress cedes more and more of its involvement in military actions to the Executive. So, while elections are a necessary check on the executive, they are not necessarily sufficient to prevent extreme executive overreach. This is particularly true if informal barriers such as public approval do not deter executive action.

²⁷⁶ *Id.* at 20 ("[A]cceptance of the classic theory of the unitary executive does not require resolution of the scholarly debate over whether the Article II Vesting Clause grants the president a residual foreign affairs power or war power." (footnotes omitted)).

²⁷⁷ Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 *YALE L.J.* 2611, 2611-12 (2006).

²⁷⁸ *Id.* at 2612.

c. Context and Early Leadership

Another important point to consider when comparing the wisdom of an emergency powers provision with the U.S. model is that constitutions are often formed with specific leaders in mind. This can lead to failures to adequately define and control certain functions of government. One example of this failure could be an overreliance on informal checks on governmental powers. In creating a government designed to appeal to “the best and the brightest” there may be a background assumption that the government will be led by those who reflect the Framers’ interest in creating a fair and just republic. In light of such an assumption it may also be assumed that informal checks such as precedent and reputational constraints will be sufficient to guide and restrain a properly civic-minded executive.

Both the U.S. Constitution and the French Constitution were written with an identified first executive in mind. While de Gaulle imposed his will on the constitution of the Fifth Republic and essentially tailored it to his understanding of how the government should function,²⁷⁹ Washington had a more indirect impact on the U.S. Constitution. Much of the vagueness built into the functioning of the Executive can largely be attributed to an understanding that Washington would be the first President.²⁸⁰ The Framers (including, of course, Washington himself) passed over many of the thornier issues regarding executive power which could have upset the delicate balance between the Federalists and Anti-Federalists. They did so, confident in the knowledge that the actual role of the executive would be shaped by the actions of its first occupant, the trusted, steady, and honorable George Washington.²⁸¹

As discussed in Part IV, concerns over a Gaullist dictatorship impacted the drafting of the 1958 Constitution and led to at least a nominally superior role for the Prime Minister’s government.²⁸² Yet, largely because of the force of de Gaulle’s personality and the opening provided by the emergency powers, the governmental structure was transformed. One could argue that, in some respect,

²⁷⁹ See *supra* Part IV.

²⁸⁰ YOO, *supra* note 216, at 53, 70-71.

²⁸¹ *Id.* at 53 (“A singular factor influenced the ratification of the Constitution’s article on the Presidency: all understood that George Washington would be elected the first President.”).

²⁸² See *supra* Part IV.

emergency powers actually saved the Fifth Republic by allowing a charismatic leader to create a more stable Presidential system. But this experience also shows the dangers of granting too much power to the executive based on the initial understanding of who will fill that role. Essentially, in the Fifth Republic, a constitution built around Parliamentary supremacy was unilaterally turned into a strong presidential system in part due to the leverage provided by an emergency powers provision.

d. Controls

In addition to comparing the experience of countries like the United States, Germany, France, and India, another way to compare constitutional structures with and without emergency powers is to look at (1) what controls are needed to confine executive power in both types of systems, (2) what efforts are needed to protect civil liberties, and (3) whether the control necessary will inhibit the ability of the government to respond to crisis situations. The simple existence of a written constitution purporting to protect individual rights and freedom cannot, on its own, limit government overreach. If this were the case, the Russian Federation would be one of the freest democracies in the world.²⁸³ Clearly, more is required, some type of checks, either internally or externally, must exist to protect individuals from government abuse.

Mark Tushnet argues that these protections for civil liberties in the face of a national emergency most often come from “legal controls” or “political controls.” Professor Tushnet describes these controls as follows:

Legal controls on the exercise of emergency powers rely on the courts to determine whether some novel practice violates fundamental human rights; political controls rely on the interactions among important political actors—including political parties, the permanent staffs of executive bureaucracies and the people in their capacity as voters—to

²⁸³ See CONSTITUTION OF THE RUSSIAN FEDERATION [CONSTITUTION] ch. 2 “Rights and Freedoms of Man and Citizen” (guaranteeing, for example, that “[f]undamental human rights and freedoms are inalienable and shall be enjoyed by everyone since the day of birth”). My thanks to Professor Calabresi for pointing out the extensive protections for individual freedom included in the written Russian Constitution but overwhelmingly ignored by its government.

produce policies that do not violate fundamental human rights.²⁸⁴

Professor Tushnet argues that political controls provide the best protections for civil liberties, even in the face of national emergencies.²⁸⁵

However, when a constitution includes explicit authorization to exercise emergency powers which allow the executive to act without requiring the cooperation of other political actors and without the threat of searching judicial review, the controls proposed by Professor Tushnet will not effectively limit potential abuses of executive powers. Legal controls are perhaps more likely to be overcome during emergencies. In Weimar Germany, for example, the judiciary surrendered any authority to review the appropriateness of a declaration of a state of emergency and deferred to the Cabinet's decision.²⁸⁶ While the Weimar Courts could review the appropriateness of certain individual actions taken by an emergency government, they rarely did so.²⁸⁷ Similarly, under the French model, the Constitutional Council has little role to play once an emergency has been declared and needs only to acquiesce at the outset of an emergency.²⁸⁸ Alternatively, under the Indian model, the President can strip the courts of jurisdiction to hear challenges to certain emergency actions. As discussed above, the courts attempted to continue to provide some type of check on government actions during emergency periods, but large numbers of cases were found to be beyond review and the Supreme Court itself was susceptible to government control.²⁸⁹

However, it is not clear that the judiciary provides a more effective check on emergency actions under the U.S. model, at least not while the emergency is ongoing. Time and again the U.S. Supreme Court has upheld executive actions during times of national crisis which likely would not have been upheld in calmer times and has stepped in to restrict executive authority only once the

²⁸⁴ Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation*, 3 INT'L J.L. CONTEXT 275, 276-77 (2007).

²⁸⁵ *Id.* at 277; see also Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 MINN. L. REV. 1451 (2007).

²⁸⁶ See *supra* Part III.

²⁸⁷ See *id.*

²⁸⁸ See *supra* Part IV.

²⁸⁹ See *supra* Part V.

crisis has passed.²⁹⁰ U.S. Courts have proven themselves much more likely to disapprove of executive actions when the danger has passed and when the cases are less directly connected to military action. But it is precisely during those times when civil liberties tend to be most at risk.

In addition to this delayed response by the courts, the decisions of the courts are not always sufficient to check executive power. Take the showdown in *Ex parte Merryman* described above. Political scientists and constitutional scholars have long debated whether Lincoln had the constitutional authority to suspend habeas relief. Those who think Lincoln exceeded his constitutional authority point to the fact that the only discussion of the writ in the Constitution is located among the limitations on Congressional powers in Article I Section 9,²⁹¹ while Lincoln's supporters point out that there is nothing exclusive in the suspension clause.²⁹² Lincoln's critics respond that the vaunted position of the writ in English common law history and its important place as one of the fundamental "rights" of Englishmen suggest that it would be odd to include no protection of the writ in the Bill of Rights, if there were any way of suspending the writ outside of the narrow confines of the Suspension Clause.²⁹³ Alternatively, supporters have asserted the very persuasive argument that the Constitution cannot be considered a "suicide pact" and clearly allows efforts to be taken which are necessary for the survival of the nation.²⁹⁴

While this debate has important consequences for our understanding of executive power in the U.S. Constitution as a

²⁹⁰ Compare, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding Japanese internments during World War II), and *Schenck v. United States*, 249 U.S. 47 (1919) (upholding conviction of anti-government pamphleteer under the Espionage Act despite an asserted First Amendment defense), with *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that Guantanamo Bay detainees are entitled to habeas relief), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding unconstitutional President Truman's seizure of American steel mills during the Korean War), and *Ex parte Milligan*, 71 U.S. 2 (1866) (striking down use of a military tribunal to convict a civilian when the courts of the states remained open during the Civil War).

²⁹¹ See, e.g., REHNQUIST, *supra* note 221, at 36.

²⁹² YOO, *supra* note 216, at 224-36.

²⁹³ *Id.* at 36-37.

²⁹⁴ See, e.g., Paulsen, *supra* note 40, at 1257 ("The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements.").

whole, the relevant point for this Article is that Lincoln's actions defied the "legal controls" then-existing in the constitutional structure. Regardless of whether Lincoln's actions were constitutional or "extra-constitutional," the entire experience shows that legal controls may be altogether insufficient to check executive action even in the U.S. model which does not explicitly provide for the suspension or suppression of the legal process.

However, political controls seem more likely to sufficiently check the executive in the U.S. model than in the German, French or Indian models. In fact, the inclusion of an emergency powers provision often explicitly allows for the silencing of opposition. In 1961, de Gaulle prohibited Parliament from debating any of his emergency measures and took control of the national airwaves. During the Internal Emergency, Indira Gandhi jailed thousands of opposition leaders and completely shut down any critical news outlets. It was not political pressure which ended these crisis situations but rather a perceived opportunity to gain an advantage based on temporary circumstances.

While similar efforts at censorship have occurred (and have even received judicial sanction) in the United States, political opposition has often been sufficient to prevent the recurrence of such invasions of liberty.²⁹⁵ Additionally, political consequences seem to have a much stronger effect on government action in the absence of an emergency power provision which can be invoked to suppress public opposition. The Civil Rights Marches moved Presidents Kennedy and Johnson to action; protests against the Vietnam War led to President Johnson's refusal to seek a third term; and opinion polls typically have a significant impact on national policy. What has been fascinating to observe over the course of the Trump administration, however, is the ways in which these political controls have struggled to play a substantial checking function. Whether this is the anomalous result of a Presidential administration that seemed somehow immune from the typical rules of American politics, or whether the events of the Trump administration are a harbinger of a significant decline in the efficacy of informal sanctions, remains to be seen.

²⁹⁵ See, e.g., ROSSITER, *supra* note 29, at 241-50 (describing the extensive censorship of the press employed by Woodrow Wilson during World War I).

VIII. CONCLUSION

While experience has shown that emergency powers provisions lend themselves to powerful executives' attempts to hang on to power, in the face of democratic opposition, history has also shown that while necessary, an "energized" executive²⁹⁶ with sufficient authority to confront national crises tends to expand its own power incrementally during those same crises. Once the crisis turns into a semi-permanent condition, the potential for a strong executive to continue to accumulate power poses a real threat to a separation-of-powers system based on checks and balances. While this risk of aggregation of power within the executive branch seems to afflict all constitutional systems, especially during times of crisis, inclusion of an explicit approval of the use of "emergency powers" amplifies the risk that the executive will stifle opposition to hold on to authority.

This is not to say that an implied emergency powers system can alleviate this danger. Rather, it highlights the importance of informal checks on executive action in an implied emergency powers system. Because an implied system does not formally distinguish between emergency action and non-emergency action, many of the important limitations placed on executive power rely on informal barriers such as previous practice, public opinion, and the threat of public exposure. Throughout the course of U.S. history, these checks have been sufficient to prevent the employment of emergency powers to take such actions as suspending elections, attempting to dissolve the legislature, or similar measures designed to allow the executive to maintain a nearly unlimited hold on power. Whether this informal system is superior to the formal barriers that are typically included in explicit emergency powers provisions is beyond the scope of this Article. It is important, however, to openly acknowledge that these informal barriers are essential to an implicit emergency powers system and to commit to defending any challenge to these structures just as strongly as we would protect formal constitutional requirements.

²⁹⁶ THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property . . . to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.").