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# Methodology

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## **Methodology**

Under the U.S. Constitution, emergency powers do not per se exist; therefore they must be defined by an amalgamation of precedent. For this paper, I am focused on executive use of emergency powers. The U.S. model for those executive powers can be defined through executive prerogative in the form of executive orders and congressional acquiescence. In comparing the U.S. model to nations that have adopted explicit constitutional emergency provisions, there are several factors analyzed in this paper: 1) constitutional language or precedent 2) historical basis for the model 3) examples of emergency power usage and 4) a summation of the advantages and disadvantages of the model.

## **Introduction**

At 8:46 a.m. the first tower was hit and at 9:30 a.m. the second one was hit. Fire, death and destruction engulfed an unsuspecting New York City. On September 11, 2001, widespread chaos ensued causing confusion throughout government. The questions of who did this and why inevitably crossed the minds of officials. However, the more pressing and immediate question for government officials: what do we do? The U.S. Constitution does not delegate any emergency powers to the branches of government. As a result, from a constitutional perspective the government is forced to delineate their own procedures in combating crisis in a sort of ad hoc means of addressing emergencies.

While this method of combating emergencies seems inefficient and dangerous, there is a constant balancing between security and freedom that comes into play. If government had constitutionally embedded emergency powers, it may more easily oppress its people in the name of security. For example, if there had been an emergency powers provision in the Constitution during 9/11 it may have called for civil liberties to be suspended until the emergency was over.

But then the question becomes – when does the emergency end? In reflection of the past several years, the U.S. occupation of Afghanistan and 2003 invasion of Iraq exposed the U.S. to more terrorist threats constituting an “emergency.” However, the conflicts were resolved years after the conflicts began. Thus, the implication is that the U.S. was arguably in a state of national crisis for those several years until the completion of hostilities. During this national emergency, a number of civil liberties may be compromised or government power would be consolidated to address the emergency. Consequently, the outcome and danger of constitutional emergency powers is a government closer to totalitarianism rather than a democracy.

This danger is epitomized by the rise of Nazi Germany during the Weimer Republic. Prior to World War II, Germany’s constitutional emergency powers came into effect when a fire erupted at the Reichstag parliament building, which was alleged to be a terrorist attack. The German government consolidated power and suspended civil liberties, ultimately resulting in the Nazi party taking power. While it is very unlikely that the U.S. will ever reach a stage of government oppression similar to Nazi Germany, the threat is abundantly clear that in time of emergency a country is faced with potential abuses of power.

Accordingly, the U.S. Constitution was unique in that it established a separation of powers. However, because the Constitution is interpretative by its nature, a blurring of the lines between the branches of government occurs. During times of unrest a government’s ability to respond to threats quickly is a necessity. However, the rights of citizens often act as inadvertent obstructions to accomplishing certain national security goals. Consequently, concentrated executive powers and limitations during times of emergency are frequently solutions to national crisis.

The tendency of legislative power is to be cumbersome, slow and bureaucratic. As a result, the executive branch generally steps in to address immediate emergencies. While the U.S. has a long history of constitutional tension between balancing security and freedom, other nations have encountered similar issues generated by national emergencies. Accordingly, the constitutional traditions of other countries acknowledge that in some situations freedom may be affected by both foreign and domestic calamities, leading to increased flexibility of government intervention.

## **Part I: Defining U.S. Emergency Powers**

### **Original Intent of the Executive Branch**

While the U.S. Constitution is plagued by numerous uncertainties of what the framers originally intended when they drafted the document, it is clear that they intended executive power to be a necessary evil.<sup>1</sup> This is evidenced by their early experimentation with the Articles of Confederation, which completely lacked an executive branch.<sup>2</sup> In addition, to having no executive branch, the legislative branch was unicameral and responsible for all military action and foreign policy.<sup>3</sup> Due to the numerous complications from the Articles of Confederation, the executive branch was created with an emphasis on efficiency in correcting the deficiencies of the Articles.

Alexander Hamilton, stated in Federalist Papers Number 70 stated “energy in the executive is a leading character in the definition of good government.”<sup>4</sup> This quote reflected the Framers’ intent in that the executive branch was meant to assume a prominent role in

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<sup>1</sup> Eric M. Freeman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution From the Confederation Period: The Case of the Drafting of the Articles of Confederation*. 60 Tenn. L. Rev. 783 (1994).

<sup>2</sup> *Id.*

<sup>3</sup> Arthur Schlesinger, *Imperial Presidency* 1-10 (1973).

<sup>4</sup> Arthur Schlesinger, *Imperial Presidency* 1-2 (1973).

government. However, distinctively absent from the Constitution is a provision detailing emergency powers. Consequently, when emergencies occur the executive branch is one of the best means of dealing with threats. For instance, in regard to foreign threats, the president as an individual is generally far better able to reach quick decisions than congress. Debates and voting with a consensus require so much time that they are luxuries, which sometimes cannot be afforded, especially in times of military conflict. Furthermore, the President doesn't have to deal with the practical concerns of securing majority agreement among 535 members of Congress<sup>5</sup>. As a result, the President was given vast powers in terms of foreign policy formulation and the ability to address conflicts efficiently. This is particularly important, because foreign powers may prompt military actions and consequently cause a nationwide emergency.

However, because of the danger of oppression during an emergency, the Framers had the objective of avoiding a monarchy and sought to deny the president the British imperial prerogative of vesting war making powers with a sole ruler. The last clause of the Constitution Article I, Section 8 expressly prevents some of that by granting Congress the ability to declare war.<sup>6</sup> But interestingly enough, at the same time, command of the Army and Navy was vested expressly with the president through the words "Commander in Chief" that is embedded in the constitution. This meant that once congress declared war, the president in his role would carry out this declaration in his capacity as leader.

Accordingly, the legislative and executive branches, by design, were meant to have "joint possession," as Hamilton would call it – in reference to the president's ability to control matters

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<sup>5</sup> Head. "Imperial Presidency 101 - Unitary Executive Theory and the Imperial Presidency."  
<http://civilliberty.about.com/od/waronterror/p/imperial101.htm>

<sup>6</sup> *Id* at 3.

of war and treaty making powers.<sup>7</sup> This joint possession of powers implies that during emergencies, the executive and legislature would work together. But the interwoven responsibilities between the two branches resulted in competing interests at times. However, language in the constitution gave the president broad powers to execute the laws through the take-care clause and the necessary and proper clause to enact the will of the legislature, this is particularly useful when dealing with an emergency.

This language allowed the president and executive to act when the law was not written or ambiguous<sup>8</sup>. The president, the inference is, should have the discretion to act for the public good to protect the country. In fact, the presidential oath of office explicitly states that the president will take all necessary measure to “preserve” and “protect” the Constitution of the U.S., an oath that is different from that of all other federal officials.<sup>9</sup> As a result, there is an implicit tension at times between the executive branch acting to enforce the laws and protect the country and legislative branch’s objective to pass well thought out legislation reflecting the will of the people. Similarly, there is an implicit tension between the theme of freedom and the necessity of security.

According to the prominent historian Arthur Schlesinger, the U.S. Constitution was “established, for better or for worse, an idea new to the world in the eighteenth century – the idea of the separation of powers.<sup>10</sup>” This illustrates the American contribution to the “art of government” with an inherent and institutionalized conflict between governmental branches<sup>11</sup>. But while checks and balances prevent power from being concentrated, it also prevents

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<sup>7</sup> Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: the Federalist Papers as a Political Narrative*, 74 Tex. L. Rev. 447 (1996).

<sup>8</sup> Arthur Schlesinger, *Imperial Presidency* 1-15 (1973).

<sup>9</sup> Fisher and Adler, *American Constitutional Law* 492-493 (2009).

<sup>10</sup> Arthur Schlesinger, *Imperial Presidency* vi-x (1973).

<sup>11</sup> *Id.* at 1-5.

efficiency. Despite these tensions and difficulties created by the separation of powers, the U.S. Constitution has no provision allowing for exceptions during national emergencies even though the Framers' would have inevitably known that emergency circumstances may arise.

Based on original intent, it appears that the Framers' intentionally left out emergency powers and that governance during an emergency should be a joint venture. The probable reason for leaving out such a strong power is the potential for abuse and the fear of monarchy. Therefore, it's arguable that the very notion of emergency powers may run contrary to the Framers' intent when crafting the constitution. But when abiding by a strict constitutional perspective, the result may be detrimental to the overall nation's well-being when threats are encountered. Thus, over the course of U.S. constitutional history, presidents have adopted their own methods of dealing with crisis outside of normal constitutional provisions under a theory of implicit powers. These implied powers consist primarily of legislation and executive orders.

### **Executive Action and Congressional Acquiescence**

During an emergency the executive may implement a number of provisions to address the problem but these actions may be repugnant from a separation of powers perspective. This includes the use of executive orders and congressional acquiescence of power. During an emergency, the president may issue an executive order instructing his executive officials and agencies to do certain actions with the full-force of law. Similarly, in the midst of crisis, congress may see value to the executive action and may yield their authority in favor of an executive dealing with an imminent crisis. This doctrine of "congressional acquiescence" has been implemented by the executive branch throughout history to push the limits of executive power during an emergency.

Consequently, the U.S. model in terms of emergency power is characterized primarily by affirmative actions taken by the executive and legislative silent consent of executive actions. Few instances in U.S. history have reached the level of constitutional crisis comparable in the American Civil War. Constitutionally, the Civil War was a foreseeable but unique predicament that left many more questions than answers. The nation was divided geographically and politically with a splintered Congress and no precedent to guide government in addressing the situation.

One of the most striking examples of a president acting to combat an emergency is in the form of President Lincoln suspending habeas corpus.<sup>12</sup> This prevented the accused from appearing before a judge who would assess the legality of the imprisonment. But by suspending habeas corpus, the accused prisoner could be held indefinitely without trial. However, Lincoln's actions were in contradiction with Article I Section 9 of the Constitution which explicitly stated that the right of habeas corpus cannot be suspended unless in time of rebellion by Congress<sup>13</sup>. Lincoln thereby explicitly encroached upon congressional power on behalf of the executive branch; this power was acquiesced by congress.

In *Ex parte Milligan* the ultimate issue of the case was whether or not President Lincoln, in time of national emergency, could suspend the writ of habeas corpus contrary to the constitution and order a military trial of a U.S. citizen.<sup>14</sup> The Supreme Court ruled that the suspension of habeas corpus was constitutional given the circumstances of Civil War – thereby implying an emergency power by the executive. However, while Lincoln acted unilaterally to

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<sup>12</sup> Jonathan Hafetz, *A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies*, 12 Chap. L. Rev. 439 (2009).

<sup>13</sup> Arthur Schlesinger, *Imperial Presidency* vi-x (1973).

<sup>14</sup> Louis Fisher, *American Constitutional Law* 267-268 (1<sup>st</sup> ed. 2007); *Ex Parte Milligan* 71 U.S. 2, 10 (1866).

suspend habeas corpus, the presidential act itself was justified through congressional legislative power later on. The Habeas Corpus Suspension Act of 1863 was passed, which acquiesced the power to suspend from Congress to President Lincoln.<sup>15</sup>

While the precedent of *Ex Parte Milligan* is limited, the implication is clear for emergencies. The Habeas Corpus Act was passed retroactively after Lincoln suspended the right of habeas corpus; thus the power was acquiesced on behalf of the Congress. Justice Jackson stated in his concurrence in *Ex Parte Milligan* that the Constitution only explicitly allows for the suspension of one right (habeas corpus) and thus the implication was that government is held to a high standard in regard to civil liberties and would only be suspended when necessary.<sup>16</sup> But as a result, the precedent stands that when there is a legislative deficiency in action, the President may step in and if there is no Congressional objection the President may proceed with what action he deems fit.

However, the presidential power during emergencies is not unlimited and congress or the judiciary may easily put a stop to executive prerogatives. When the legislative or executive branch objects to an executive action the president is constrained. Almost 100 years after the Civil War, President Truman attempted to seize the production operations of a number of steel factories that were striking during the Korean War in *Youngstown Steel*. The court eventually held that the President's actions were tantamount to lawmaking, thus infringing upon the legislative branch's power.<sup>17</sup>

During emergencies, congressional acquiescence presents a novel way for presidents to maneuver constitutional restrictions in order to address national emergencies. However, when congress does not acquiesce, the president is constrained despite the emergency conditions. The

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 634.

<sup>17</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 579-709 (1952).

decision in *Youngstown Steel* was in keeping with the separation of powers doctrine and the Framers' intent that the branches govern jointly to prevent tyranny. But in the midst of an emergency, certain civil liberties are generally constrained.

### **Executive Power during an Emergency**

During an emergency, civil liberties are inevitably limited to some extent in the name of security but vary given the circumstances. A full scale war is an extreme but generally uncontroversial category of emergency that prompts use of special executive powers. Executive powers are generally used because they have the full force of law and allow for the executive to act immediately. For instance, in *Hirabayashi V. United States*, after the attack on Pearl Harbor, President Roosevelt issued an executive order placing restrictions on the civil liberties of Japanese-Americans in terms of mandated time curfews to better control the movement of possible enemy sympathizers.<sup>18</sup> The order was upheld as constitutional where the court concluded that the curfew was not beyond the scope of legislative/executive power in the presence of wartime circumstances. However, due to the restraints on liberty resulting from the curfew, it was placed under a rational basis analysis and held to be valid.

Similarly, in *Korematsu V. United States* an executive order was issued where all Japanese-Americans were to be detained and put into quasi-concentration camps, under the suspicion that subterfuge may occur from wartime collaborators of Japanese origin. Civil rights were essentially nullified despite no evidence of crimes or terrorism.<sup>19</sup> The court ruled that these restrictions were to be analyzed under a strict scrutiny analysis. But given the nature of the ongoing war effort and the threats posed by the Japanese it was believed that public necessity fostered the need for restrictions on civil rights. The emergency powers implication of

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<sup>18</sup> *Hirabayashi V. United States*, 320 U.S. 81, 81-113 (1943).

<sup>19</sup> *Korematsu v. United States*, U.S. 214, 214-248 (1944).

*Hirabayashi* and *Korematsu* illustrate that there are very few limitations on executive power when the gravity of the circumstances mandate that some civil liberties are limited in the name of security. However, the balancing test between security and civil liberties is generally of more freedom when the emergency is not immediate.

In comparison, the Bush Administration in 2001 in response to 9/11 worked to implement the Patriot Act, thereby allowing for more effective combating of terrorism.<sup>20</sup> Consequently, the National Security Agency was authorized to monitor, without warrants any phone or internet communication that involved suspected terrorists overseas through executive order to enforce the Patriot Act. This patent use of emergency power as justification for infringement of the Fourth Amendment is one of the more controversial measures of the executive.

Similarly, in *Hamdi v. Rumsfeld* a U.S. citizen was captured in a warzone and detained without access to an attorney and did not have any notice of any charges against him for being an enemy combatant.<sup>21</sup> The Supreme Court considered the question of whether the executive branch has the authority to detain citizens who are labeled enemy combatants without civilian due process of law. The court held that the president has the power to detain enemy combatants because of executive war powers – therefore the initial detention was at least lawful, citing *Ex Parte Milligan*.<sup>22</sup> However, the court stated that the detained should at least be given due process in order to challenge his detention. In addition, the court stated that there is always a fear of vesting too much power in a single branch and the judiciary acts as a check on executive power. Thus the implication was that even in wartime or an arguable emergency, due process and civil liberties should be upheld whenever possible but there are situations that may mandate executive intervention.

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<sup>20</sup> 18 U.S.C. § 2331

<sup>21</sup> *Hamdi v. Rumsfeld* 542 U.S. 507 (2004).

<sup>22</sup> *Id.* at 521.

## Legislative Power during an Emergency

The potential of emergency executive power is great for abuse in the American model; there are a variety of limitations and checks on power that safeguard liberty. While, there are no formal emergency powers in the U.S. Constitution, the legislative branch makes laws that outlines what sorts of measures can or can't be taken by the executive, notwithstanding congressional acquiescence.

For instance, the *Posse Comitatus* Act in concert with the Insurrection Act was passed to ensure that federal troops could not unilaterally enter a state to enforce state law and put down unrest.<sup>23</sup> Naturally, during an emergency assistance from federal troops under the guidance of the executive branch may be helpful, especially in case of rebellion. However, by allowing the executive branch power to send troops to a state gives the executive too much power especially during an emergency; hence, the legislative prohibition.

In addition, when there is an emergency or potential emergency the legislature has passed laws to place limit the potential for abuse. The right of privacy is typically one of the first rights to be diminished in exchange for security. In 1978, the Foreign Intelligence Surveillance Act (FISA) was passed to prevent the executive from trampling on civil liberties through wiretapping.<sup>24</sup> The act outlined a list of procedures for the executive to use when investigating potential terrorist or criminal suspects through physical or electronic searches.

In contrast, when the circumstances of September 11<sup>th</sup> required more invasive searches and investigatory techniques, the legislature in response passed the Patriot Act to grant the executive more power to combat terrorism. This included provisions in the act that allowed for enhanced domestic security, more scrutiny for financial transactions, and ultimately easier

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<sup>23</sup> 18 U.S.C.A. § 1385

<sup>24</sup> 36 U.S.C.A. 36 § 1801

surveillance procedures in contrast to the FISA Act. Thus, when the situation presented itself, the legislature allowed for greater flexibility for the executive with fewer restraints on civil liberties.

Consequently, the implication is that even during time of emergency, rather than a constitutional provision outlining what to do during an emergency, congress frequently adjusts and passes legislation accordingly. This approach limits the amount of governmental interference with civil rights, while allowing the government to implement some emergency provisions if needed. As a result, despite the lack of constitutional mandate, the government is not limited in addressing potential emergencies.

## **Part II: Comparative Perspective**

### **German Constitutional Emergency Powers**

The constitutional history of Germany parallels the United States experimentation with executive power. While the Articles of Confederation emphasized a lack of an executive, the Weimer Republic Constitution focused on executive power as a means to addressing emergencies with an explicit provision in the form of Article 48.<sup>25</sup> The article allowed the president to use executive power to combat an emergency without legislative consent. As a result of this narrow explicit provision, the executive was able to exercise quasi-dictatorial powers.<sup>26</sup>

Article 48 detailed that the president, during time of upheaval may use armed forces to compel the government if it is not fulfilling its duties.<sup>27</sup> In addition, the president may suspend a number of fundamental rights detailed in the constitution such as habeas corpus, right to privacy,

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<sup>25</sup> Andras Jakab, *German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse*, German Law Journal Vol.5 No.7, 453, 453-478 (2005).

<sup>26</sup> C.J. Friederich, *The Development of the Executive Power in Germany*, American Political Science Review, (1933) at 150; Jenny Martinez, *Inherent Executive Power: A Comparative Perspective* 15 Yale L.J. 2480, 2480-2510 (2006).

<sup>27</sup> Constitution of the German Reich of 1919, Art. 48.

and protection against search and seizure.<sup>28</sup> Initially, Article 48 was used to combat economic crisis which allowed for the dissolving of the parliament and the calling of new elections in order to get certain legislation passed.<sup>29</sup> In addition, it was used to combat a number of small rebellions and unrest garnered by economic depression. However, under the Nazi regime, Article 48 was used in conjunction with the Reichstag Fire Decree to suppress dissidents and civil liberties of citizens.<sup>30</sup> A fire broke out in the Reichstag parliament building and was alleged to be from a communist or anarchist insurrection, despite little to no proof. As a result, political opponents of the Nazis were imprisoned which paved the way for the rise of Hitler.

However, under Article 48 there was a provision requiring legislative notification and approval of emergency.<sup>31</sup> In fact, Article 48 has many similarities with some broad emergency powers in some modern constitutions such as Russia. But even with the legislative oversight, dictatorial power was achieved. Consequently, the implication is that even with an emergency power with a legislative check on the executive, power may be still abused. As a result of these lessons, the modern German Constitution has a comparatively weak executive branch with few emergency powers outlined for the executive. In addition, the modern German constitution is very detailed and outlines with specificity most constitutional provisions to the point of cumbersomeness. The level of detail is reflective of Germany's bloody past and is intended to avoid any ambiguity leading to the possibility of dictatorship.

In fact, Article I of the Constitution states that human dignity is the foremost priority and the suspension of human rights is also barred to prevent future abuse.<sup>32</sup> Power is largely vested in the legislature, where the parliament can remove individual executive ministers and can vote out

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

<sup>29</sup> Jakab at 453-478.

<sup>30</sup> *Id.* at

<sup>31</sup> Constitution of the German Reich of 1919, Art. 48.

<sup>32</sup> Basic Law for the Federal Republic of Germany, Art. 1.

the head of state chancellor through a vote of no confidence.<sup>33</sup> This legislative emphasis is illustrated by the vesting of war powers with the legislature, which may expedite the legislative process during war or an emergency but must nevertheless authorize all military action.

In Article 81 of the modern German constitution, there is a power to call a state of legislative emergency which vests most of the power within the legislature as opposed to the executive in dealing with emergency situation. This method of vesting the ability to call a state of emergency with the legislature prevents abuses of power akin to Nazi Germany. Foreign and domestic threats are constitutionally separated in a similar way to the United States. Internal threats are constitutionally handled explicitly by German police forces, whereas foreign threats are handled by armed forces and must be addressed legislatively. But during states of emergency, armed forces are granted extra special domestic powers, such as the protection of private property or perform traffic duties to the extent necessary to protect the country.<sup>34</sup>

But what is unique about the German model for dealing with emergencies is the lack of executive enforcement with little if any involvement. The German Chancellor acts more of a subordinate to the legislature, instead of the American President who acts in concert with Congress. Furthermore, the detail of legislative emphasis and the lack of executive mention regarding how emergencies should be handled in comparison to the U.S., illustrates a fear of executive power. However, some rights are reluctantly lessened during emergencies such as freedom of movement and right to privacy in homes may be explicitly limited during times of

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<sup>33</sup> Basic Law for the Federal Republic of Germany, Art.115a.

<sup>34</sup> Basic Law for the Federal Republic of Germany, Art. 87-A (3) and (4) (“During a state of defense or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defense mission. Moreover, during a state of defense or a state of tension, the Armed Forces may also be authorized to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.”)

emergency.<sup>35</sup> But these are very limited and the constitution even provides for a method of redress in the event that constitutional power is allegedly abused.

Accordingly, most of Germany's emergency power comes from legislative direction. Article 81 details "legislative emergencies" which upon agreement of the legislature, the president, in conjunction with the chancellor, may ask the legislature to declare a state of legislative emergency that expedites the legislative process.<sup>36</sup> As a result, certain pieces of legislation may be streamlined and get through to combat the emergency. A federal chancellor can only do legislative expediting one time per term of chancellor.

In addition, in Article 91 the German Constitution allows for the use of police force to combat an "internal emergency." For foreign external threats during the state of defense, the executive is only allowed to address the problem with troops to address the problem "insofar as necessary to combat the threat." This threat from external forces is called a "state of defense" and declared by the legislature and allows the federal government to pass laws that all federation states must abide by even if power is encroached upon. In addition, the constitution only provides for restrictions on human rights only in external emergencies, not regular states of emergency.<sup>37</sup> As a result, the state of defense must be declared by the legislature upon request by the executive even if a threat is imminent. This illustrates the cumbersomeness of the model and the merits of the American model. For example, the United States used legislation in the form of the War Powers resolution giving legislative oversight of actions of hostility without the constraint of a constitutional procedure. Whereas, in Germany, if a foreign threat is attempting to invade the country a state of defense is a legislative hurdle the government must overcome

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<sup>35</sup> Basic Law for the Federal Republic of Germany, Art.13 and 17a

<sup>36</sup> Basic Law for the Federal Republic of Germany, Art.81

<sup>37</sup> Basic Law for the Federal Republic of Germany, Art.115C(2).

before anything can be done. Consequently, German executive powers are best described as a legislative centric model, as opposed to the U.S. model.

### **Russia's Emergency Power**

In contrast to the German constitutional model of legislative emphasis, Russia emphasizes executive prerogative in governance. Both countries represent two extremes in regard to how from a constitutional perspective a country should deal with a national emergency. Russia's tumultuous history resonates with its current constitutional model of government, similar to Germany but from a different historical perspective. After many years of communist rule, Russia's current constitution delegates various powers to their executive branch. These powers give the executive great latitude from a constitutional perspective in using unilateral powers compared to the United States. One of the most powerful executive acts the Russian President has is the power to declare a national emergency, as outlined in the constitution.<sup>38</sup> However, there are a number of notable limitations on the executive that constrain it from concentrating too much power.

One of the most powerful actions the Russian President can do is declare a state of emergency pursuant to Article 88 of the Constitution. The language states: "The President of the Russian Federation, in the circumstances and in accordance with the procedure envisaged by federal constitutional law, shall introduce a state of emergency on the territory of the Russian Federation or on certain parts thereof and shall immediately inform the Council of Federation and the State Duma of this."<sup>39</sup> As defined, the state of emergency is in place to "ensure the safety of citizens and the protection of the constitutional order."<sup>40</sup> In addition, certain restrictions may

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<sup>38</sup> Constitution of the Russian Federation, Art. 88.

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

<sup>40</sup> *Id.*

be imposed on human rights and freedoms during the state of emergency.<sup>41</sup> However, some rights may not be restricted as explicitly outlined in the constitution; the right to counsel, protections against double jeopardy, self-incrimination, and habeas corpus.<sup>42</sup> While these limitations provide some constraint on the executive, it nevertheless is clearly the dominant branch in the constitution.

One of the most striking executive powers outlined in the constitution is the president's ability to unilaterally dissolve the State Duma and call for new elections. Presumably, the logic behind the constitutional provision is that a president needs the support of the Duma to act efficiently with legislative support. However, during a state of emergency the constitution is explicitly precludes dissolution of the Duma.<sup>43</sup> But this power has the potential to be a powerful political weapon to solidify the president's position and could be easily abused prior to a state of emergency for the benefit of the president. It would allow the president to oust political dissidents who would normally act as a check on executive power.

In fact, Boris Yeltsin during the early years of the new constitution of the Russian Federation implemented those powers with great success. He dissolved the Duma for the purpose of ousting former communists who were still present after the fall of the Soviet Union. While Yeltsin was not nefarious in his purpose and his actions ultimately benefitted the country as a whole, there is a great potential for abuse in the future. Hypothetically, this dissolution could occur and the president could install his own supporters then call a state of emergency with great executive power.<sup>44</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> Constitution of the Russian Federation, Art. 56.

<sup>43</sup> Constitution of the Russian Federation, Art. 109.

<sup>44</sup> Ara Balilkian, *The New Russian Federation Constitution: A Legal Framework Adopted and Implemented in a Post-Soviet Era*, 18 *Suffolk Transnat'l L. Rev.* 237 (1995).

The executive emphasis in the constitution is also seen through other provisions in the constitution. For instance, if the president is responsible for misconduct, impeachment proceedings can occur but are limited and very improbable during a national emergency. The process begins with a vote in the legislature which is then turned over to the courts which determines whether or not the president is guilty or innocent. Then the matter is turned over to a Federal Council which decides whether to impeach or reject the matter. A strict time limit of three months for an impeachment proceeding is required and exceeding that constraint will ultimately lead to dismissal.<sup>45</sup>

As a result, it's very hard if not unlikely a Russian President can be impeached much less so during a national emergency. While the age of Soviet totalitarianism is over for Russia, the fact remains that the executive branch in Russia is one of the most powerful and is capable of doing most anything during a time of emergency. The Russian President's executive power during an emergency appears backward and quasi-dictatorial but at the same the power is not necessarily unique.

The limited checks on power in regard to the Russian President are particularly important because the executive is in control of the ministries responsible for addressing an emergency: Ministry of Defense and the Ministry of the Russian Federation for Affairs for Civil Defense, Emergencies and Elimination of Consequences of Natural Disasters (EMERCOM). The Ministry of Defense is in charge of external emergencies and combating terrorism, whereas EMERCOM is responsible for emergencies stemming from civil defense and dealing with natural disasters. In contrast to domestic threats, foreign enemies and threats are also addressed at the direction of the

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<sup>45</sup> *Id* at 257.

president and ministry of defense, who must seek approval to institute martial law on the country.<sup>46</sup>

However, because the Russian Constitution is broad like the U.S. model, the legislature must fill in the gaps to address certain situations. Specifically to deal with terrorism, the Russian government passed an anti-terror act called “On the Fight Against Terrorism.”<sup>47</sup> The act allows for authorities to restrict movements of private citizens when necessary and force a citizen to show identification papers and detain the citizen until identity can be established. Some of the more intrusive provisions even include free warrantless entrance into homes in the course of “suppressing terrorism.” The U.S. Patriot Act pales in comparison to the provisions of the Russian anti-terrorist equivalent. But the act is reflective of the emphasis on executive force and efficient overwhelming use of force. Consequently, the executive-centric model on emergency powers focuses more on efficiency and completing an objective rather than emphasizing civil liberty protection.

### **France’s Executive Emergency Power**

In France, the President has significantly less powers as the Russian President when there is a state of emergency. The state of emergency in the modern French Constitution of 1958 is codified in Article 16 of their constitution and contains some of the broadest grants of emergency power to an executive, merely stating:

*When the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures demanded by these circumstances after official consultation with the Prime Minister, the Presidents of the Assemblies, and the Constitutional Council.*<sup>48</sup>

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<sup>46</sup> Constitution of the Russian Federation, Art.87.

<sup>47</sup> “On the Fight Against Terrorism,” [https://www.fas.org/irp/world/russia/docs/law\\_980725.htm](https://www.fas.org/irp/world/russia/docs/law_980725.htm) (last visited December 1, 2013).

<sup>48</sup> Constitution of France, 1958, Art. 16.

Despite the broadness of the article the state of emergency and subsequent actions must be “prompted by a will to ensure within the shortest possible time that the constitutional governmental authorities have means of fulfilling their duties.”<sup>49</sup> Though this is open to interpretation, it illustrates the desire to end emergency action as soon as practicable to avoid the fear of a perpetual state of emergency and the dangers of unchecked executive power. Similar to the Russian Constitution, it explicitly outlines that the legislature can only be dissolved but not during an emergency. In addition, when martial law is granted by the executive, it cannot exceed more than 12 days unless the legislature authorizes it.<sup>50</sup>

Article 16 was only implemented once in response to a rebellion in French controlled Algeria in 1961.<sup>51</sup> During the emergency, the president issued 18 orders of which included: censorship in the territory, harsh punishments for rebels and sympathizers, and the use of military courts. Since the Algerian rebellion and succession, Article 16 has not been implemented but instead the executive branch and legislature have used normal constitutional powers without going to the extent of a “state of emergency” in addressing national issues.

In this capacity, the executive branch issued decrees similar to executive orders using existing legislation to justify curfews and searches by authorities. These decrees are used as emergency powers but not widespread to the point of classifying the nation in a state of emergency.<sup>52</sup> Typically, these decrees are implemented via the executive branch with legislative consent and used to quell riots and other forms of limited unrest. As a result, the decrees are

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<sup>49</sup> *Id.*

<sup>50</sup> Constitution of France, 1958, Art. 56.

<sup>51</sup> Emergency Powers of the French President, <http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/pouvoirs-exceptionnels-du-president.html> (last visited December 1, 2013).

<sup>52</sup> Constitution of France, 1958, Art. 69.

similar to executive orders in the U.S., where the executive branch has the ability to govern its own affairs and manage issues as they arise.

For instance, an emergency decree was issued by the French President in order to quell strikes at oil refineries by essential workers, which resulted in a fuel shortage. The decree gave police authority to break up the strikes; in addition force the workers to return back to work – a stark contrast to *Youngstown Steel* in the U.S. The French President has also at times placed curfews on the population in order to combat rioting and crime via executive emergency decrees.<sup>53</sup> Consequently, the French model is similar to the model in the U.S. with joint possession of executive powers but with legislative oversight and a broad emergency provision.

### **South Korea's Emergency Power**

In keeping with the tradition of France, South Korea acknowledges the necessity of some sort of emergency power but with legislative notification and checks against the executive. Under Article 76 of the South Korean Constitution it outlines broad executive emergency powers for the executive. An emergency is explicitly defined as: “a time of internal turmoil, external menace, natural calamity, or a grave financial or economic crisis.”<sup>54</sup> During an emergency, the president is given power to act to maintain the public order when the legislature hasn't had the ability to convene.

Most startling is South Korea's executive power in relation to national security emergencies, which are akin to Weimer Constitutional provisions. When major hostilities threaten national security, the President gains a quasi-legislative power in which he may issue orders having the effect of law. The constitution limits the president in terms of this power by specifying that the power is only allowed “when it is required to preserve the integrity of the

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<sup>53</sup> French Emergency Powers, <http://news.bbc.co.uk/2/hi/4420588.stm> (last visited December 1, 2013).

<sup>54</sup> South Korean Constitution, Art. 76.

nation, and it is impossible to convene the National Assembly.”<sup>55</sup> While the president is required to notify the legislature, this broad language is still very interpretative and resembles the Article 48 of the Weimer Constitution. But nevertheless legislative mandate is required implying somewhat of a check on executive power and is significantly less powerful than previously.<sup>56</sup>

However, the somewhat cautious language of the constitution is reflective of its emergency powers in their earlier constitutions. South Korea in its young history has gone through a total of six constitutions due to political and military overthrows of government abusing the constitutional power of emergency. In the first South Korean Constitution, emergency powers were also in place but like so many other constitutions the executive abused that power. President Rhee in the midst of the impending Korean War conflict declared a state of emergency.<sup>57</sup>

But in the course of the emergency, the President used the situation to take advantage of his political opponents and intimidate the legislature to pass laws to secure the presidential reelection. He also forced the change of the method of election of president to a direct popular vote, contrary to legislative opposition during martial law. After numerous power grabs during emergencies and martial law, Rhee pushed a controversial amendment eliminating presidential term limits. As a result, Rhee won reelection for four terms of alleged rigged elections; a military coup resulted in decades of dictatorial rule under constitutional emergency powers.<sup>58</sup>

Under this military dictatorship, the self-proclaimed President General Park Chung-hee drafted a new constitution and enjoyed a “blanket power of emergency.” He declared a state of emergency and put the country under martial law for two years from 1960-1962. When political

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<sup>55</sup> *Id.*

<sup>56</sup> Victor Ramraj, *Emergency Powers in Asia*, 72-79 (Arun Thiruvengadam, 2010).

<sup>57</sup> *Id.* at 72.

<sup>58</sup> *Id.*

opposition began to grow over his rule, he declared martial law again in 1964 under the same premise.<sup>59</sup> Over the course of his presidency, President Park Chung-hee passed laws censoring speech, political discourse, and eventually suspended the activities of the legislature in the name of emergency. However, upon Chung-hee's retirement, the country's freedom gradually returned to western democracy standards.

The modern constitution, interestingly enough still has emergency powers despite many years of abuse. Consequently, while the modern South Korean constitution acknowledges emergency powers, it has very good reason to place checks on executive power. The checks on power consist mostly of giving the legislative branch notification of emergency powers so that they may end abuses. This is in keeping with the French and German tradition of legislative oversight in terms of executive emergency power. However, the South Korean constitution is not as expansive or encompassing as the Russian constitution in delegating power.

Under Article 75 of the constitution, it allows the president to issue decrees similar to the French model and the U.S. model of executive signing statements but during a state of emergency a president's decrees can be given force of law.<sup>60</sup> But states of emergency must be approved by the legislature in order to be in effect. Similarly, the president must request the legislature to declare martial law and at the legislature's discretion, the martial law will be terminated. Consequently, the new constitution reflects far more constrained emergency powers but with executive and legislative involvement.

### **Conclusion**

What makes the U.S. Constitution unusual is its subtle acknowledging of emergencies all while it disregards outlining specific emergency powers with the exception of habeas corpus

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<sup>59</sup> *Id.* at 74.

<sup>60</sup> South Korean Constitution, Art. 75.

suspended during an a rebellion, a power reserved only to the legislature. A lack of an emergency power doesn't imply that it is nonexistent but instead that it should be a power limited to a very small number of situations. The number one threat the founding fathers wanted to avoid was the potential of an American monarchy. In fact, the focus on legislative and executive flexibility when dealing with not just emergencies but matters in general provide a great basis for keeping power in check.

The American Republic has survived over 200 years without an emergency power but nonetheless has encountered a number of emergencies without any threat of dictatorial takeover. The historical record of stability and division of power is telling of how efficient the lack of explicit emergency powers is when dealing with potential power consolidation. In response to potential emergencies, the executive coupled with legislative oversight have passed a number of pieces of legislation and created a number of executive agencies to deal with emergencies despite a constitutional mandate. The justification of the creation of these methods is outlined in the broad language of the constitution to address issues on a case by case basis. As a result, there is a high level of flexibility with a high level of oversight for all emergency actions.

The German model is a legislature-centric model focused on having the legislature implement state of emergency procedures with the executive merely acting as a means to an end. The American model is ideally focused on having both legislative and executive acting in harmony with one another in passing and executing legislative acts. While the German model merely expedites the process of which legislation gets passed during an emergency, the U.S. executive can simply act in accordance with executive prerogative and address the issue immediately. Consequently, the German legislative model is somewhat of an overabundance of legislative authority in this regard.

When dealing with foreign policy matters, an executive is essential because of the ease of decision-making. Thus, an emergency like a wartime situation is best suited for an executive to handle. The U.S. is able to use legislative acts to better define certain situations but the executive is not prevented from simple emergency procedures. The U.S. model, however, does not go nearly as far as the Russian model in which the executive is clearly the most powerful branch of government and is able to bully its way into a legislative concurrence.

In comparison, the U.S. executive is explicitly barred from the type of actions unilateral actions that are akin to quasi-legislative engagements. *Youngstown Steel* is a prime example of how the U.S. executive is limited in his ability to act in accordance with an emergency while preserving the emphasis on civil liberties that the Germanic constitutional model provides. However, the executive is also tarnished by its ability to historically consolidate power to accomplish goals which are repugnant in retrospect to civil liberties.

Executive orders and signing statements are some of the most broad and easiest way for the U.S. president to implement his policies immediately. While nationwide emergencies are fertile ground for executive orders, they are exceptionally hard to limit if abuses occur. For instance, the legislative and judicial branches do have the power to place checks on the president if he is acting against the interests of the constitution. But at the same time their checks are somewhat inefficient. In analyzing the facts and the court's ruling in *Youngstown Steel*, the judicial check on the executive came in the form of a lengthy Supreme Court decision preventing executive action. This method is burdensome and time consuming for the damaged party who must wait for the court to render a decision all while the executive is acting upon his prerogative.

The French model is most similar to the U.S. in that the majority of emergency actions are handled through executive decrees and legislation. However, there is a broad provision in

place in the constitution outlining national emergencies. But even with the provision, there is little guidance during emergencies and actions by the government supplemented with unilateral executive action or legislation. As a result, the ultimate outcome is similar to the U.S. model with little or no difference.

However, the problem with specific outlined constitutional provisions is the fact sensitive nature of emergencies in general. Emergencies can take many forms which is reflective of the problems with the modern German constitution. External and internal emergencies are distinguished in the German constitution and a number of detail procedures of what can and can't be done are outlined. But in the event that the constitution did not outline provisions dealing with an unanticipated emergency, the government's abilities are limited and may not be able to address the emergency effectively. For instance, the German constitution does not characterize economic emergencies as "emergencies" in the constitutional sense. Thus, a devastating economic depression may be just as devastating as an external threat but may not be addressed in an effective way because of the constitutional limits.

While a 9/11 scenario in the U.S. presents a number of uncertainties and the appeal of a German model with predictable outcomes is appealing but also inefficient. The flexibility of the U.S. model is its greatest strength and allows the U.S. government to address a multitude of emergencies the legislature and executive deem appropriate without being constrained to a certain formula of solving the emergency. Consequently, despite the disadvantage of uncertainty, the U.S. model is an appropriate and efficient means of dealing with emergencies.

Based off the American model, any recommendations to a new budding constitution in a country such as Egypt should include some sort of acknowledgement of emergency power but not necessarily in the form of a broad explicitly outlined provision. However, first and foremost,

the country should have a bill of rights outlining what rights can and cannot be suspended and for how long. In addition, there should be legislative and executive flexibility when dealing with emergencies and constitutional powers granting them – such as the ability for an executive to issue the equivalent of U.S. executive orders. Broad emergency provisions should be avoided to avoid a Weimer Republic situation where despite legislative oversight; power can be easily consolidated and taken advantage of by an executive.

While a broad emergency provision does not entail abuse, like in the French Model, the potential is always there and it is best to avoid that situation all together. The histories of various countries inevitably reveal the danger of emergency power. Therefore, in balancing the interests of freedom and security, a new constitution should err on the side of caution by outlining a specific bill of rights but not to the point of inefficiency such as in the modern German model. Consequently, a joint possession of broad powers by an executive and legislature in an ad hoc manner with an emphasis on flexibility on a case by case basis is the best means of addressing emergencies.