
VIRGINIA LAW REVIEW

VOLUME 99

NOVEMBER 2013

NUMBER 7

ARTICLES

THE IMBECILIC EXECUTIVE

*Saikrishna Bangalore Prakash**

INTRODUCTION	1362
I. THEORIES OF EMERGENCY EXECUTIVE POWER	1370
II. A TRADITION OF IMBECILITY	1375
A. <i>The English Monarchy in the Late Eighteenth Century</i>	1377
B. <i>The State Executives</i>	1381
C. <i>The Continental Commander in Chief</i>	1386
III. THE FORMATION OF AN IMBECILIC FEDERAL EXECUTIVE.....	1390
A. <i>The Text</i>	1391
B. <i>The Constitution's Creation</i>	1395
IV. THE IMBECILIC PRESIDENCY IN ACTION	1399
A. <i>The Commander in Chief's Impotency Continues</i>	1399
B. <i>Suspension of the Privilege of the Writ</i>	1404
C. <i>Martial Law</i>	1407
D. <i>The Civil War as an Inflection Point</i>	1415
V. FROM ALMOST IMBECILIC TO VIRTUALLY OMNIPOTENT	1418
A. <i>The Original Framework</i>	1419
B. <i>The Modern Regime</i>	1425
C. <i>The Modern Regime in Action</i>	1430
CONCLUSION	1432

* James Monroe Distinguished Professor of Law & Horace W. Goldsmith Research Professor, University of Virginia. Thanks to Simon Cataldo, Alexander Krueger-Wyman, Archith Ramkumar, and Erin Ward for research assistance. Thanks to John Harrison, Eric Posner, Adrian Vermeule, and workshop participants at the University of Virginia and the University of Maryland for comments on earlier versions of this Article.

INTRODUCTION

THE President seems tailor-made for emergencies. Unlike Congress, the executive branch does not have sessions and recesses. Instead, the executive is always on duty, with every presidential vacation a working one. Unlike Congress, the executive branch does not contain numerous vetogates,¹ procedural steps that either delay or preclude final action. Rather, the President can make rapid, even hasty, decisions because they are his alone to make. Unlike the courts, the executive need not hear from interested parties before resolving some matter. The President may decide an issue *ex parte*, dispensing with briefs, arguments, and public reasoning. Unlike his sluggish and contemplative counterparts, the President is like a tightly coiled spring, full of potential energy, ready to act when an emergency erupts.

But wait, there's more: The Constitution's text hints at an energetic emergency executive. The President may command the state militias² to "suppress Insurrections and repel Invasions."³ He is Commander in Chief of the army and navy,⁴ both of which may be deployed to crush rebels and invaders. Finally, the Chief Executive must "preserve, protect and defend the Constitution,"⁵ a vow perhaps premised on the notion that the Constitution supplies the wherewithal to honor this pledge. Some scholars have argued that the President's supposed power to take whatever measures are necessary to save the Constitution subsumes the power to take measures necessary to save the nation itself. On this view, because there can be no Constitution of the United States, in a meaningful sense, unless the United States remains intact, the President must serve as protector of the Constitution and the nation it constitutes.⁶

One might even suppose that the Presidency was crafted with emergencies in mind. Ponder a somewhat obscure passage from *The Federalist*. Extolling the importance of "[e]nergy in the executive," Publius insisted that such energy "is essential to the protection of the community

¹ Vetogates are procedural hurdles that a bill must overcome in order to become a law. Opponents may use these vetogates to obstruct proposed bills. See William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 66–68 (4th ed. 2007).

² U.S. Const. art. I, § 8, cl. 15.

³ See *id.* art. II, § 2, cl. 1.

⁴ *Id.*

⁵ *Id.* art. II, § 1, cl. 8.

⁶ For an argument along these lines, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 *Notre Dame L. Rev.* 1257, 1257–58 (2004).

2013]

Imbecilic Executive

1363

against foreign attacks . . . to the protection of property . . . [and] to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”⁷ As if to leave no doubt where he stood, Publius embraced what, for many, must be one of the most troubling examples of an energetic executive:

Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes . . . whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.⁸

Some might find within this paean to the Roman dictatorship the suggestion that the Constitution contemplates an autocracy in crisis, with the President as the ultimate defender of the American Republic. Perhaps the Founders crafted a modest peacetime executive who could, when crisis struck, serve as dictator. In war or rebellion, maybe the President was to become a Camillus or a Cincinnatus, benevolent dictators each. After the storm passed, the President would “retire” to his set of ordinary powers.

Presidents and scholars favoring vigor in crises have read the Constitution as ceding extraordinary powers to the President. President Theodore Roosevelt’s steward theory claimed the power to do anything not expressly forbidden by statute or the Constitution,⁹ a reading that suggested ample executive crises discretion. Abraham Lincoln suspended habeas corpus and freed Southern slaves, at times claiming a right to do anything necessary to save the Union.¹⁰ Professor Michael Paulsen ardently backs what he calls Lincoln’s “Constitution of Necessity.”¹¹ Grounding the claim in text, Professor John Yoo argues that “the executive power . . . contains a power to address national emergencies and crises.”¹² Professors Eric Posner and Adrian Vermeule contend vast crisis

⁷ The Federalist No. 70, at 344 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

⁸ Id.

⁹ See Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* 357 (1920).

¹⁰ See Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), *reprinted in Selections from the Writings of Abraham Lincoln* 396, 397 (J.G. de Roulhac Hamilton ed., 1922).

¹¹ See Paulsen, *supra* note 6, at 1260.

¹² John Yoo, *Crisis and Command: The History of Executive Power from George Washington to George W. Bush* 122 (2009). See also Harvey Mansfield, *The Law and the Presi-*

powers should rest with the President because, of the three branches, he can best determine what must be done to weather emergencies.¹³

Whether chief executives have an array of emergency powers is a question older than the Constitution, for it was on the minds of many in England and America before the Constitution was even a glimmer in anyone's eye. It is also a question that will never go away. It recurs whenever we are at war, foreign or civil. The matter arose during the Revolutionary War, the War of 1812, the Mexican-American War, and, of course, the Civil War. President George W. Bush claimed a power to try noncitizens before military commissions.¹⁴ More recently, when it seemed that Congress might not raise the statutory debt ceiling, scholars asserted that the President could ignore that statute in order to avert an economic calamity.¹⁵ Going forward, what is certain is that chief executives (and their acolytes) will claim extraordinary authority in extraordi-

dent: In a National Emergency, Who You Gonna Call?, *Wkly. Standard*, Jan. 16, 2006, at 12, 13 (claiming that the Founders gave the President emergency powers). For a view that the President can constitutionalize otherwise unconstitutional action by showing the imperative necessity of taking those actions, see Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* 10 (2009).

Recently, Professors John Yoo and Robert Delahunty have taken a more nuanced position on whether the President has what they call a "prerogative power"—a power to act contrary to standing law. See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *Tex. L. Rev.* 781, 823, 834–35 (2013) (leaving open the question of whether the Constitution grants the President authority to act contrary to statutes or whether that power is extralegal). For a rejoinder defending the legality of the Obama administration's policy, see Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 *Tex. L. Rev.* See Also 115, 115 (2013).

¹³Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 15–16 (2007). Posner and Vermeule make clear that theirs is not an originalist case for a strong crisis President. *Id.* at 56. But some might suppose that the cogent arguments Posner and Vermeule make for a robust Presidency would have been no less convincing in the eighteenth century and that such arguments led to the creation of a strong crisis President. Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 *B.U. L. Rev.* 289, 293 (2007) (arguing that Posner and Vermeule's arguments cohere with the original Constitution).

¹⁴Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 *Fed. Reg.* 57,833, 57,833–34 (Nov. 16, 2001).

¹⁵See Eric A. Posner & Adrian Vermeule, *Obama Should Raise the Debt Ceiling on His Own*, *N.Y. Times*, July 22, 2011, <http://www.nytimes.com/2011/07/22/opinion/22posner.html>. For a discussion of the crisis and a claim that the President faced a "trilemma," see Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 *Colum. L. Rev.* 1175, 1197 (2012).

2013]

Imbecilic Executive

1365

nary times, reading the supposed ambiguities of Article II as an invitation to act.

Despite all that can be said in favor of an energetic emergency executive—the arguments from policy, text, structure, and practice—the *Founders rendered the Chief Executive almost entirely impotent in crises*. The original Constitution did not vest the President with legal authority to act *contra legem* or to do whatever he judged necessary to save the nation or the Constitution. The President even lacked authority to take temporary measures to preserve the status quo until Congress could address an incipient crisis. In a nutshell, the Constitution fashioned something of an imbecilic emergency executive,¹⁶ one lacking constitutional authority to take property, suspend habeas corpus, or impose military rule.

The Presidency's impotence in emergencies comes into focus when we consider its antecedents. Each of its predecessors—the Crown, the state governors, and the proto-national executive officers under the Continental Congress—lacked a generic emergency power. This was the background against which the Constitution was created.¹⁷

The Crown lacked authority to act *contra legem*, as is clear from Parliament's laws. The English Bill of Rights expressly barred the Crown from suspending the laws or issuing dispensations that permitted individuals to ignore certain laws.¹⁸ In 1767, Parliament reaffirmed this principle when it conspicuously rebuked the Crown for suspending an export law in the wake of famine and severe riots.¹⁹

State executives likewise could not act contrary to established law. Nor could they take property or impose martial law²⁰ on civilians. A few had explicit constitutional authority to lay temporary embargoes,²¹ and a

¹⁶ I use "imbecilic" in its archaic sense of "weak, feeble." 7 The Oxford English Dictionary 672 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1998).

¹⁷ For an argument that backdrops supply crucial context in understanding the Constitution, see Stephen A. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1816 (2012).

¹⁸ 1 W. & M., c. 2 (1689), *reprinted in* 1 *Translations and Reprints from the Original Sources of European History* 32, 33–34 (Edward P. Cheney ed., Philadelphia, Dep't of History of the Univ. of Pa. 1894).

¹⁹ See *infra* Section II.A.

²⁰ I use "martial law" to refer either to the use of military commissions to try civilians or to exercise military rule over a civilian populace. The latter sense encompasses the power to punish without any trial, military or otherwise. I do not use "martial law" to cover ordinary military law, that is, the codes adopted to govern the American military.

²¹ See *infra* note 112.

number could summon the assembly,²² to secure whatever crisis legislation the latter deemed necessary. But by virtue of their constitutions alone, the executives were almost powerless in emergencies.²³ As one executive lamented during the Revolutionary War, the state constitution left his office in a “state of imbecility.”²⁴

The Continental Army’s Commander in Chief was no less feeble in crisis, at least as a matter of his office. Neither the Continental Congress nor George Washington believed that the office of Commander in Chief came with built-in power to take property, suspend habeas corpus, or try civilians. Washington only took property or tried civilians before military courts when Congress granted such authority via temporary laws. When those statutes expired, so did the Commander in Chief’s extraordinary powers.²⁵

The Constitution hardly energized the executive in emergencies. To be sure, the President was to enjoy four requisites of energy—unity, duration, adequate support, and competent powers—thus making it possible for him to act with “[d]ecision, activity, secrecy, and dispatch.”²⁶ Yet insofar as the Constitution was concerned, the President was only slightly less imbecilic than his immediate predecessors—the state governors and the Continental Commander in Chief.

We know this because the Constitution’s makers used the same phrases—“executive power” and “commander in chief”—found in the state constitutions. Phrases that never conveyed emergency powers in the states could not plausibly be read as ceding such powers in the federal Constitution. Likewise, if the Continental Army’s Commander in Chief evidently lacked emergency powers, there is little reason to think that the office sprouted crisis powers when the Constitution made the President the Commander in Chief, *ex officio*.

Confirming this reading, the Constitution contains clues suggesting the Chief Executive lacks an emergency power. To begin with, he cannot raise taxes, issue debt, or appropriate funds. Those powers—authorities crucial to weathering crises—rest exclusively with Con-

²² See *infra* note 113.

²³ See *infra* Section II.B.

²⁴ Margaret Burnham MacMillan, *The War Governors in the American Revolution* 92 (2d prtg. 1965) (quoting a letter from Joseph Reed to George Washington).

²⁵ See *infra* Section II.C.

²⁶ *The Federalist* No. 70, at 345 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

gress.²⁷ Moreover, the Commander in Chief could command no one until and unless Congress raised armies, launched a navy, and authorized the summoning of the state militias.²⁸ Finally, the Founders' Constitution never authorized the President to suspend civil liberties in crises; he could not suspend the privilege of the writ,²⁹ much less suspend the privilege of a jury trial.³⁰ In sum, most powers necessary and proper to overcome emergencies—raising taxes and soldiers, issuing debt, appropriating, summoning militias, and suspending civil liberties—rested with Congress.

This is not to say that the federal executive was entirely impotent in crises. The President could summon Congress, a power especially useful in war and rebellion,³¹ recommend and influence crisis legislation;³² pardon rebels and traitors;³³ and appoint officers during a Senate recess.³⁴ These authorities made the President more powerful than the Continental Commander in Chief, even as the President lacked authority to appropriate funds, raise armies, seize property, or suspend civil liberties. In sum, while the President is more potent than his predecessors, he enjoyed no vast accretion of emergency power.

The President's limited crisis authority was one support of a sturdy, three-legged stool that formed the original Constitution's emergency regime. The second leg was Congress's ability to enact crisis legislation, including delegations of authority to the President. When the President acted in conformity to this system of *ex ante* authorization, his acts generally were legal. These two legs were capable of handling most crises, especially where Congress had the foresight to legislate in advance. When those legs proved inadequate, the President was to hazard his own

²⁷ U.S. Const. art. I, § 8, cls. 1–2; *id.* art. I § 9, cl. 7. Professors Buchanan and Dorf do not suppose that the President has constitutional power to do any of these things, only that when the President faces statutes that issue contradictory commands he must choose which statutes to enforce. Thus, their argument for why the President should issue debt unilaterally consists of the claim that doing so is necessary to execute Congress's spending statutes. See Buchanan & Dorf, *supra* note 15, at 1197–98, 1211.

²⁸ U.S. Const. art. I, § 8, cls. 12, 13, 15.

²⁹ *Id.* art. I, § 9, cl. 2.

³⁰ *Id.* amend. XII.

³¹ U.S. Const. art. II, § 3.

³² *Id.*; *id.* art. I, § 7, cl. 2.

³³ *Id.* art. II, § 2, cl. 1.

³⁴ *Id.* art. II, § 2, cl. 3. The scope of this power has recently been questioned. See, e.g., *Noel Canning v. NLRB*, 705 F.3d 490, 499–507 (D.C. Cir. 2013) (analyzing competing interpretations of the term “recess,” concluding that the term is limited to intersession recesses).

good name. He was expected to take illegal (unauthorized) action and seek indemnification or forgiveness. This third leg was not an express feature of the Constitution. Yet because there had been a long custom of unlawful executive crisis measures followed by ex post legislative forgiveness, it was a conventional feature of a familiar system. The general acceptance of the third leg reflected a hardheaded appreciation that the executive occasionally might have to violate the law in order to protect the existing regime.

Over centuries, a less surefooted three-legged stool has supplanted the sturdy one of old. First, in the wake of Abraham Lincoln's successes and constitutional excesses, modern Presidents are quick to claim that armed conflict gives them sweeping, if uncertain, authority. Something resembling executive omnipotence has replaced imbecility. The second leg consists of a vast set of ex ante crisis delegations from Congress that supplement the broad and indeterminate executive crisis powers. These statutory delegations sit uneasily with the first leg, because these laws suggest that the President otherwise lacks the authorities granted therein and because they sometimes seem to constrain executive crisis powers. The last leg consists of an extreme executive aversion to admitting illegality during crisis. The preferred method is to stretch and strain constitutional and statutory authority, sometimes beyond recognition.

On many constitutional questions, it may well be that "[j]ust what our forefathers did envision . . . must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."³⁵ And it may be the case that on some constitutional issues, the Founders "largely cancel each other."³⁶ But on the question of executive power in emergencies—the very question that prompted Justice Robert Jackson's assertions in *Youngstown Sheet & Tube Co. v. Sawyer*—there is no enigma or contradictory evidence. The Founders crafted an executive authorized to act quickly, responsibly, and energetically, but not one

³⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

³⁶ *Id.* at 635. As evidence for this proposition, Justice Jackson cited the debate between Hamilton and Madison on the propriety of the Neutrality Proclamation. *Id.* at 635 n.1. Yet neither actually addressed whether the President had generic crisis authority. See Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, in *Presidential Power Stories* 21, 21–52 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009). Hamilton's claim that the President could issue his Proclamation was grounded in the President's duty to execute the law and his powers over foreign affairs. *Id.* at 34. Madison's contrary claim was grounded in the Declare War Clause. *Id.* at 37.

empowered to take whatever emergency measures he deemed requisite. And there was no division on this question.³⁷

Let me underscore the limited nature of the claim. The Constitution as it is implemented today often bears only a faint resemblance to the original framework. This Article hardly establishes that the President does not have or should not have emergency authority deriving from the Constitution itself. It only denies that the original Constitution ever vested such powers. If, during crises, the President now may invade private right, suspend habeas corpus, impose martial law, or appropriate funds, it is because Presidents have acquired such powers over the course of our nation's innumerable crises, large and small, real and imagined. To borrow from Justice Felix Frankfurter, practices may have glossed the "executive power," giving it a sheen that it originally lacked.³⁸

Given the "normative power of the actual,"³⁹ some may question the utility of delving into the Founding. Yet even the most ardent living constitutionalist makes arguments about the Founding, at least when the Founding seems to generate congenial results.⁴⁰ In particular, those who decry the Imperial Presidency even as they embrace the living Constitution may regard this Article as a useful rebuttal of those originalists who maintain that the original Constitution ceded tremendous crisis powers to the executive. Additionally, this Article may lay to rest the sense among some proponents of a more flexible Constitution that in order to stay true to some aspects of the original Constitution, one must permit the President, in time of crisis, to do such things as suspend habeas corpus or enlarge the army. That is to say, if some living constitutionalists have a soft spot for some original meanings—perhaps because of a desire to venerate some part of the Founding—that weakness for originalism, by itself, should not lead to an embrace of a vigorous crisis executive.

³⁷ See Lucius Wilmerding, Jr., *The President and the Law*, 67 *Pol. Sci. Q.* 321, 336 (1952) (asserting that no early statesmen claimed that the executive had power to act contrary to law and that the Constitution never granted a suspending or dispensing power).

³⁸ *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring). For a discussion of historical gloss, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411 (2012).

³⁹ Charles L. Black, Jr., *The Death Penalty Now*, 51 *Tul. L. Rev.* 429, 434 (1977).

⁴⁰ See Michael D. Ramsey, *Presidential Originalism?*, 88 *B.U. L. Rev.* 353, 365 (2008) (noting the penchant of nonoriginalist opponents of robust presidential power to resort to originalist arguments).

In any event, the Founders' Constitution remains relevant today, for no other reason than many of us so regard it. For some, the modern Constitution simply is what it meant when it was created and amended, making the original understanding paramount. For others, discerning the contours of the modern Constitution is far more complicated because it involves weighing and sifting through prudential arguments, historical practices, judicial doctrine, text, and the Constitution's original meaning. This Article speaks to originalists and others who find originalist and historical claims relevant to contemporary constitutional meaning and practice.

Part I will lay out different conceptions of presidential authority in emergencies. Part II will consider the emergency authority of precursors to the President—the English Crown, the state executives, and the Continental Commander in Chief—and contend that none had a generic emergency power. Part III will consider constitutional text and structure and argues that the President likewise lacks an emergency power to act *contra legem*, invade private right, or suspend constitutional liberties. Part IV will describe early practice under the Constitution up to the Civil War. Part V will expand on the original crisis regime and address the modern era where the President is widely thought to have some emergency powers, albeit with uncertain and contested bounds.

I. THEORIES OF EMERGENCY EXECUTIVE POWER

Human imagination is such that there can be countless conceptions of presidential authority in crisis. But Presidents and scholars have advanced only a handful with much traction. Arraying them on a continuum is easy enough and illuminates their differences.

At one extreme lies “prerogative.” John Locke argued that the executive had a “Power to act according to discretion, for the public[] good, without the prescription of the Law, and sometimes even against it.”⁴¹ Such a power was necessary because lawmakers were sometimes out of session, were too deliberate, and could not enact laws sufficiently flexible to meet every contingency.⁴² President Richard Nixon came closest

⁴¹ John Locke, *Two Treatises of Government* 375 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁴² *Id.* For greater detail on the Lockean prerogative, see Clement Fatovic, *Outside the Law: Emergency and Executive Power* 38–82 (2010); Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crises: Emergency Powers in Theory and Practice* 119–23 (2003).

to endorsing this view when he said, “[W]hen the President does it, that means that it is not illegal.”⁴³ Nixon clarified that his principle applied only during wars and acute internal turmoil.⁴⁴

Nixon’s embrace might unduly tar the theory. Yet a venerated Republican also seemed to back it. In an 1864 letter, Abraham Lincoln declared that “measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation.”⁴⁵ Call this the Prerogative Theory of executive crisis authority, one in which the President has constitutional power to take whatever measures he believes are necessary to save the Constitution and the nation during wars and rebellions.

Reflecting his era, William Blackstone advanced a less sweeping claim, asserting that the English Crown had a “discretionary power of acting for the public good, where the positive laws are silent.”⁴⁶ Speaking of the Presidency, Theodore Roosevelt insisted that the executive had “*the legal right to do whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it.*”⁴⁷ Neither theory is crisis-centric. Yet both have obvious implications for executive crisis power because each supposes there is executive power to act whenever there is no bar. Despite potential differences,⁴⁸ we can treat them as roughly equivalent and label them the Steward Theory. The name reflects Roosevelt’s claim that the President served as a servant of the people and their laws.⁴⁹ Under this theory, perhaps the President may suspend habeas corpus because the Constitution never expressly bars executive suspensions.

Modern scholars advance a third theory. Some aspire to tame executive emergency powers by attaching an expiration date to their use. They support an interim emergency power, leaving long-term measures for

⁴³ David Frost with Bob Zelnick, *Frost/Nixon: Behind the Scenes of the Nixon Interviews* 89 (2007).

⁴⁴ *Id.*

⁴⁵ Letter from Abraham Lincoln to A.G. Hodges, *supra* note 10, at 397. For a modern defense of this view, see Paulsen, *supra* note 6, at 1257. Obviously, one can endorse Lincoln’s proposition but disagree with particular invocations of the Lincolnian prerogative.

⁴⁶ 1 William Blackstone, *Commentaries* *252.

⁴⁷ Roosevelt, *supra* note 9, at 464 (emphasis added).

⁴⁸ Blackstone’s claim leaves open the possibility that the “positive laws” might speak (and hence not be silent), even though they do not explicitly bar some executive action. If that is the best reading of Blackstone, he differs from Roosevelt.

⁴⁹ Roosevelt, *supra* note 9, at 357, 361, 464 (describing the President as a steward of the people).

Congress.⁵⁰ The case is compelling as a matter of structure and policy. Congress might recess for long periods and hence may be unable to respond rapidly to a crisis. Indeed, it might not meet for years, as when an invader precludes its assembly. In contrast, the President is at the ready twenty-four hours a day, seven days a week.⁵¹ When Congress is not in session, for whatever reason, the President must be able to take measures to prevent or alleviate crises, or so the theory supposes. In this way, the country can soldier on under the Commander in Chief.

When Congress reconvenes (assuming it can), it may modify the President's crisis measures, extend them, or let them expire. Some argue that a few of Lincoln's unilateral Civil War measures were constitutional as temporary measures.⁵² During the Supreme Court's conference on *Youngstown*, Justice Felix Frankfurter seemed to endorse this theory.⁵³ Call this the Provisional Power Theory of emergency powers.

Left unclear is the sweep and duration of the President's temporary power. Because Lincoln is the exemplar, perhaps scholars believe that during a congressional recess, Presidents may enlarge the armed forces, expend unappropriated funds, and suspend habeas corpus.⁵⁴ Whether Presidents may take such measures even when Congress sits is unclear. Given that Congress can proceed at a glacial pace, an executive power to maintain the status quo during a session might be rather useful. Finally, we lack a sense of when the President's temporary measures must lapse. If they continue until Congress affirmatively rejects them, Presidents effectively will have a generic, but defeasible, crisis power that is not meaningfully temporary. Perhaps adherents of the Provisional Power

⁵⁰ See, e.g., Akhil Reed Amar, *America's Constitution: A Biography* 122 (2005) (praising Lincoln's claim of suspension authority and characterizing it as a claim of temporary unilateral authority); William F. Duker, *A Constitutional History of Habeas Corpus* 144–45 (1980) (arguing that the President has authority to respond to sudden attacks and can suspend the privilege when Congress cannot be consulted); Daniel Farber, *Lincoln's Constitution* 121–23 (2004) (arguing that the President and Congress had concurrent power to suspend and that the President's power arises from his power to respond to sudden attacks).

⁵¹ Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 *Harv. L. Rev.* 701, 706 n.24 (1995).

⁵² See Amar, *supra* note 50, at 122; Farber, *supra* note 50, at 142–43.

⁵³ See Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *Presidential Power Stories*, *supra* note 36, at 233, 258. Frankfurter, however, argued that the President only could exercise a provisional power when there was no contrary statute. *Id.*

⁵⁴ See generally J.G. Randall, *Constitutional Problems Under Lincoln* 51, 514 (Univ. of Ill. Press 1951) (1926).

Theory suppose that a President's temporary measures must lapse soon after Congress convenes.

A final possibility is that the President has but a few emergency powers under the Constitution, making him relatively feeble in crises. The President may appoint to vacant offices during the Senate's recess.⁵⁵ This would be especially useful as casualties mounted during a war, for the President could quickly replace military officers.⁵⁶ The Commander in Chief may use whatever resources, military and civilian, that Congress supplies to overcome invaders and rebels. The President may offer and grant pardons in a bid to convince traitors and rebels to reconcile.⁵⁷ When the President's constitutional authorities and his existing set of statutory powers prove inadequate in "extraordinary occasions," the President may summon Congress,⁵⁸ thereby making it possible for it to furnish him the funds, soldiers, and discretion necessary to thwart the invasion or suppress the rebellion. If Congress has the keys to the Treasury, fixes the sizes of the armed forces, and can cede crisis powers to the President, convening Congress is a vital power. Call this the Imbecilic Theory of presidential crisis power.⁵⁹

The Imbecilic Theory is a claim about the scope of powers that the Constitution vests with the President, not an assertion that the Constitution mandates imbecility. Because Congress may delegate to the President, he need not be imbecilic. *Ex ante* laws can grant sweeping powers that spring into existence upon some emergency. For instance, Congress might provide by statute that the President can raise the size of the army whenever there is an invasion. Alternatively, in the immediate wake of a crisis, Congress might convey additional authority, say authorizing detentions via a suspension of the privilege of the writ of habeas corpus. Whether Congress delegates via *ex ante* or *ex post* laws, it may grant the President a more muscular military, greater interstitial lawmaking pow-

⁵⁵ U.S. Const. art. II, § 2, cl. 3.

⁵⁶ For the first three decades, there was a tradition of unilateral brevet (battlefield) appointments. All that changed in 1818. See David T. Zabecki, Ranks, US Army, in 2 *The Encyclopedia of North American Indian Wars, 1607–1890: A Political, Social, and Military History* 662, 664 (Spencer C. Tucker ed., 2011). After the 1818 statute, the President could make unilateral battlefield appointments to the military, but only during the Senate's recess. *Id.* Such appointments expired at the end of the next session of the Senate. See U.S. Const. art. II, § 2, cl. 2.

⁵⁷ U.S. Const. art. II, § 2, cl. 1.

⁵⁸ *Id.* art. II, § 3.

⁵⁹ See MacMillan, *supra* note 24 and accompanying text for the lament of one state executive about his constitutional weakness during crisis.

er, or authority to suspend habeas corpus and conduct military trials of civilians.

Of these conceptions, the Provisional Power Theory may strike many as the most attractive. It permits prompt and vigorous executive action while still preserving ultimate congressional authority over taxation, appropriations, and the military. One might say it balances the need for swift action and the desire for ultimate legislative control.

Some may suppose that the first two theories cede too much authority. The Prerogative Theory seems to exalt the President above the law whenever he concludes that the Constitution or statutes hinder his ability to safeguard the nation. During crises, the theory renders the government one of men, not of laws. If the Constitution grants the President such power, its grant is as comprehensive as it is opaque.

The Stewardship Theory, because it is atextual, runs afoul of the enumerated powers theory. Under the original Constitution and the Tenth Amendment,⁶⁰ federal entities claiming authority under the Constitution must cite a constitutional grant of authority. In contrast, Roosevelt's Steward Theory reads Article II as embodying a converse Tenth Amendment—all powers not expressly denied the President, by either the Constitution or laws, are implicitly ceded to him. There is no good reason for reading the Tenth Amendment as if it contained an executive power exception or for construing Article II as if it contained a converse Tenth Amendment—for example, all powers not expressly denied the President rest with him.

The Imbecilic Theory leaves the President with rather little emergency authority and thus may seem unappealing. It treats the President as a lowly night watchman, with the power to sound the alarm that summons those able to make consequential decisions. What is more, if Congress fails to delegate crisis powers, either in advance or in the wake of a crisis, woe unto us all, for there will be no *legal* way for the executive to pilot the nation through the exigency.

Yet the original Constitution seems to reflect the Imbecilic Theory. In fact, if we attend to the era that preceded the Founding, the Imbecilic Theory appears to be an immanent constitutional feature, one only slightly less apparent than the implicit requirement that the executive execute judicial judgments.⁶¹ As will be discussed in Part II, the English

⁶⁰ U.S. Const. amend. X.

⁶¹ See William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1810 (2008).

Crown lacked power to act *contra legem*, even during rebellion or famine. Early American executives were successors to the Crown, for they also could not act *contra legem*. Indeed, they lacked any sort of generic emergency power, even of the temporary sort. During the Revolutionary War, state and national executives repeatedly denied that they could take property, suspend habeas corpus, or impose military justice on civilians. Generally speaking, state and federal executives only took such measures when statutes conferred such powers. When executives took such measures without statutory authority, they recognized that they were acting illegally and typically sought statutory indemnification.

Part III will build upon the backdrop of executive imbecility, arguing that the Constitution contains nary a hint that the Founders meant to depart from this regime of executive impotence. The Constitution contains familiar provisions—the grant of executive power and the office of Commander in Chief⁶²—that were never thought to encompass generic emergency powers in eighteenth-century America. If the Founders intended to create a robust, hyper-powered crisis executive, their Constitution left no traces of that design.

II. A TRADITION OF IMBECILITY

To understand why early Presidents had a modest conception of their emergency powers, we need to forget, for the moment, our modern constitutional sensibilities, shaped as they are by the Civil War and events since. We also need to shunt aside the common perception that the modern world, with its seemingly countless existential threats, requires vigorous executive unilateralism during crises. Instead we must hearken back to the period immediately preceding the Constitution, an era of different sensibilities and somewhat less dreadful threats.

In some ways, the era's executives stood poles apart. Americans came to see King George III as a symbol of executive excess, partly because the Declaration of Independence had railed against his abuses. The Commander in Chief of the Continental Army was the most venerated man in America, even as he was the least powerful executive. George Washington was a creature of the Continental Congress, serving at its pleasure and dutifully obeying its directives. The state executives—the products of jealousy towards all things executive—were arrayed between the Georges. Unlike Washington, they had constitutionally grant-

⁶² See *infra* Section II.B.

ed powers and were not mere creatures of statute. Unlike the Crown, few could veto and most had fleeting tenures and faced term limits.⁶³

Whatever their differences, if the era's chief executives generally had broad emergency power, temporary or otherwise, we have good reason to read Article II as conveying the same, via the executive power or the grant of the office of Commander in Chief. That backdrop of executive vigor should be decisive when trying to make sense of the grants in Article II.

By the same token, if the era's chief executives were relatively impotent in crisis—if they could not try civilians before military tribunals or suspend habeas corpus—that fact should influence how we read the Constitution, because it too supplies contextual clues about its meaning. Against a backdrop of executive weakness in crises, the architects of a new framework would know that if they wished to depart from prevailing frameworks, they would have to make that intent crystal clear, lest their purposes be mistaken or overlooked. Satisfying a desire to infuse the executive with new crisis powers would require novel text, especially in a regime of enumerated powers.

So what crisis authority did executives of the era enjoy? The Crown lacked anything resembling a generic “emergency power,” temporary or otherwise. In peacetime, the Crown could not increase the size of the army, raise taxes, or impose embargoes, whatever the crisis. During a war, however, the Crown could raise armies and impose embargoes, and might have been empowered to impose martial law. In contrast, American state and national executives were just as feeble in war as they were in peace. By virtue of their offices, they could not take property, raise armies, or impose martial law. Such authority came, if at all, via legislative grants, meaning that in crises American executives were anemic until legislatures decreed otherwise.⁶⁴

This constitutional feebleness of American executives was not widely perceived as a flaw, because governments were able to outlast crises without having to cede, via constitutional grants, extensive authority to their executives. The resilience of the American system likely left the impression that there was no need for written constitutions to delegate sweeping emergency powers to the executive. Instead, legislatures could delegate crisis authority via temporary and tailored grants.

⁶³ See Macmillan, *supra* note 24, at 57, 62.

⁶⁴ See *infra* Sections II.A–C.

A. The English Monarchy in the Late Eighteenth Century

By the eighteenth century, the English had discarded a broad Lockean prerogative. We know this because constitutional settlements, reflected in statutes, had hemmed in the Crown. Written about the same time as Locke's *Second Treatise of Government*, the 1689 English Bill of Rights⁶⁵ codified the view that Parliament's laws reigned supreme even over traditional conceptions of the Crown's executive power.

The contours of the Bill of Rights are key. It denounced the "pretended" regal power of granting individualized dispensations from statutory strictures.⁶⁶ It condemned the "pretended" power of suspending Parliament's laws.⁶⁷ It declared that the Crown could not "levy[] money for or to the use of the Crown by pretence [sic] and prerogative,"⁶⁸ thereby decreeing that the Crown could not raise taxes. And it stipulated that the Crown could not raise or keep armies in the kingdom without Parliament's consent in times of peace.⁶⁹

Did the Bill of Rights permit these executive measures in emergencies? Generally speaking, no. The Bill contained no express exception permitting the forbidden actions when the Crown believed that suspensions, dispensations, taxation, or appropriations were indispensable due to some crisis. Any implicit exemption is extremely unlikely because the Bill of Rights asserted that executive suspensions, dispensations, and tax impositions were "illegal,"⁷⁰ and that raising armies was "against law."⁷¹

Two textual pointers strengthen the implication that the English Bill of Rights generally did not permit these executive measures during emergencies. First, the Bill made clear that its restrictions did not apply when Parliament had ceded discretion to the Crown, thereby suggesting that the relevant executive acts were legal *only* when Parliament gave its approval.⁷² Second, by declaring that the Crown could not raise or keep armies in the kingdom "in time of peace," the Bill conceded that the Crown could do so either during wars and rebellions.⁷³ This concession

⁶⁵ 1 W. & M., c. 2 (1689), *reprinted in* 1 *Translations and Reprints from the Original Sources of European History*, *supra* note 18, at 32–38.

⁶⁶ *Id.* art. I § 2, at 34.

⁶⁷ *Id.* art. I § 1, at 32.

⁶⁸ *Id.* art. I § 4, at 34.

⁶⁹ *Id.* art. I § 6, at 34.

⁷⁰ *Id.* art. I § 4, at 34.

⁷¹ *Id.* art. I § 6, at 34.

⁷² *Id.* art. XII, at 38.

⁷³ *Id.* art. I § 6, at 34.

was necessary because it, alone among the Bill's limitations, was inapplicable when the kingdom was at war. Put another way, because the other restrictions—related to suspension, dispensation, and taxation—never indicated that they applied only in peacetime, they applied equally in war and peace.

We need not rely solely upon inferences from the Bill of Rights. An episode from the mid-eighteenth century makes clear that the Crown lacked authority to act *contra legem*. When, in the teeth of a crisis, the Crown blocked the export of grain, Parliament responded in a way that shed light on the Crown's powers in domestic emergencies.⁷⁴ Think of it as the *Youngstown*⁷⁵ of eighteenth-century England.⁷⁶

In early 1766, a torrential downpour devastated grain crops, leading to a "Corn Crisis." While Parliament was in recess, grain prices skyrocketed, triggering riots. Mobs destroyed flourmills and seized foodstuffs;⁷⁷ some culprits were imprisoned and others hanged.⁷⁸ Believing that it could not wait, the Crown acted unilaterally, banning grain exports in order to preserve the supply for the domestic market.⁷⁹ In an argument Abraham Lincoln would have found congenial, George III said "great evils must require at times extraordinary measures to remove them."⁸⁰ Unlike Lincoln's measures in 1861, the Crown's proclamation expressly provided that its export ban lapsed three days after Parliament returned. This was an implicit acknowledgement that any final decision rested with Parliament. To some of the Crown's advisors, the measure must have seemed necessary and legal. Others, including the Lord Chancellor, had their doubts.⁸¹

⁷⁴ Over the next several pages, I have drawn heavily from Philip Lawson, *Parliament, The Constitution and Corn: The Embargo Crisis of 1766*, 5 *Parliamentary Hist.* 17 (1986).

⁷⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁷⁶ See Lucius Wilmerding, Jr., *The President and the Law*, 67 *Pol. Sci. Q.* 321, 336–38 (1952).

⁷⁷ Merrill Jensen, *The Founding of a Nation: A History of the American Revolution, 1763–1776*, at 218 (1968).

⁷⁸ Hilton L. Root, *The Fountain of Privilege: Political Foundations of Markets in Old Regime France and England 88–89* (1994).

⁷⁹ Lawson, *supra* note 74, at 22–24.

⁸⁰ Lawson, *supra* note 74, at 22.

⁸¹ *Id.* at 22–23. During wartime, the Crown had a common law right to impose an embargo. Not so during times of peace. See Christopher Vincenzi, *Crown Powers, Subjects and Citizens* 152 (1998); see also Lawson, *supra* note 74, at 29 (noting that Lord Mansfield asserted that the Crown could have imposed an embargo during war).

When Parliament reconvened, George III's address referenced his export ban, without acknowledging its illegality and without asking for any bill to indemnify his ministers and officers against suits. Justifying the measure, George III said that "[t]he urgency of the necessity called upon me . . . to exert my royal authority for the preservation of the public safety, against a growing calamity which could not admit of delay."⁸² Because the ban would soon expire, the Crown referenced the possibility of new legislation. By not admitting the illegality of the export ban, however, the Crown seemed to be reasserting a pre-Bill of Rights power to suspend laws temporarily.⁸³

Several Lords criticized the Crown, with some insisting on a new bill that would reassert Parliamentary supremacy. In response, William Pitt quoted the portion of Locke's Second Treatise that argued that the Crown had a power to act *contra legem*.⁸⁴ But he also seemed to back away from the implication, supposedly denouncing it.⁸⁵ Lord Camden argued that the suspension established "only a tyranny of forty days."⁸⁶ Astonished, a member replied that once a dispensing power was established, "you cannot be sure of either liberty or law for forty minutes."⁸⁷

Without definitively addressing the legality of the ban, Lord Mansfield, the Chief Justice, delicately suggested an act of indemnity to protect those who enforced the embargo.⁸⁸ Such an act would benefit the judiciary immensely because it would not have to decide the legality of the executive's ban. In fact, exporters had sought damages against customs officials who were enforcing the Crown's export bar.⁸⁹

Parliament obliged, passing an act of indemnity. Rather than sidestepping the export ban's legality, however, Parliament rebuked those who had advised it. The Act declared that the export bar "could not be ju[s]tified by Law" but that because it was "for the Service of the Pub-

⁸² The King's Speech on Opening the Session (Nov. 11, 1766), in 16 The Parliamentary History of England 235, 235 (London, T.C. Hansard 1813).

⁸³ Id. at 235–36.

⁸⁴ Jeremy Black, Pitt the Elder 270 (1992).

⁸⁵ Id. at 271.

⁸⁶ 5 John Lord Campbell, The Lives of the Lord Chancellors and the Keepers of the Great Seal of England 226 (John Lord Campbell ed., 2d Am. ed., Philadelphia, Blanchard & Lea 1851).

⁸⁷ A Speech in Behalf of the Constitution Against the Dispensing and Suspending Prerogative (Dec. 10, 1766), in 16 The Parliamentary History of England, supra note 82, at 284.

⁸⁸ See Lawson, supra note 74, at 30.

⁸⁹ Id. at 29.

lick” and “necessary,” it should be “justified by Act of Parliament.”⁹⁰ It proceeded to indemnify any act “advised, commanded, appointed, or done” relating to the embargo.⁹¹ The Act thus conspicuously rejected the attempt to resurrect the Crown’s power to suspend statutes, even though the suspension was concededly introduced for the public good in time of crisis. While *salus populi* might be the supreme *rex* in an abstract sense, it was not the supreme law in England. Only Parliament’s laws had that status. Because the King-in-Parliament had permitted the export of grain at the time of the executive’s ban, the Crown could not unilaterally forbid grain export.⁹²

The Act’s preamble carried an important constitutional lesson, for it reaffirmed what was implicit in the Bill of Rights. The executive could not, as a legal matter, create, modify, or suspend laws, in a domestic crisis, even when doing so was for the public good in time of crisis. William Blackstone, as a member of Parliament, witnessed the debate and referenced it in later editions of his Commentaries.⁹³ Those Founders who read the American printing would have known of the episode and Blackstone’s more general conclusion that the Crown could not act contrary to law.

Did the Crown have an emergency power during wars and rebellions? In some respects, the answer was clearly “yes.” The Bill of Rights’ bar on raising and keeping a domestic peacetime army implied that the Crown generally could deploy the army overseas and, during wartime, might raise and keep a standing army in England.⁹⁴ Moreover, the Crown could impose wartime embargoes.⁹⁵

One aspect of the Crown’s power during wars and rebellions was uncertain and contested, namely the power to impose martial law. Professor R.W. Kostal describes various crises and cases throughout the late

⁹⁰ 6 Geo. 3, c. 7 (1767), in 10 *The Statutes at Large: From the Fifth Year in the Reign of King George the Third to the Tenth Year of the Reign of King George the Third, Inclusive* 281, 281 (1771).

⁹¹ *Id.*

⁹² Lawson, *supra* note 74, at 17, 33.

⁹³ 1 William Blackstone, *Commentaries* *271 (1771) (describing the 1767 indemnity act as necessary because the Crown’s proclamation was “contrary to law”).

⁹⁴ 1 W. & M., c. 2, art. 6 (1689), *reprinted in* 1 *Translations and Reprints from the Original Sources of European History*, *supra* note 18, at 34.

⁹⁵ See 16 *The Parliamentary History of England*, *supra* note 82, at 251, 284 (noting admission by Member of Parliament that Crown had “undoubted right” to impose embargo during war); see also Vincenzi, *Crown Powers*, *supra* note 81, at 114, 152 (declaring that the Crown has general power to impose an embargo during wartime).

2013]

Imbecilic Executive

1381

eighteenth and nineteenth centuries that touched upon the issue, with no uncontested or easy answers emerging.⁹⁶ Based on the Petition of Right⁹⁷ and a few cases,⁹⁸ some thought that the Crown could never unilaterally authorize military commissions to try civilians;⁹⁹ perhaps it was left to Parliament to impose martial law.¹⁰⁰ Others seemed to admit that such commissions might be used when the ordinary courts were closed.¹⁰¹ And still others claimed that whenever war, of whatever sort, was afoot, the Crown could subject to martial law those suspected of aiding the enemy, even if the courts were open.¹⁰² Disagreements about martial law would continue through the nineteenth century.

Yet whatever uncertainty existed about martial law, it was clear that the Crown could not suspend habeas corpus.¹⁰³ Only Parliament could suspend the writ of habeas corpus and only Parliament had done so. This raised the puzzle of how it could be that the Crown could not suspend habeas corpus but nonetheless subject private citizens to military trials.

The Corn Crisis demonstrated that the Crown could not act *contra legem* and that it lacked even a provisional emergency power in peacetime. Wartime was more complicated. While the Crown could not suspend habeas corpus, it enjoyed additional wartime authority over embargoes, military discipline, and raising armies. Whether the Crown could impose martial law was much disputed.

B. The State Executives

Reflecting a jealousy of executive power, the state constitutions drew from the English Bill of Rights. Some expressly provided that no one but the legislature could suspend laws. For instance, the Maryland Con-

⁹⁶ See generally R.W. Kostal, *The Jurisprudence of Power: Victorian Empire and the Rule of Law* (2005). I draw heavily from Kostal in this paragraph.

⁹⁷ 3 Car., c. 1 (1627).

⁹⁸ See Kostal, *supra* note 96, at 198–99 (collecting cases about martial law).

⁹⁹ See *Facts and Documents Relating to the Alleged Rebellion in Jamaica, and the Measures of Repression*, Jamaica Papers No. 1, at 72 (London 1866); Frederic Harrison, *Martial Law: Six Letters to the Daily News*, Jam. Papers No. 5, at 13 (London 1867).

¹⁰⁰ Robert B. Scott, *The Military Law of England 18–19* (1810).

¹⁰¹ See *Juridicus*, *Solicitors' Journal* (Dec. 9, 1865), *reprinted in* 10 *Solicitors' Journal and Reporter* 109, 109 (London 1866); William Willis, *Authority of the Executive to Proclaim Martial Law*, *Daily News*, Jan. 3, 1866, at 3.

¹⁰² See generally W.F. Finlason, *A Treatise on Martial Law* (London, Stevens & Sons 1866); W.F. Finlason, *Commentaries on Martial Law* (London, Stevens & Sons 1867).

¹⁰³ See Saikrishna Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 *Alb. Gov't L. Rev.* 575, 593 (2010).

stitution of 1776 declared “[t]hat no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.”¹⁰⁴ Like their English precursor, these provisions lacked emergency exceptions. Moreover, because the constitutions were themselves law, the state bar on suspensions meant that the executive could not suspend constitutional provisions—either separation of powers clauses or rights provisions.

Focusing on the anti-suspension clauses, however, obscures the extent to which it was widely understood that state executives lacked crisis powers. During the War of Independence, state executives faced the daunting task of defeating an imperial power at its height. To succeed they not only had to defeat the enemy on the battlefield, they also had to secure military supplies, apprehend spies, and maintain civil government.¹⁰⁵ Though state constitutions often made their chief executives commander in chief and almost always granted them “executive power,”¹⁰⁶ those executives lacked emergency powers. To the contrary, they were remarkably feeble in crises. The leading historian on the war governors, Margaret Burnham MacMillan, noted that the constitutions ceded executives “limited powers entirely inadequate for dealing with . . . emergencies.”¹⁰⁷

Consider the plight of Pennsylvania’s plural executive (“the Supreme Executive Council”), endowed with the “executive power.”¹⁰⁸ The Council’s President informed General George Washington that it could no longer seize supplies because a statutory grant had expired¹⁰⁹:

It may seem strange . . . that we have not legal power to impress a single horse or wagon, let the emergency be what it will, nor have we any legal power whatever over property in any instance of public dis-

¹⁰⁴ Md. Const. of 1776, art. VII, *in* 1 *The Federal and State Constitutions, Colonial Charters, and Organic Laws of the United States* 817, 818 (Perley Poore ed., 2nd ed. Washington, Government Printing Office 1878). See also N.C. Const. of 1776, art. V, *in* 2 *The Federal and State Constitutions*, *supra*, at 1409, 1409 (all powers of suspending the laws should be exercised only with legislature’s consent).

¹⁰⁵ See Joseph E. Kallenbach, *The American Chief Executive: The Presidency and the Governorship* 27 (1966); MacMillan, *supra* note 24, at 83.

¹⁰⁶ MacMillan, *supra* note 24, at 57, 63.

¹⁰⁷ *Id.* at 61.

¹⁰⁸ Pa. Const. of 1776, §§ 3, 19, *in* 2 *The Federal and State Constitutions*, *supra* note 104, at 1540, 1544.

¹⁰⁹ MacMillan, *supra* note 24, at 92.

stress In this state of imbecility . . . we regret our inability to answer the public expectation with the keenest sensibility.¹¹⁰

Another chief executive spoke for most when he lamented the lapse of emergency legislation, for he was now “left to the Constitution which may do in Peace but is by no means adapted to war.”¹¹¹

Such complaints were predictable for two reasons. First, they were accurate in their description of the executive, for the state constitutions ceded them few emergency powers. Second, they manifested the understandable temptation to claim that powers were inadequate to the task at hand both as a means to acquire greater powers and to deflect blame if a particular response to a catastrophe seemed inadequate.

Yet it would be a mistake to imagine that state executives were entirely feckless in emergencies. Several had constitutional authority to impose embargoes (bans on the export of grains, materials, and goods).¹¹² Because the state constitutions were products of war, one has to suppose the executive was given authority to lay embargoes with an eye towards preventing the export of needed supplies during that war. Moreover, as the Corn Crisis demonstrated, without some affirmative grant of embargo authority, via constitutions or statutes, the executives would lack any authority to lay embargoes in time of peace.

The embargo provisions were hardly blank checks. Rather, they granted authority to impose short-term embargoes when the legislature was in recess. The implication was that legislatures had exclusive power over long-term export bans and on short-term bans when in session. Needless to say, it is hard to read those state constitutions that granted their executives authority to impose interim export bans during a legislative recess as if they also implicitly ceded far more consequential power

¹¹⁰ *Id.*

¹¹¹ *Id.* at 61.

¹¹² See Del. Const. of 1776, art. 7, *in* 1 *The Federal and State Constitutions*, supra note 104, at 273, 274 (the president, with consent of council, may impose thirty day embargoes during recess of legislature); Md. Const. of 1776, art. XXXIII, *in* 1 *The Federal and State Constitutions*, supra note 104, at 817, 825 (the governor may impose thirty day embargoes during recess of general assembly to prevent departure of ships and export of commodities); N.C. Const. of 1776, art. XIX, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1409, 1412 (same authority for governor); Pa. Const. of 1776, § 20 (1776), *in* 2 *The Federal and State Constitutions*, supra note 104, at 1540, 1545 (the executive council may impose thirty day embargoes during recess of House); S.C. Const. of 1778, art. XXXV, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1620, 1626 (the governor may impose thirty day embargoes during recess of legislature).

to their executives, such as the powers to seize property, raise armies and taxes, and sacrifice individual liberties for the sake of defeating the enemy or rebels.

Furthermore, many chief executives could summon their legislature.¹¹³ Some constitutions provided that this power could be used whenever the executive thought it “necessary.”¹¹⁴ For others, the power could be exercised only in an “emergency.”¹¹⁵ In states that limited the power to crises only, constitutional structure strongly hinted that the executives lacked a generic emergency power. An executive with a Lockean prerogative to do whatever was necessary during a crisis, including a power to act *contra legem*, had no need to summon the legislature in an emergency. Still, the power to summon the legislature was a vital crisis power resting with the executive, because it served as a means of acquiring delegated authority in the wake of an emergency.

So the constitutions granted little crisis authority and were generally understood to leave the state executives in an imbecilic state, at least until statutes ceded crisis powers. Yet navigating the twists and turns of war sometimes requires immediate, extraordinary action. Little wonder that executives occasionally took measures that were constitutionally and statutorily unauthorized. Such unilateral action—often dealing with

¹¹³ See, e.g., N.Y. Const. of 1777, art. XVIII, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1334, 1335; Pa. Const. of 1776, § 20, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1540, 1545; Va. Const. of 1776, cl. 30, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1910, 1911. See Mass. Const. ch. II, § 1, art. V, *in* 1 *The Federal and State Constitutions*, supra note 104, at 956, 965; and N.H. Const. art. XLIII, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1280, 1288 for examples of power to convene at a particular location.

¹¹⁴ Md. Const. of 1776, art. XXIX, *in* 1 *The Federal and State Constitutions*, supra note 104, at 817, 824; Pa. Const. of 1776, § 20, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1540, 1545; S.C. Const. of 1778, art. XVII, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1620, 1624; S.C. Const. of 1776, art. VIII, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1617, 1618; Vt. Const. of 1777, ch. II, § XVIII, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1862, 1863; Va. Const. of 1776, cl. 30, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1910, 1911; see also Del. Const. of 1776, art. 10, *in* 1 *The Federal and State Constitutions*, supra note 104, at 273, 275 (stating that the President may convene at his discretion “with the advice of the privy council, or on the application of a majority of either house”); Mass. Const. ch. II, § 1, art. V, *in* 1 *The Federal and State Constitutions*, supra note 104, at 956, 965 (stating that the Governor may summon the legislature where “the welfare of the commonwealth shall require the same”).

¹¹⁵ Ga. Const. of 1777, art. XX, *in* 1 *The Federal and State Constitutions*, supra note 104, at 377, 380. See also N.Y. Const. of 1777, art. XVIII, *in* 2 *The Federal and State Constitutions*, supra note 104, at 1334, 1335 (including “extraordinary occasions”).

supplies—was seen as illegal, despite the necessity. For instance, Governor George Clinton of New York advised officers to seize nails, claiming that necessity justified the seizure.¹¹⁶ Yet he admitted that necessity was not a legal defense: “[I]t is not in my Power as Gov’r [to impress] & I ought to be cautious how I walk.”¹¹⁷

When executives took such unauthorized measures they sometimes received post hoc legislative sanction.¹¹⁸ After one executive illegally transferred cannons to Washington’s army,¹¹⁹ he sought and received legislative sanction.¹²⁰ Similarly, the Virginia legislature “legalize[d] certain acts” of its governor, finding that they were “evidently productive of general good and warranted by necessity.”¹²¹ Indemnification would have been unnecessary if these executives had legal authority to take all needful measures during crises. As in England, legislative sanction was essential because the executive had taken illegal, but necessary, actions.

Three lessons emerge from the states. First, although almost all executives enjoyed express grants of executive power and many served as commander in chief, none of them acted as if they had constitutional authority to take any and all emergency measures. In other words, even though state constitutions were created in the crucible of crisis, they were not constitutions of necessity insofar as the executives were concerned. Relatedly, state executives never claimed authority to do anything not specifically prohibited by law, meaning that they did not view themselves as Rooseveltian stewards. Finally, no chief executive asserted constitutional authority to take temporary emergency measures that preserved the status quo for the legislature, except where their constitutions expressly granted as much, as in the case of embargoes. In sum, in

¹¹⁶ Letter from George Clinton to General Parsons (Mar. 12, 1778), in 3 *Public Papers of George Clinton, First Governor of New York* 27, 27–28 (Hugh Hastings ed., 1900).

¹¹⁷ Letter from George Clinton to Hugh Hughes (Mar. 17, 1778), in 3 *Public Papers of George Clinton, First Governor of New York*, supra note 116, at 53, 53. See also MacMillan, supra note 24, at 203–04 (discussing Clinton’s impressing of flour at the urging of Washington even though impressment was illegal).

¹¹⁸ MacMillan, supra note 24, at 99.

¹¹⁹ *Id.* at 202.

¹²⁰ *Id.*

¹²¹ 10 William Waller Hening, *The Statutes at Large Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 478 (Richmond, George Cochman 1822).

the midst of a war threatening their “Lives,” “Fortunes,” and “sacred Honor,”¹²² state executives felt rather handcuffed.

Second, and just as important, when executives took measures in the absence of statutory and constitutional authority—such as seizing supplies or giving state property away—they admitted that they acted illegally and sought legislative sanction.¹²³ In so doing, the executives recognized that they lacked constitutional authority to do anything that might win the war.

The third and final lesson relates to the perceived inadequacies of the system of weak crisis executives. Though executives complained about their constitutional imbecility, skepticism is in order. In crises, executives often will believe that all manner of obstacles will be overcome only if they are given more authority and a freer hand. But believing so does not make it so.

Fortunately, we need not linger on their protests. The important question is how did the system of weak crisis executives fare. Quite well, one might say. Despite the frail executives, the Revolution was won and, for the most part, the state executives and legislatures acquitted themselves well enough. So while chief executives might have insisted the system was inadequate, many likely disagreed, having witnessed the nation prevail against the British under it. It seems probable that the successes of the American regime of weak crisis executives helped shape the federal Constitution.

C. The Continental Commander in Chief

One of the factors propelling the nation to victory over the British was the leadership of the Commander in Chief of the Continental Army. If George Washington had sweeping emergency powers, perhaps the vigorous exercise of such powers counteracted the feebleness of the state chief executives. In fact, the Commander in Chief did not regard his office as ceding him power to take property, enlarge the army, suspend habeas corpus, or declare martial law. Congress agreed with that assessment, meaning that the office of Commander in Chief was no more powerful in crises than the state executives. In some respects, he was weaker.

¹²² The Declaration of Independence para. 6 (U.S. 1776).

¹²³ See MacMillan, *supra* note 24, at 202–03.

Congress appointed the Commander in Chief in June of 1775. It made Washington “General and Commander-in-chief of the army of the United Colonies and of all the forces raised or to be raised by them and of all others who shall voluntarily offer their service and join the said army.”¹²⁴ His Commission required soldiers and officers to obey him.¹²⁵ It also gave Washington “full power and authority to act as you shall think for the good and [w]elfare of the service.”¹²⁶

At first glance, the office appears rather powerful. Yet a careful reading of the commission and an examination of Washington’s actions reveal otherwise. He lacked “full power and authority” to do anything he thought useful for the “good and [w]elfare of” the United Colonies as a whole. He could only act for the good and welfare of the “service,” namely the army.

This meant that he could command soldiers and issue standing orders governing a military camp. But what of other, broader powers? Could the Commander, *ex officio*, raise new troops or set soldier pay, on the theory that doing so would enhance the army’s welfare? Could he impress supplies to feed and clothe his men? Could he arrest and detain treasonous individuals who plotted the army’s destruction? Finally, could he subject civilians to military justice when doing so might benefit the army, and, by extension, the Revolution?

We know that the Commander in Chief could do none of these things by virtue of his office alone because Congress occasionally granted power to take supplies, arrest Tories, and impose martial law.¹²⁷ Almost always, the grants were short-lived, expiring during a coming session of the Continental Congress.¹²⁸ Occasionally, the grants were geographically limited to a radius around a camp or the scene of hostilities.¹²⁹ There was no reason to limit crisis authority in duration and geographical scope if the Commander in Chief, by virtue of his office alone, enjoyed

¹²⁴ See Washington’s Commission from Congress from John Hancock, President, to George Washington (June 19, 1775), *in* *The Glorious Struggle: George Washington’s Revolutionary War Letters* 6, 6–7 (Edward G. Lengel ed., 2007).

¹²⁵ *Id.* at 7.

¹²⁶ *Id.*

¹²⁷ See, e.g., Entry from Friday, Dec. 27, 1776, *in* *6 Journals of the Continental Congress 1774–1789*, at 1044, 1045–46 (Worthington Chauncey Ford ed., 1906) (granting emergency authority to Washington for a period of six months).

¹²⁸ See, e.g., Entry from Wednesday, Sept. 17, 1777, *in* *8 Journals of the Continental Congress 1774–1789*, *supra* note 127, at 750, 752 (1907) (granting power to impress for sixty days).

¹²⁹ *Id.*

a generic crisis power to impress supplies, suspend habeas corpus, or impose martial law.

The genesis of some statutory grants also suggests that the office of Commander in Chief was bereft of crisis authority. Often, the Continental Congress granted emergency powers because the Commander in Chief requested as much.¹³⁰ Washington's desire for statutory authority was an implicit acknowledgment that his office did not encompass power to impress supplies, arrest civilians, or try them via courts martial.

Washington's careful respect for the terms of crisis legislation points to the same conclusion. The Commander strictly complied with emergency laws, never venturing beyond their terms. When a civilian was executed for his "heinous" crime, Washington rebuked the responsible officer, saying that crime was not cognizable by the military courts and that Congress had not authorized capital punishment, in any event, even on soldiers.¹³¹ In another episode, Washington declared that martial law could no longer be applied against civilians because the law that had permitted it had expired the day before.¹³² In a third instance, the General condemned the trial of a civilian who had been caught far from headquarters because it was statutorily unauthorized. "There is a resolve of Congress, empowering courts Martial to take cognizance of inhabitants who have any communication of Trade or intelligence with the enemy . . . ; but the operation of this law is limited to persons" captured within thirty miles of headquarters, "which prevents its applications to the present case."¹³³ Washington hewed strictly to congressional laws because they were his only lawful means of seizing property or detaining and trying civilians.

In one respect, Washington enjoyed less authority than some state counterparts. As noted, a handful of state executives could impose a temporary embargo during a legislative recess. Washington, however,

¹³⁰ See Letter from George Washington to John Hancock (Dec. 20, 1776), *in* 7 *The Papers of George Washington: Revolutionary War Series* 381, 382 (Philander D. Chase ed., 1997).

¹³¹ Letter from George Washington to Preudhomme de Borre (Aug. 3, 1777), *in* 10 *The Papers of George Washington: Revolutionary War Series*, *supra* note 130, at 495 (Frank E. Grizzard, Jr., ed., 2000).

¹³² Letter from George Washington to John Lacey, Jr. (Apr. 11, 1778), *in* 14 *The Papers of George Washington: Revolutionary War Series*, *supra* note 130, at 476, 477 (David R. Hoth ed., 2004).

¹³³ Letter from George Washington to William Smallwood (May 19, 1778), *in* 15 *The Papers of George Washington: Revolutionary War Series*, *supra* note 130, at 168, 168 (Edward G. Lengel ed., 2006).

2013]

Imbecilic Executive

1389

lacked such authority, as his request that Congress impose an embargo suggests.¹³⁴ He perhaps understood that while the price of war materiel might decline in the wake of an export ban, that fact alone hardly suggested that commanders in chief could impose the bar. After all, he lacked all sorts of powers that would have been militarily useful.

Though the Crown had special wartime authority related to raising armies and imposing embargoes (and perhaps also imposing martial law), it could not act *contra legem*. The Bill of Rights, with its bar on suspensions and dispensations, had made that clear. This bar was reaffirmed in the wake of the 1766 Corn Crisis, when Parliament declared that the Crown's temporary export ban was illegal, notwithstanding the famine and riots.

The principle of limited executive crisis powers made its way to American shores. Americans did not regard their executives as empowered to handle a crisis by any means necessary. To the contrary, throughout the existential crisis that was the Revolutionary War, no state executive ever claimed constitutional authority to suspend habeas corpus, seize supplies, or impose martial law. Their abjuration of any such emergency powers fairly shows that grants of executive power and commander-in-chief authority did not encompass crisis powers to raise taxes and armies or to dispose of the property and lives of citizens.

General Washington faced the same crisis. And he was a practical man. “[D]esperate diseases, require desperate [r]emedies,” he once wrote.¹³⁵ Yet the desperate remedies were to come from Congress, as he implicitly admitted in his request for a delegation of emergency power.¹³⁶ That was so because the office of Continental Commander in Chief did not come with a panoply of emergency powers. Powers to impress, conduct military trials of civilians, or impose martial rule could come only via statute, courtesy of the Continental Congress.

¹³⁴ Letter from George Washington to Nathaniel Woodhull (July 24, 1776), in 5 *The Papers of George Washington: Revolutionary War Series*, supra note 130, at 454, 455 (Phyllis K. Kupperman ed., 1993).

¹³⁵ Letter from George Washington to John Hancock, supra note 130, at 382.

¹³⁶ *Id.*

III. THE FORMATION OF AN IMBECILIC FEDERAL EXECUTIVE

The Constitution's executive was far more robust and energetic than any that had existed in independent America. The President was clothed with several powers, most prominently authority to execute the laws¹³⁷ and pardon violations of them,¹³⁸ to superintend foreign affairs,¹³⁹ to command the military,¹⁴⁰ and to direct and remove executives.¹⁴¹ When he had constitutional power, the President generally could act unilaterally; only when making treaties and appointments would he need the concurrence of a council (the Senate).¹⁴² Finally, he had a share in lawmaking, via his power to propose measures and his veto power.¹⁴³ The Presidency seemed so potent and muscular that many thought that it rivaled the most powerful European monarchs.¹⁴⁴ The resemblance to monarchy—singular chief executive vested with powers over the military, appointments, legislation, and officers—was unmistakable, even as some tried to deny it.¹⁴⁵

Perhaps it is natural to suppose that this unparalleled American chief executive acquired the emergency powers his domestic predecessors lacked. After all, state executives had grouched that their constitutions were inadequate in crises. Would not sensible drafters, like the ones at the Philadelphia Convention, have identified this defect and fixed it by

¹³⁷ The executive power principally encompassed power to execute federal law. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The Executive's Power to Execute the Law*, 104 *Yale L.J.* 541 (1994); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U. Ill. L. Rev.* 701.

¹³⁸ U.S. Const. art. II, § 2, cl. 1.

¹³⁹ The Constitution's grant of executive power included a residual power over foreign affairs. See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231 (2001).

¹⁴⁰ U.S. Const. art. II, § 2, cl. 1.

¹⁴¹ The executive power was read to include authority to remove executive officers. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *Cornell L. Rev.* 1021, 1040 (2006); Saikrishna Prakash, *Removal and Tenure in Office*, 92 *Va. L. Rev.* 1779, 1815–32 (2006).

¹⁴² U.S. Const. art. II, § 2, cl. 2.

¹⁴³ *Id.* art. II, § 3; *id.* art. I, § 7, cl. 2.

¹⁴⁴ See, e.g., Stephen Jones, *The History of Poland, From Its Origin as a Nation to the Commencement of the Year 1795*, at 393 (1795); Letter from John Adams to Roger Sherman, in 6 *The Works of John Adams* 429, 430 (Charles Francis Adams ed., 1851); see also Frank Prochaska, *The Eagle and the Crown* 16 (2008).

¹⁴⁵ In the *Federalist Papers*, Hamilton sought to belittle the resemblance to monarchy, but he did this by misleadingly inflating the Crown and deflating the Presidency. See *The Federalist Nos. 67–77* (Alexander Hamilton).

granting the Presidency emergency powers beyond its immediate precursors? There were seven governors at Philadelphia,¹⁴⁶ both serving and former, and perhaps they pressed for additional crisis powers.

And yet the delegates to the Philadelphia Convention did nothing to vest the executive with substantially greater crisis powers. Nothing in the Constitution indicates a departure from the prevailing, limited conception of executive crisis authority. Much like his American predecessors, the President would have limited emergency authority: The President could make interim appointments during a Senate recess, summon Congress, and pardon rebels and traitors. But he could not, during a crisis, draw funds from the Treasury, raise armies, suspend habeas corpus, seize private property, or subject civilians to martial law.

All this suggests that the Founders drew a rather different conclusion from the Revolutionary War. Rather than supposing that a weak executive in emergencies was a curse, perhaps they supposed it a blessing, because they fashioned an impotent emergency executive. Having seen that the war had been won without a single executive *constitutionally* empowered to take whatever measures it thought necessary, the Founders perhaps thought no augmentation of executive power in emergencies was necessary. Statutes could strengthen the executive, as they had done before. At the least, perhaps more pressing matters occupied any who thought executive powers inadequate, preventing them from ceding new crisis authority to the President.

A. The Text

The first sign of the President's impotence in emergencies comes from the Constitution's text. Article II grants him the "executive power"¹⁴⁷ and makes him the "Commander in Chief."¹⁴⁸ In the states, those same phrases were never thought to cede any power to seize property, appropriate funds, or rule by martial decree, making it very unlikely that the phrases took on that meaning in the Constitution. Likewise, no one thought that the Continental Army's Commander in Chief could, by virtue of his office, take property, impose martial law, or detain individuals. Every time the Commander in Chief exercised such powers, it was

¹⁴⁶ See Edward F. Larson & Michael P. Winship, *The Constitutional Convention: A Narrative History from the Notes of James Madison* 3 (2005).

¹⁴⁷ U.S. Const. art. II, § 1, cl. 1.

¹⁴⁸ *Id.* art. II, § 2, cl. 1.

pursuant to a statutory delegation. When those delegations lapsed, so did his emergency powers.

To be sure, the Constitution cedes the President some emergency powers that some extant American executives lacked. The President has an absolute power to pardon, useful in rebellions.¹⁴⁹ Some state executives had circumscribed pardon powers, requiring legislative acquiescence in many cases.¹⁵⁰ Others required consultation with a council.¹⁵¹ Rebels otherwise open to reconciliation might be unwilling to surrender their arms if their pardon required legislative or conciliar approval, for such approval might never come. Some also believed that if the pardon power rested with the legislature alone, the legislature would be less forgiving than a chief executive. To buttress their claim, some cited the Massachusetts legislature's initial unwillingness to pardon those who participated in Shays' Rebellion.¹⁵² Far better, some thought, to give the pardon power to the executive alone because he could credibly promise and deliver pardons.

The President's power to appoint during Senate recesses means that offices need not remain vacant indefinitely.¹⁵³ Military offices in particular might need to be filled quickly, especially when the Senate might not meet for months or where an invasion or rebellion might preclude Congress from meeting at all. That the President's recess appointments would last until the end of the Senate's *next* session facilitated crisis governance, for such appointments might, in an exigency, last for months or even years.

A few crisis-related powers may have been curbed, at least if we compare the Presidency to his state counterparts. Whereas some state

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Ga. Const. of 1777, art. XIX, *in* 1 *The Federal and State Constitutions*, supra note 104, at 377, 380 (granting power to issue reprieve with pardon to come only from assembly).

¹⁵¹ N.H. Const. art. LII (amended 1792), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1280, 1292; N.J. Const. of 1776, art. IX, *in* 1 *The Federal and State Constitutions*, supra note 104, at 1310, 1312; Pa. Const. of 1776, § 20, *in* 1 *The Federal and State Constitutions*, supra note 104, at 1540, 1545; Vt. Const. of 1777, ch. II, § 11 (1786), *in* 1 *The Federal and State Constitutions*, supra note 104 at 1866, 1871; Va. Const. para. 7 (1776), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1909, 1910.

¹⁵² See 2 *The Records of the Federal Convention of 1787*, at 626–27 (Max Farrand ed., 1911) (comments of Rufus King).

¹⁵³ U.S. Const. art. II, § 2, cl. 3.

executives could summon the legislature at their discretion,¹⁵⁴ or whenever “necessary,”¹⁵⁵ the President could summon only on “extraordinary Occasions.”¹⁵⁶ While any war or rebellion satisfied that standard, perhaps there would be instances when convening Congress might be “necessary,” yet not seem an “extraordinary occasion.”¹⁵⁷

Unlike some state executives,¹⁵⁸ the President lacks a power to impose a provisional embargo, because there is no plausible textual foundation for a presidential embargo power. Given Congress’s power over interstate and international commerce, it seems plain that it has such authority.¹⁵⁹ Hence in time of war, where necessary supplies might be in short supply, the President could not impose an embargo, even when Congress was in recess.

As in the state constitutions, the existence of two presidential powers (appointing officers and summoning) that can be exercised only in a legislative recess suggests that there are no other presidential powers, emergency or otherwise, that may be exercised only when the legislature is in recess. That is to say, the Constitution’s text likely does not permit the President to exercise a host of temporary crisis powers—to raise armies, expend funds, suspend habeas corpus—during a legislative recess. Moreover, as in the state constitutions, the power to summon Congress on extraordinary occasions suggests that the President may convene it to enact the measures necessary to weather those occasions. The President may call Congress into an “extraordinary” session, hoping that the latter

¹⁵⁴ See Del. Const. of 1776, art. 10, *in* 1 *The Federal and State Constitutions*, supra note 104, at 273, 275 (the President may convene “with the advice of the privy council, or on the application of a majority of either house”).

¹⁵⁵ See Md. Const. art. XXIX (1776), *in* 1 *The Federal and State Constitutions*, supra note 104, at 817, 824; Pa. Const. § 20 (1776), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1540, 1545; S.C. Const. art. XVII (1778), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1620, 1624; S.C. Const. art. VIII (1776), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1617, 1618; Vt. Const. ch. II, § XVIII (1777), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1857, 1863; Va. Const. cl. 30 (1776), *in* 1 *The Federal and State Constitutions*, supra note 104, at 1910, 1911.

¹⁵⁶ U.S. Const. art. II, § 3.

¹⁵⁷ The Constitution contains a similar distinction between matters “necessary” and those “absolutely necessary.” Compare *id.* art. I, § 8, cl. 18 (granting Congress “necessary and proper” authority), with *id.* art. I, § 10, cl. 2 (limiting power of states to tax exports to the amount “absolutely necessary” to cover inspection costs). John Marshall made much of this distinction in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819).

¹⁵⁸ See supra note 112 and accompanying text.

¹⁵⁹ U.S. Const. art. I, § 8, cl. 3.

enacts extraordinary (emergency) legislation relating to habeas corpus, the army, and so on.

The Militia Clause also signals executive impotence. Congress may “provide for calling forth” the militias to “suppress Insurrections and repel Invasions,”¹⁶⁰ meaning that it may pass laws declaring when the militias may be federalized. The grant to Congress suggests that the President lacks constitutional power to summon the militias, even in an invasion or rebellion. But if the President lacks this power in an invasion or rebellion, there is little reason to suppose that he may suspend habeas corpus, impose martial law, or take property.

Finally, consider the implications of the Third Amendment. It provides that “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”¹⁶¹ The executive cannot order quartering, even during wartime, because he cannot unilaterally impose, “by law,” the modalities of quartering. The Amendment evidently assumes that Congress alone can authorize wartime quartering, an assumption that suggests that the executive more generally may not take all manner of wartime emergency measures. Put another way, if the executive cannot take houses during a war—for quartering is a physical occupation¹⁶²—why would he be able to take guns, horses, or ammunition, or be able to try civilians before courts martial? As Justice Jackson recognized in *Youngstown Sheet & Tube Co. v. Sawyer*, the Amendment presupposes that the executive is feeble in wartime.¹⁶³

Before we consider what people said about the Constitution prior to its ratification, a few words about the relationship between the Constitution’s text and the English Crown are necessary. Candor requires admitting that it is possible to read the Constitution as incorporating the English understanding of executive power, one that includes, in time of war, the powers to raise and punish soldiers and to bar the export of goods.

Yet the better view is that a narrower American understanding of executive power had supplanted the uncertain but broader English sense. While the Crown was more muscular in war, the Constitution did not

¹⁶⁰ Id. art. I, § 8, cl. 15.

¹⁶¹ Id. amend. III.

¹⁶² The Court has explained that temporary physical occupation is a taking under the Fifth Amendment. See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374, 380 (1945).

¹⁶³ 343 U.S. 579, 644–45 (1952) (Jackson, J., concurring).

2013]

Imbecilic Executive

1395

replicate this muscularity. The period between 1776 and 1789 had sun-dered the association between American executives and emergency powers. The Constitution suggests as much when it grants Congress ex-press powers to raise, fund, equip, and discipline the military and regu-late foreign commerce. The implication is that these grants vest Con-gress with exclusive authority over these matters, with the President limited to a checking function via presentment.

B. The Constitution's Creation

Again, even as the Constitution's unitary executive was meant to be more powerful than the ones that preceded it, in that the President could act with secrecy, vigor, and dispatch,¹⁶⁴ no Federalist asserted that the President would have crisis powers that previous American executives and commanders in chief lacked. And on this point, the Anti-Federalists seemed to agree. While generally complaining that the Presidency would be too muscular, they never complained that it was clothed with author-ity to do what it deemed necessary to save the Union. Nor did anyone moot a temporary crisis power deployable during congressional recesses or otherwise.

In contrast, participants highlighted the new powers vested with Con-gress that would enable the nation to overcome crisis. The Federalist No. 23 noted that the "common defense" of the union would be furthered by the power "to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support"; and that these powers should exist without limit, "*because it is impossible to foresee or to define the extent and variety of national exi-gencies.*"¹⁶⁵ All these powers rest with the legislature. Congress, and not the President, acquired authority to raise armies and a navy,¹⁶⁶ it no longer needed to make requisitions on the states.¹⁶⁷ Congress, and not the President, obtained power to raise taxes;¹⁶⁸ again, it no longer had to requisition the states.¹⁶⁹ Congress, and not the Commander in Chief,

¹⁶⁴ See Comments of George Mason, in 1 The Records of the Federal Convention of 1787, supra note 152, at 110, 112; see also The Federalist No. 70, supra note 7, at 343, 344.

¹⁶⁵ The Federalist No. 23, at 114 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (emphasis in original).

¹⁶⁶ U.S. Const. art. I, § 8, cl. 12, 13.

¹⁶⁷ See Articles of Confederation of 1781, art. IX, para. 5.

¹⁶⁸ U.S. Const. art. I, § 8, cl. 1.

¹⁶⁹ See Articles of Confederation of 1781, art. VIII, para. 2.

gained power to summon state militias.¹⁷⁰ Though these powers were not confined to emergencies, they were especially useful in crises.

Where the Constitution could be read as less than clear about the situs of emergency powers, participants in the public debate saw them resting with Congress. Consider suspensions of the privilege of the writ of habeas corpus. Though Article I, Section 9 provides that the writ of habeas corpus shall not be suspended except during invasions and rebellions,¹⁷¹ it never declares who may suspend it. Indeed, it never even says that habeas corpus may be suspended; rather, it limits the occasions for its suspension. Yet the backdrop made clear that the power to suspend rested with Congress.

In England, only Parliament could suspend the statutes codifying the ancient writ, probably because the Crown lost any claim to the suspension power in the English Bill of Rights.¹⁷² Following the English tradition, only state legislatures had suspended the privilege of the writ during the Revolutionary War.¹⁷³ Indeed, one state enacted an express restriction that assumed that only the assembly could suspend. The Massachusetts Constitution decreed that suspensions by the assembly could last no longer than twelve months.¹⁷⁴ If the executive had a concurrent power to suspend the privilege, one would have to suppose that the Constitution constrained legislative suspensions while leaving the executive free to enact permanent ones. It seems more likely that the Massachusetts Constitution limited legislative suspensions because it was commonly supposed that executives lacked authority to suspend and hence there was no need to constrain them.

Believing that the Constitution left existing practices undisturbed, commentators read it as authorizing suspensions by the legislature only. James Wilson, said by some to be the father of the Presidency and a proponent of a vigorous executive, observed that the Habeas Clause was “restrictive of the general Legislative Powers of Congress.”¹⁷⁵ In Massa-

¹⁷⁰ U.S. Const. art. I, § 8, cl. 15.

¹⁷¹ *Id.* art. I, § 9, cl. 2.

¹⁷² Prakash, *supra* note 103, at 593.

¹⁷³ *Id.* at 594.

¹⁷⁴ Mass. Const. ch. VI, art. VII.

¹⁷⁵ R. Carter Pittman, Jasper Yeates's Notes on the Pennsylvania Ratifying Convention, 1787, 22 *Wm. & Mary Q.* 301, 307 (1965).

2013]

Imbecilic Executive

1397

chusetts, one judge said much the same,¹⁷⁶ with another lauding the Constitution for ceding a relatively constrained habeas power to Congress.¹⁷⁷ The Constitution's opponents also read it as empowering Congress alone to suspend. Brutus described the Habeas Clause as "limit[ing] the power of the legislature."¹⁷⁸ Another Anti-Federalist complained that Congress had general power to suspend laws, with the Clause merely limiting suspensions of the Great Writ in particular.¹⁷⁹ None remarked or hinted that the President could suspend the Great Writ, under the Habeas Clause's strictures or otherwise.

Various conventions proposed or debated amendments, each of which assumed that the power to suspend rested with Congress. Consider two New York measures. One clarified that anyone could challenge his detention except when Congress had suspended habeas corpus,¹⁸⁰ the other, a proposed amendment, spoke of suspending the privilege by "act."¹⁸¹

What was true for habeas corpus was no less true for other emergency powers. Again, when the Constitution did not specify the situs of emergency powers, such as the powers to take property or impose martial law, the powers rested with Congress.

¹⁷⁶ Judge Sumner, Remarks During Convention Debates at the Massachusetts Convention (Jan. 26, 1788), *in* 6 *The Documentary History of the Ratification of the Constitution* 1359, 1359 (John P. Kaminski et al. eds., 2000).

¹⁷⁷ Judge Dana, Remarks During Convention Debates at the Massachusetts Convention (Jan. 26, 1788), *in* *The Documentary History of the Ratification of the Constitution*, *supra* note 176, at 1359, 1359.

¹⁷⁸ Letter from Brutus, No. IX (Jan. 17, 1788), *in* 15 *The Documentary History of the Ratification of the Constitution*, *supra* note 176, at 393, 394 (1984).

¹⁷⁹ See William Grayson, Remarks During Debates at the Virginia Convention (June 16, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution*, *supra* note 176, at 1332, 1332 (1993). For other claims that Congress would be the one to suspend, see Patrick Henry, Remarks During Debates at the Virginia Convention (June 17, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution*, *supra* note 176, at 1299, 1345 (1993) (remarking that the Habeas Clause restrains Congress); George Nicholas, Remarks During Debates at the Virginia Convention (June 6, 1788), *in* 9 *The Documentary History of the Ratification of the Constitution*, *supra* note 176, at 998, 1002 (1990); Edmund Randolph, Governor, Remarks During Debates at the Virginia Convention (June 10, 1788), *in* 9 *The Documentary History of the Ratification of the Constitution*, *supra* note 176, at 1092, 1099 (1990) (claiming that privilege is as secure as in England and noting that only Parliament could suspend and implying that only Congress could).

¹⁸⁰ See New York Instrument of Ratification (July 26, 1788), *in* 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 327, 328 (Jonathan Elliot ed., 1836).

¹⁸¹ See New York's Proposed Amendments (July 26, 1788), *in* *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, *supra* note 180, at 329, 330.

Take the case of martial law. In Maryland, some proposed that the “militia shall not be subject to martial law, except in time of war, invasion or rebellion.”¹⁸² The provision “to restrain the powers of [C]ongress” was deemed necessary, for otherwise Congress could impose martial law on the militia at any time.¹⁸³ In Virginia, George Mason pushed for a similar restriction,¹⁸⁴ leading James Madison and others to respond that Congress could impose martial law on the militia only when it was called into active service.¹⁸⁵ The complaint and the responses presupposed that only Congress could subject citizens to martial law. No one imagined that the President might impose martial law.

What of Publius and his paean to Roman dictators?¹⁸⁶ Read carefully, Publius never claimed that the President had emergency powers, sweeping or otherwise. He was praising vigor, dispatch, and unity, and the potential role the executive could play in emergencies, not making a claim about the constitutional powers of the President. Perhaps Publius thought that Congress might make a dictator of the President in a time of crisis. After all, Roman dictators were nominated or named by others, with some ancients believing that “dictator” came from “dicere,” meaning “to name.”¹⁸⁷

Because the Presidency faced withering criticism, it is remarkable that no one claimed that it was clothed with dangerous crisis powers. But in another way, the absence of such arguments was not curious. While the English Crown had some wartime crisis powers, the state executives and the Continental *Commander in Chief* were almost impotent in emergencies. Given that the Presidency’s immediate precursors were so weak,

¹⁸² Address of the Minority of the Maryland Convention (Apr. 29, 1788), *in* 17 Documentary History of the Ratification of the Constitution, *supra* note 176, at 242, 244 (1995).

¹⁸³ *Id.*

¹⁸⁴ See George Mason, Remarks During Debates at the Virginia Convention (June 16, 1788), *in* 10 The Documentary History of the Ratification of the Constitution, *supra* note 176, at 1299, 1312 (1993). Mason supposed that Congress might impose martial law on the militia even when not in federal service. See *id.* at 1304.

¹⁸⁵ James Madison, Remarks During Debates at the Virginia Convention (June 14, 1788), *in* 10 The Documentary History of the Ratification of the Constitution, *supra* note 176, at 1272, 1273 (1993); George Nicholas, Remarks During Debates at the Virginia Convention (June 14, 1788), *in* 10 The Documentary History of the Ratification of the Constitution, *supra* note 176, at 1278, 1280 (1993); Edmund Randolph, Governor, Remarks During Debates at the Virginia Convention (June 14, 1788), *in* 10 The Documentary History of the Ratification of the Constitution, *supra* note 176, at 1288, 1288 (1993).

¹⁸⁶ See *supra* text accompanying note 7.

¹⁸⁷ See 2 Plutarch’s Lives 57 (Aubrey Stewart & George Long eds., London, George Bell & Sons 1881).

2013]

Imbecilic Executive

1399

there were no grounds for arguing that the President could suspend habeas corpus, impose martial law, raise armies, or seize private property. The Constitution contained no text suggesting a departure from the status quo of weak crisis executives. The dogs did not bark because there was no occasion for it.

IV. THE IMBECILIC PRESIDENCY IN ACTION

Our nation has faced innumerable crises. Some have been large, others small, and the overwhelming majority mostly forgotten. In crises, did Presidents implement whatever emergency measures they deemed necessary? Or did they limit themselves to their statutory delegations and their modest crisis powers arising from the Constitution, leaving other decisions for Congress to make via its powers over the military, wars, taxation, and spending?

To make the discussion tractable, I focus on practices until the Civil War. Pre-Civil War practice suggests a pattern of executive incapacity. That impotence manifested itself in different ways and senses. For almost a century, no President claimed anything resembling a Lockean prerogative to act against standing laws. Nor did any assert a power to take temporary crisis measures.

The Civil War is an apt terminus because it is an inflection point. It was a time where many previously implausible or unreasonable arguments regarding executive crisis authority became quite respectable. Claims of presidential crisis authority grew more reputable and popular in some quarters, primarily because of the President who articulated them (Abraham Lincoln) and the cause with which they were associated (saving the Union).

A. The Commander in Chief's Impotency Continues

During crises, President George Washington possessed only slightly more authority than he had by virtue of his office as Commander in Chief of the Continental Army. The President took limited measures within his constitutional competence, such as issuing pardons during a rebellion and ordering defensive measures in the wake of invasions. He never imposed an embargo or martial law. Nor did he claim constitutional authority to summon the militia or raise armies. So narrow was Washington's view of his crisis authority that, despite his express constitutional authority to summon Congress, he would not summon it else-

where at a time when members were set to return to a city in the throes of a pestilence.

In Washington's first term, a tax revolt struck western Pennsylvania. The Whiskey Rebellion was a populist response to a federal liquor excise, a tax that one senator described as the "most execrable system that ever was framed against the liberty of a people."¹⁸⁸ The Rebellion was the first serious threat to federal authority.¹⁸⁹ It greatly alarmed the President, who feared that it might lead first to uprisings elsewhere and to the nation's disintegration. He was resolved to pacify the Rebellion, or, failing that, to crush it.¹⁹⁰

Washington did not act as if he had constitutional authority to do whatever he believed necessary to suppress the Rebellion. In particular, he did not use the militia on the basis of his constitutional authority, as he could have had he enjoyed a generic emergency power.¹⁹¹ Instead, Washington carefully satisfied the Militia Act of 1792 that authorized the President, in limited circumstances, to summon the militia.¹⁹² Before calling forth the militia, a judge had to conclude that the ordinary means of executing the law were inadequate.¹⁹³ Only after Justice James Wilson made this finding did Washington summon the militia.¹⁹⁴ By scrupulously following the law, the President recognized that the Constitution authorized Congress alone to provide when the federal executive could summon the militia to execute the law, even during rebellions.

Congress agreed that the President lacked a generic emergency power, for it otherwise would not have ceded him statutory authority to summon the militias. After all, if the President had a constitutional summoning power, statutory authorization would have been superfluous. Strengthening the inference that only Congress could provide when the federal government might summon the armed people, the Militia Act of 1792 sometimes conveyed narrow discretion. While Congress was in

¹⁸⁸ The Journal of William Maclay: United States Senator from Pennsylvania, 1789–1791, at 375 (Charles A. Beard ed., 1965).

¹⁸⁹ See William Hogeland, *The Whiskey Rebellion* 7, 9 (2006).

¹⁹⁰ Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorder 1789–1878*, at 31–32, 38–40 (1988) (describing how Washington sought compliance with the laws and called forth the militias after he could not be assured that there would be no further opposition to the excise).

¹⁹¹ See Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 *Yale L.J.* 149, 168–83 (2004).

¹⁹² Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264.

¹⁹³ *Id.* ch. 28, § 2, 1 Stat. 264, 264.

¹⁹⁴ Hogeland, *supra* note 189, at 185–86, 195, 206.

session, the President could summon a state militia to execute federal law only within its state. Only when Congress was not in session could the President deploy militias across state lines to execute the law.¹⁹⁵ Evidently members were wary of cross-border deployments.

Washington's militia instructions also suggested a bounded scope of executive crisis authority. He described the mission as follows: "to aid and support the civil Magistrate in bringing offenders to justice. The dispensation of this justice belongs to the civil Magistrate."¹⁹⁶ He reportedly assured associates of the rebels "that the army should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them."¹⁹⁷ These stances were based on the sense that, by law, the militias were subordinate to the civil power and on the notion that the President could not unilaterally determine that the rebels ought to be tried in military courts.

The President's restrained response to Creek and Cherokee invasions also revealed his sense that the Presidency lacked a generic emergency power. After these tribes invaded and attacked frontier towns, declaring war formally and informally, the President authorized defensive measures only.¹⁹⁸ He specifically forbade offensive measures, such as sending raiding parties into Indian territory, because he said that only Congress could authorize such measures.¹⁹⁹ While his limited instructions primarily speak to the scope of presidential war powers, they also confirm that presidential power in emergencies was seen as rather cir-

¹⁹⁵ Militia Act of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264.

¹⁹⁶ Letter from George Washington to Henry Lee (Oct. 20, 1794), in 34 *The Writings of George Washington from the Original Manuscript Sources, 1745–1799*, at 5, 6 (John C. Fitzpatrick ed., 1940).

¹⁹⁷ William Findley, *History of the Insurrection in the Four Western Counties of Pennsylvania in the Year 1794*, at 179 (Philadelphia, Samuel Harrison Smith 1796). In his diary, Washington claimed to have said something slightly different. Washington reported that he told the emissaries "[t]hat the Army, unless opposed, did not mean to act as executioners, or bring offenders to a military Tribunal; but merely to aid the civil Magistrates, with whom offences would lye." 4 *The Diaries of George Washington 1748–1799*, at 216 (John C. Fitzpatrick ed., 1925). This statement suggests that military tribunals might have been used to try the rebels.

Perhaps Washington was imprecise in his diary entry. Or maybe military tribunals were appropriate on the grounds that all the rebels were members of the Pennsylvania militia, and hence could be tried for failing to follow orders, desertion, insubordination, and so on.

¹⁹⁸ See Saikrishna Prakash, *A Two-Front War*, 93 *Cornell L. Rev.* 197, 213–14 (2007).

¹⁹⁹ See Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), in 33 *The Writings of George Washington from the Original Manuscript Sources, 1745–1799*, supra note 196, at 73, 73.

cumscribed. The President did not suppose he could do anything he deemed necessary to thwart these invasions.

A third crisis is especially probative. In the summer of 1793, yellow fever plagued Philadelphia. It would eventually kill almost 5000 in a city of about 55,000.²⁰⁰ Prior to the plague's onset, Congress had adjourned and provided that it would reconvene in Philadelphia. Given the outbreak, Washington thought it imprudent for Congress to so reconvene. Unsure of his constitutional authority and wary of action that might "make further 'food for scribblers,'"²⁰¹ Washington asked his three principal aides (Jefferson, Hamilton, and Edmund Randolph), Jonathan Trumbull (House Speaker), and Congressman James Madison whether he could convene Congress outside of Philadelphia using his authority to convene Congress "on extraordinary Occasions."²⁰²

Madison and Jefferson said that neither the Constitution nor federal law permitted the executive to alter where Congress met.²⁰³ Hamilton and Randolph hedged, arguing that the power to convene could be used to move Congress, but only when there was an "unforeseen occurrence in the public affairs" which made it necessary to convene Congress *early*, such as a war.²⁰⁴ Trumbull claimed the President, using his power to convene Congress, could summon them elsewhere; but he confessed that others might demur.²⁰⁵

Wary of acting *ultra vires*, Washington did nothing, and eventually the fever subsided.²⁰⁶ For our purposes, what is significant is what is conspicuously absent from these opinions. Even though the President had sought advice on his ability to move Congress in the midst of a plague, none of the opinions mentioned the possibility of executive cri-

²⁰⁰ J.H. Powell, *Bring Out Your Dead: The Great Plague of Yellow Fever in Philadelphia in 1793*, at vi, 282 (1949).

²⁰¹ 7 John Alexander Carroll & Mary Wells Ashworth, *George Washington: First in Peace* 132 (1957).

²⁰² U.S. Const. art II, § 3.

²⁰³ Letter from Thomas Jefferson to George Washington (Oct. 17, 1793), *in* 14 *The Papers of George Washington: Presidential Series* 226, 227 (David R. Hoth ed., 2008); Letter from James Madison to George Washington (Oct. 24, 1793), *in* 14 *The Papers of George Washington: Presidential Series*, *supra*, at 278–81.

²⁰⁴ Letter from Alexander Hamilton to George Washington (Oct. 24, 1793), *in* 14 *The Papers of George Washington: Presidential Series*, *supra* note 203, at 271; Letter from Edmund Randolph to George Washington (Oct. 24, 1793), *in id.* at 281–82.

²⁰⁵ Letter from Jonathan Trumbull, Jr. to George Washington (Oct. 31, 1793), *in* 14 *The Papers of George Washington: Presidential Series*, *supra* note 203, at 302.

²⁰⁶ See Charles F. Jenkins, *Washington in Germantown* 88 (1905).

sis authority. Had Madison or Jefferson thought the President enjoyed a broad emergency power, they would have argued that though the power to summon did not permit convening Congress outside of Philadelphia, the “executive power” (or some other) was up to the task. Similarly, had Hamilton, Randolph, or Trumbull thought that the President could convene Congress elsewhere pursuant to his executive power, they would have argued in the alternative. They would have said that the power to summon Congress was supplemented by a broader crisis power, an executive prerogative capable of handling a plague or any other crisis facing the nation.²⁰⁷

The exigencies President Washington faced were not of the same magnitude as the Revolutionary War. But the yellow fever was close. Several described the situation as a crisis, including Madison and Washington.²⁰⁸ It is easy to see why. On the one hand, if Congress had met in Philadelphia, the plague might have decimated it. On the other hand, if enough legislators had been unwilling to come to Philadelphia, Congress might have been paralyzed for lack of a quorum.

In any event, what is striking is that in the face of invasions, a rebellion, and a plague—three of the most significant challenges to a nation—Washington never asserted a generic emergency power. He never argued that he could do what was necessary to ensure the survival of the government or the nation. Nor did he ever claim authority to act *contra legem*. And he clearly abjured any temporary emergency power to act while Congress was in recess.

This was not some oversight on Washington’s part. More than almost anyone else in America, he would have been keenly aware of the pre-constitutional sense of executive power and what it meant to be a commander in chief. He likely recognized that he lacked an emergency power because the Constitution had not departed from the basic structure of its domestic precursors. It left emergency power with the legislature,

²⁰⁷ A similar issue arose in New Jersey during the Revolution, where people concluded that the Governor could not convene the Assembly wherever he wished, despite the British threat. See N.J. Const. § 5 (1776) (authorizing the Assembly to empower the speaker to convene the Assembly). The New Jersey Assembly eventually ceded the Governor statutory authority to convene in a different location. See MacMillan, *supra* note 24, at 229.

²⁰⁸ Letter from James Madison to George Washington (Oct. 24, 1793), *in* The Papers of George Washington: Presidential Series, *supra* note 203, at 278–81 (calling the situation a “calamity” and an “exigency”); Letter from George Washington to Henry Knox (Oct. 15, 1793), *in* 14 The Papers of George Washington, *supra* note 203, at 215 (calling the situation an “exigency”).

while making the executive better equipped to exercise any crisis powers that might be delegated.

Perhaps Washington preferred a stronger crisis executive; his views are unknown because he seems never to have addressed the matter during the Convention or afterwards. Still, the President's impotence during crises was something familiar. And because it was *de rigueur* for American chief executives of that era, it may have brought a measure of comfort to those who opposed an otherwise muscular executive. Whatever Washington's particular preferences, the weakness of the crisis Presidency could not have alarmed him. He had won independence while laboring under a restrained sense of an executive's crisis powers. He also knew well that impotence during emergencies could be remedied via statutory grants.

B. Suspension of the Privilege of the Writ

The focus on the Washington Presidency allowed us to consider early presidential responses to different types of crises. Now we switch gears and consider a particular issue across many years, namely, which federal branch may suspend habeas corpus.

As noted, the Constitution might seem deliberately ambiguous on the question of who can suspend the Great Writ. After all, the Habeas Clause never says who may suspend the privilege. Rather, it assumes that some federal entity may suspend and merely limits the circumstances under which such suspensions may occur.²⁰⁹

Nonetheless, what might seem ambiguous today was fairly clear at the Founding and beyond. We have seen how James Wilson and others Founders assumed that only Congress could suspend the privilege of the writ. This reading prevailed post-ratification as well. In *Ex parte Bollman*,²¹⁰ Chief Justice John Marshall observed that if "the public safety should require the suspension" of habeas corpus, "it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide."²¹¹ Marshall's dictum, uttered in response to

²⁰⁹ See 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.").

²¹⁰ 8 U.S. (4 Cranch) 75 (1807).

²¹¹ *Id.* at 101. Marshall was referring to the habeas provisions of the Judiciary Act because he believed that the Constitution itself did not guarantee habeas corpus. Congress had to act and grant jurisdiction to issue habeas writs in order for the Habeas Clause to have effect.

2013]

Imbecilic Executive

1405

a petition for writ of habeas corpus filed by Aaron Burr's alleged co-conspirators, betrayed no doubts.

Others shared Marshall's sense of the Constitution. General James Wilkinson, the prisoners' custodian, never asked his Commander in Chief, Thomas Jefferson, to suspend the writ, likely recognizing that such a request would have been misdirected.²¹² Moreover, members of Congress assumed that they had a monopoly on suspensions. Jefferson's Senate allies voted to suspend the writ for a period of three months, never discussing the possibility that Jefferson might suspend the writ himself.²¹³ And no one in the House of Representatives claimed that the House's consideration (and decisive rejection) of the Senate measure was beside the point because Jefferson might unilaterally suspend habeas corpus even if Congress refused to do so.²¹⁴

Finally, President Jefferson almost certainly agreed with his distant cousin, John Marshall, for he seems never to have considered whether he should suspend. Consistent with this conclusion, after leaving office, Jefferson complained that the Constitution left habeas corpus "to the discretion of Congress,"²¹⁵ meaning he believed it was too easy to suspend. His critique should have been more strident had he imagined that the Constitution also left habeas to the President's sole discretion.

Commentators of the era sided with Marshall and Jefferson. William Rawle, Joseph Story, and St. George Tucker agreed that suspension rested with Congress.²¹⁶ Tucker is worth quoting: "In the United States, [the privilege of the writ] can be suspended, only, by the authority of congress."²¹⁷ An 1858 habeas treatise noted as:

[r]ebellion and invasion are eminently matters of national concern; and charged as Congress is, with the duty of preserving the United States from both these evils, it is fit that it should possess the power to

²¹² See generally Andro Linklater, *An Artist in Treason: The Extraordinary Double Life of General James Wilkinson* 259–68 (2009).

²¹³ See Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 21 (2001).

²¹⁴ See 16 *Annals of Cong.* 402–25 (1807) (debating and voting down suspension bill).

²¹⁵ *Autobiography*, in 1 *The Works of Thomas Jefferson* 3, 119 (Paul Leicester Ford ed., 1904).

²¹⁶ See William Rawle, *A View of the Constitution of the United States* 118 (Philadelphia, Philip H. Nicklin 2d ed. 1829); 3 Joseph Story, *Commentaries on the Constitution of the United States* 209 (Boston, Hilliard, Gray, & Co. 1833).

²¹⁷ 1 St. George Tucker, *Blackstone's Commentaries* 292 (Augustus M. Kelley Publishers 2d ed. 1969) (1803).

make effectual such measures as it may deem expedient to adopt for their suppression.²¹⁸

A number of other commentators agreed that only Congress could suspend, including Professor Francis Lieber, author of the “Lieber Code.”²¹⁹ Writing in 1859, he declared, matter-of-factly, it “need hardly be mentioned” that the President could not suspend.²²⁰

The only Attorney General to opine on the matter prior to the Civil War noted that only legislatures could suspend.²²¹ Various treatises cited by Attorney General Caleb Cushing declared that in England, only Parliament could suspend; in the states, only the assemblies could do so; and in the federal government, only Congress.²²² Apparently, Cushing agreed with the treatises.

Thus, just prior to the Civil War, it “need hardly be mentioned” that the President could not suspend habeas corpus. One is tempted to conclude that it also was not worth mentioning that he lacked other emergency authorities, like the powers to appropriate or expand the army. Furthermore, if he could not detain individuals indefinitely, it would seem to follow that he did not have the far more significant power to impose martial law.

And yet a number of Army men had declared martial law prior to the Civil War. Because these soldiers embraced broad conceptions of military power, notions out-of-step with civilian views, these episodes merit investigation. In doing so, we consider whether the Constitution grants the President the power to impose martial law.

²¹⁸ Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It: With a View of the Law of Extradition of Fugitives* 116 (Albany, W.C. Little & Co. 1858).

²¹⁹ For a discussion of Lieber’s Code, see John Fabian Witt, *Lincoln’s Code* 231–49 (2012).

²²⁰ Francis Lieber, *On Civil Liberty and Self-Government* 111 (Philadelphia, J.B. Lippincott & Co. 1859); see also William C. De Hart, *Observations on Military Law, and the Constitution and Practice of Courts Martial* 18 (New York, Wiley and Halsted 1859); Henry Flanders, *An Exposition of the Constitution of the United States* 140 (The Lawbook Exchange Ltd. 1999) (1860); Benjamin L. Oliver, *The Rights of an American Citizen* 340 (Boston, Marsh, Capen & Lyon 1832).

²²¹ *Martial Law*, 8 Op. Att’y Gen. 365, 372–73 (1857).

²²² *Id.*

2013]

Imbecilic Executive

1407

C. Martial Law

The Constitution does not discuss martial law, either in its limited form, where military courts try civilians using existing laws, or in its expansive form, where military commanders supersede civilian power and rule by decree. And because it does not discuss martial law, it never expressly limits its imposition, either by Congress or otherwise.²²³

There is little warrant for reading the Constitution as if it granted the President the power to impose martial law, in any form. As recounted earlier, prior to the Constitution, no American executive was thought to have such power other than by virtue of a grant from a legislature. If, prior to 1787, no one read “executive power” and the office of “commander in chief” as vesting authority to impose martial law, there is little reason to suppose that the federal executive would have that authority in a Constitution that never hints that these phrases have new meanings. The absence of presidential authority to impose martial law seems also to follow from the allocation of suspension authority. If the President cannot suspend the writ of habeas corpus, he almost certainly lacks the more consequential power to impose martial law. Consistent with this reading, treatise writers and judges assumed that the executive lacked authority to impose martial law.²²⁴

Nonetheless, prior to the Civil War, military commanders repeatedly imposed martial law. Some commanders concluded that they could try civilians before military tribunals for spying and treason. Others thought

²²³ While it never mentions the imposition of martial law on the general civilian populace, the Constitution permits Congress to discipline the militias, meaning that Congress may subject them to military justice. When the state militias are federalized, the individuals summoned may be treated like soldiers and sailors because the Constitution permits as much. See U.S. Const. art. I, § 8, cl. 16 (declaring that Congress may “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States”). In the first Militia Act, Congress applied the Articles of War to the militias. Militia Act of 1792, ch. 28, § 4, 1 Stat. 264. Because Congress provided that able-bodied males from the ages of eighteen to forty-five were part of the militia, see Second Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, Congress had the power to impose the Articles of War on all these males.

²²⁴ See Alexander Macomb, *A Treatise on Martial Law and Courts-Martial as Practised in the United States of America* 7–8 (Charleston, J. Hoff 1809). Cf. *id.* at 8–9 (noting that the President could not interfere with proceedings of a court martial or direct the outcome). See also Isaac Maltby, *A Treatise on Courts Martial and Military Law* 37 (Boston, Thomas B. Wait & Co. 1813) (saying that no one but those specified in the Articles of War may be subject to court martial); Judge Bay’s Opinion, 1 Car. L. Repository 314, 330 (1814) (declaring that in America, martial law cannot exist via executive fiat).

that they could rule by decree. In each of these episodes, the Commander in Chief (or his aides) reproached these officers, judging that the officers had acted *ultra vires*.

Though there were wars with Indian tribes in the 1790s, and though there was a chance that a land war might erupt during the naval war with France (1798–1800), the War of 1812 was the new nation's first major land war. During that war, military commanders imposed various forms of martial law.²²⁵ In upstate New York, commanders tried to punish civilians via military courts. In the deep south, Andrew Jackson ruled by decree, superseding the civil authority entirely.

Professor Ingrid Brunk Wuerth discusses the attempts to try and punish civilians in upstate New York before military courts.²²⁶ In 1812, a court martial sentenced Elijah Clark to hang.²²⁷ At the time, the Articles of War expressly extended military trial to noncitizen spies, thereby strongly suggesting that citizens accused of spying could not be so tried.²²⁸ Because Clark was a U.S. citizen, the Madison Administration forbade his execution and ordered that he be arraigned civilly or released.²²⁹ At a minimum, the administration must have supposed that

²²⁵ The first federal brush with martial law was a continuation of British policy. After the British commander in chief at Detroit declared martial law in 1785, the city apparently remained under continual military rule until 1799. See Letter from James McHenry to Alexander Hamilton (Apr. 11, 1799), *in* 23 *The Papers of Alexander Hamilton* 32, 32–33 (Harold C. Syrett ed., 1976). Detroit passed from British hands in 1796 pursuant to the Jay Treaty. Because General James Wilkinson had redeclared martial law in 1798, this curious situation came to the attention of Major General Alexander Hamilton. The latter eventually concluded that martial law should not be exercised. As he put it, there were “strong” doubts about its exercise in time of peace. Letter from Alexander Hamilton to David Strong (May 22, 1799), *in* 23 *The Papers of Alexander Hamilton*, *supra*, at 127, 128. Another letter more particularly explaining his reasons is lost. See Letter from Alexander Hamilton to David Strong (May 22, 1799), *in* 23 *The Papers of Alexander Hamilton*, *supra*, at 127, 127 & n.2.

Wilkinson is also responsible for another episode. In 1806, after Governor William Claiborne refused Wilkinson's plea to declare martial law, Wilkinson ordered a series of arbitrary arrests and evaded writs of habeas corpus issued by the courts. This was essentially a “military coup” in New Orleans, an action supposedly necessitated by the impending invasion of Aaron Burr and his forces. See Linklater, *supra* note 212, at 258–60. But Wilkinson seemed to admit that his acts were illegal, even if necessary. See *id.* at 263 (“I have never attempted to justify the infractions of the law which were forced on me in New Orleans by an impending great calamity.”). And Jefferson apparently took the same view. See *id.* at 262–63.

²²⁶ Ingrid Brunk Wuerth, *The President's Power to Detain “Enemy Combatants”*: Modern Lessons from Mr. Madison's Forgotten War, 98 *Nw. U. L. Rev.* 1567, 1580–85 (2004).

²²⁷ *Id.* at 1583.

²²⁸ *Id.* at 1582–83 & n.102.

²²⁹ *Id.* at 1583–84.

Congress had implicitly forbade military trials of citizen spies *and* that the President could not flout this limit. More likely, the administration had concluded that neither military commanders nor the Commander in Chief had authority (constitutional or statutory) to try civilians before military tribunals, even in the absence of an implicit congressional bar. The administration's response to events in New Orleans, discussed below, indicates as much.

Wuerth also recounts how, even after this incident, some in the military continued to punish civilians as spies before military courts. Each time, these attempts failed. Finding himself detained by the military, Samuel Stacy filed for habeas relief. Succor came from New York Chancellor James Kent who, after declaring that the military lacked authority to try citizens for treason, attached the Commanding General upon pain of releasing Stacy or bringing the latter before the court. The Madison Administration agreed with Kent, concluding that civilian citizens could not be detained or tried by the military. Neither Kent nor the administration suggested that the President could alter this rule by fiat.²³⁰

Finally, citizen detainees sought and received damages.²³¹ In defense of their actions, commanders claimed that because the citizens were accused of spying or treason, the military could hold and try them. The courts uniformly dismissed such arguments, with one pointing out that if a citizen could be so tried, "every citizen of the *United States* would, in time of war, be equally exposed to a like exercise of military power and authority."²³² This was a *reductio* evidently meant to show the absurdity of the military defense.

While military commanders in upstate New York were imposing military trial on a piecemeal basis, Andrew Jackson's version of martial law was far more sweeping. His imposition of martial law in New Orleans not only effectively suspended the writ of habeas corpus, it also replaced civilian rule with military rule.²³³ Jackson ruled by fiat, seizing property and ordering all males to serve in the Army or otherwise serve in the defense of New Orleans.²³⁴

²³⁰ See id. at 1583.

²³¹ Id. at 1584.

²³² Id. at 1584 (quoting *Smith v. Shaw*, 12 Johns. 257, 266 (N.Y. Sup. Ct. 1815)).

²³³ See Matthew Warshauer, *Andrew Jackson and the Politics of Martial Law* 2 (2006).

²³⁴ See Robert V. Remini, *The Battle of New Orleans: Andrew Jackson and America's First Military Victory* 58 (2001).

Although Jackson's order met with the approval of some, not all were supportive. After reading a critical article, Jackson ordered the author's arrest.²³⁵ A federal judge that issued a writ of habeas corpus soon found himself next to the writer.²³⁶ After the U.S. Attorney sought habeas relief from a state judge for the jailed author and the federal judge, Jackson imprisoned the Attorney and the state judge.²³⁷

Once it was evident that the War was over, Jackson released the detainees. Soon thereafter, the U.S. Attorney brought contempt charges against Jackson before the formerly imprisoned federal judge.²³⁸ With Jackson in the dock, the disgruntled judge fined him \$1000.²³⁹

President James Madison ordered an inquiry, instructing Alexander Dallas, the Secretary of War, to request an explanation. Jackson responded that sometimes "constitutional forms must be suspended for the permanent preservation of constitutional Rights."²⁴⁰ In so doing, he admitted that he had violated the Constitution: "Necessity . . . may, in some cases, justify the breach of the Constitution"—an argument conceding the transgression.²⁴¹

At Madison's bidding, Dallas upbraided Jackson, distinguishing necessity from law.²⁴² The Secretary declared that Jackson's actions merited the attention of the President "in a high constitutional responsibility" because otherwise, "the principle of your example" might be "misunderstood, or misrepresented."²⁴³ Madison was happy that the ground for martial law was necessity and said that it might well have been justified. But necessity did not make its declaration legal. "In the United States there exists no authority to declare and impose martial law, beyond the positive sanction of the Acts of Congress."²⁴⁴ When a general suspends habeas corpus, restrains the press, and inflicts military punishments upon civilians, "he may be justified by the law of necessity . . . but he cannot resort to the established law of the land, for the means of vindica-

²³⁵ See Warshauer, *supra* note 233, at 35.

²³⁶ *Id.* at 35–36.

²³⁷ *Id.* at 36–37.

²³⁸ *Id.* at 38.

²³⁹ *Id.* at 40.

²⁴⁰ See Letter to the United States District Court, Louisiana (Mar. 27, 1815), *in* 3 *The Papers of Andrew Jackson* 322, 329 (Harold D. Moser et al. eds., 1991).

²⁴¹ *Id.*

²⁴² See Warshauer, *supra* note 233, at 42.

²⁴³ Letter from Alexander J. Dallas to Andrew Jackson (July 1, 1815), *in* 3 *The Papers of Andrew Jackson*, *supra* note 240, at 375, 375.

²⁴⁴ *Id.* at 376.

tion.²⁴⁵ Dallas, and by extension Madison, not only denied that a general could declare martial law, he also denied that the President could do so.

Jackson's response is telling: "It is very true that 'no authority exists in the U[nited] States to declare or impose martial law beyond the possible [sic] acts of Congress' & this I look upon as a wise . . . precaution."²⁴⁶ But immediate action is sometimes indispensable, Jackson insisted. Then an officer must act "at his own risk & on his own responsibility" both to the "government & individuals" and must rely "on the Necessity which influences his conduct."²⁴⁷ Essentially, Jackson admitted that his declaration was illegal even as he justified it on grounds of exigency.

The investigation petered out, probably because an unpopular executive had no desire to further probe a war hero. State judges were less reticent. In *Johnson v. Duncan*, two announced that the executive could not declare martial law and suspend the ordinary courts.²⁴⁸

Years later, in 1844, a friendly Congress compensated Jackson for his fine.²⁴⁹ Yet as Professor Matthew Warshauer explains, the majority was divided.²⁵⁰ Some claimed that while Jackson had acted illegally, necessity was an adequate excuse for his actions. As such, he deserved compensation for the amount he paid as a fine.²⁵¹ This rationale sounded like the one Jackson supplied in response to the Madisonian rebuke. Others insisted that Jackson had legal authority to declare martial law, thus making the fine a judicial error that Congress should rectify.²⁵² These members essentially argued that *every* military commander could declare martial law when necessity required as much. For these members, the temptation to excuse their beloved leader and come to his defense led to

²⁴⁵ Id. at 376–77.

²⁴⁶ Letter from Andrew Jackson to Alexander J. Dallas (Sept. 5, 1815), in 3 *The Papers of Andrew Jackson*, supra note 240, at 384, 385.

²⁴⁷ Id. at 385.

²⁴⁸ *Johnson v. Duncan et al.'s Syndics*, 1 Mart. (o.s.) 530, 531 (La. 1815) (Xavier Martin, J.) (stating that the court is bound to ignore martial law except as it applies to the military and that no one man may suspend the functions of a regular court); id. at 548 (Pierre Derbigny, J.) (holding that powers vested in a court may only be taken away via legislative authority).

²⁴⁹ See Warshauer, supra note 233, at 111.

²⁵⁰ Id. at 150.

²⁵¹ See, e.g., id. at 131.

²⁵² See, e.g., id. at 117–18, 120–21.

a creative reading of the Constitution, one that Jackson previously had disavowed.

The legislative indemnification of Jackson was a strong brew of law and politics, as almost all legal questions decided by legislatures are. It also was a watershed event, for it ushered in a new era of presidential power. Arguments that the executive had legal authority to take extreme crisis measures gained currency.²⁵³ The traditional sense of executive impotence in emergencies was eroding in the 1840s–1860s because the debate and the indemnity lent respectability to the alternative view.²⁵⁴ During the Civil War, Abraham Lincoln chided opponents of his crisis measures for having supported Andrew Jackson’s indemnification.²⁵⁵

In the midst of the legislative debate about whether to reimburse Jackson, General Winfield Scott denied that martial law could ever be constitutional in the United States. “Congress and the President could not, if they were unanimous, proclaim martial law over any portion of the United States, without first throwing [the Bill of Rights] into the fire.”²⁵⁶ This not only denied that the President could impose martial law, it also denied that Congress could.

Ironically, General Scott would later further the cause of executive authority to declare martial law. Scott imposed martial law in 1847 during the Mexican-American War, hoping to suppress marauding American soldiers.²⁵⁷ The martial law order applied to soldiers and Mexican citizens alike.²⁵⁸ Prior to imposing military rule, he sought advice on its legality and a congressional authorization.²⁵⁹ Neither was forthcoming. Scott wrote that William Marcy, the Secretary of State, said nothing other than that he was “startle[d]” by the title of Scott’s proposed martial law order.²⁶⁰ The Attorney General, Nathan Clifford, was “stricken with legal dumbness,” recounted Scott.²⁶¹ Scott claimed that all “were evidently alarmed at the proposition to establish martial law, even in a for-

²⁵³ See *id.* at 150–51 (describing the refund as opening the door for future military commanders to impose martial law).

²⁵⁴ Warshauer describes this change quite well. See *id.* at 189–96.

²⁵⁵ See Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 *Collected Works of Abraham Lincoln* 261, 268–69 (Roy P. Basler ed., 1953).

²⁵⁶ 1 Winfield Scott, *Memoirs of Lieut. Gen. Scott*, LL.D. 284, 292 (New York, Sheldon & Co. 1864).

²⁵⁷ *Id.* at 393.

²⁵⁸ *Id.* at 395.

²⁵⁹ *Id.* at 393–95.

²⁶⁰ *Id.* at 393.

²⁶¹ *Id.* at 393–94.

eign country.”²⁶² Such was the wariness towards Scott’s martial law order that officials approached it the way a ““terrier mumbles a hedgehog.””²⁶³

Scott’s autobiography mentions both his pseudonymous criticisms of Jackson and his imposition of martial law. How to square his Mexican measures with his pointed critique of Jackson? Perhaps his anti-Jackson tract can be chalked up to animosity towards Old Hickory.²⁶⁴ Or perhaps Scott thought his martial law order was illegal but still absolutely necessary as a means of saving Mexicans from marauding American soldiers (the latter were guilty of “atrocities,” he said).²⁶⁵ Or maybe he supposed that martial law was constitutional on foreign territory, on the theory that individual rights only applied on American soil.²⁶⁶ Whatever the case, he favored congressional laws over military fiat, as his request for legislation indicates.

In 1856, a decade and a half after the Mexican-American war, Isaac Stevens, Governor of the Washington Territory, declared martial law, claiming that it was necessary to combat hostile Indian tribes and their partisans amongst the settlers.²⁶⁷ The Governor’s legal thinking might have been influenced by his service during the Mexican-American War,²⁶⁸ where he saw Scott impose martial law. Whatever the precise basis for his legal belief, his critics claimed the order was issued for no other reason than to prevent a court from releasing a prisoner who had denounced Stevens.²⁶⁹

President Franklin Pierce sided with the critics. William Marcy, the Secretary of State, announced that while the President did not want to

²⁶² Id. at 394.

²⁶³ Id.

²⁶⁴ See Allan Peskin, *Winfield Scott and the Profession of Arms 72–73* (2003) (recounting how Scott lectured Jackson as if Jackson were a “not-overly-bright cadet”); id. at 75 (describing how Jackson treated Scott with suspicion and contempt).

²⁶⁵ Scott, *supra* note 256, at 392.

²⁶⁶ But see id. at 393 (saying that the Constitution followed soldiers beyond U.S. borders).

²⁶⁷ See Proclamation of Isaac Stevens (Apr. 3, 1856), *quoted in* Proceedings of a Meeting of the Bar, *reprinted in* Message of the President of the United States of America, Exec. Doc. No. 47, and *reprinted in* 8 The Executive Documents Printed by Order of the United States Senate 1866–1857, at 5, 7 (1857).

²⁶⁸ See Letter to Father from Isaac Stevens (Apr. 11, 1844), *in* 1 Hazard Stevens, *The Life of Isaac Ingalls Stevens* 117, 117–18 (1901) (noting that Scott had imposed martial law in Mexico).

²⁶⁹ See Proceedings of a Meeting of the Bar, *reprinted in* 8 The Executive Documents, *supra* note 267, at 5, 7.

insist that martial law was never appropriate, he “has not been able to find . . . a justification for” Stevens’ declaration.²⁷⁰ Marcy warned, “The recognition of such an inherent power in any functionary, whatever be his grade or position, would be extremely dangerous to civil and political liberty.”²⁷¹ Only “direful necessity” might “excuse” a declaration, or so the President concluded.²⁷²

Martial law or threats to impose it seemed to be bubbling up all over. Within days after Marcy admonished Stevens, another governor sought to declare martial law. John Geary, Governor of the Kansas territory, said he would be forced to proclaim martial law if the civil authorities did not provide more aid in suppressing a rebellion against the territorial government.²⁷³ In a terse letter, Marcy approved of many of Geary’s other measures but also told him “you have not power to proclaim martial law,”²⁷⁴ thereby making clear that martial law was not an option.

Perhaps Marcy was moved to a more definitive conclusion by informal legal advice from the Attorney General. On February 3, 1857, Marcy received an opinion from Caleb Cushing on whether territorial governors could declare martial law (the opinion discussed earlier in the section on habeas corpus).²⁷⁵ Cushing declared, “[W]e are without law on the subject” of martial law, before intimating that only Congress could suspend habeas corpus and declare martial law.²⁷⁶

Early practice under the Constitution mirrored practice during the Revolution. Most concluded that executives lacked legal authority to declare martial law, no matter the circumstances.²⁷⁷ The few who concluded otherwise were subordinate military commanders. But when they declared martial law within the United States, their superiors rebuked them. The most notable censure was when President James Madison in-

²⁷⁰ Letter from William Marcy to Isaac Stevens (Sept. 12, 1856), in 8 *The Executive Documents*, supra note 267, at 56, 56.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Letter from John W. Geary to W.L. Marcy (Sept. 16, 1856), in S. Exec. Doc. No. 5, at 105, 108 (1856).

²⁷⁴ Letter from W.L. Marcy to John W. Geary (Sept. 27, 1856), in S. Exec. Doc. No. 5, supra note 273, at 155, 155.

²⁷⁵ See supra text accompanying note 221.

²⁷⁶ *Martial Law*, 8 Op. Att’y Gen. 365, 371–72 (1857).

²⁷⁷ *Id.* at 373 (“And it may be assumed, as a general doctrine of constitutional jurisprudence in all the United States, that the power to suspend laws, whether those granting the writ of *habeas corpus*, or any other, is vested exclusively in the legislature of the particular State.”).

2013]

Imbecilic Executive

1415

structed Andrew Jackson on the difference between legality and necessity. Even if Jackson's martial law declaration was necessary, it was illegal, said Madison, for no one but Congress could impose martial law.²⁷⁸

But this sense of executive impotence eroded over time. The debate over whether to reimburse Jackson's fine led many to argue that the General had acted legally, lending a patina of respectability to a position that apparently had no adherents a quarter of a century earlier. The position became more respectable still when Winfield Scott's extraterritorial declaration of martial law went unchallenged.²⁷⁹ Though both Isaac Stevens and John Geary were told that they lacked authority to declare martial law, the denials were ambiguous when compared to Madison's clear renunciation of martial law authority.

D. The Civil War as an Inflection Point

All this set the stage for a Whig-turned-Republican to exercise emergency powers during the course of the Civil War. This is not the place to analyze Lincoln's extraordinary measures. But it is worth noting the breadth of his actions. In the course of defending the Union, he expanded the army and navy, expended unappropriated funds, seized rebel property, suspended habeas corpus, declared martial law, and transgressed federal statutes.²⁸⁰

The President took many crisis measures while Congress was in recess, deliberately choosing to call them back into session months after the firing on Fort Sumter.²⁸¹ Initially, Lincoln was ambiguous about the legality of many of his actions. In his July 4, 1861 address to Congress, Lincoln recounted how he had expanded the army and navy and then said that "nothing has been done beyond the constitutional competency

²⁷⁸ Letter from Alexander J. Dallas to Andrew Jackson (July 1, 1815), in 3 *The Papers of Andrew Jackson*, supra note 240, at 375, 376.

²⁷⁹ Even today, Scott's orders are cited to support the proposition that the executive may use military commissions to try civilians. See *Legality of the Use of Military Commissions to Try Terrorists*, 25 *Op. O.L.C.* 1, 8 (2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>.

²⁸⁰ See generally Brian McGinty, *The Body of John Merryman* (2011); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991); Stephen C. Neff, *Justice in Blue and Gray* (2010); Randall, supra note 54.

²⁸¹ On April 15, 1861, Lincoln issued the call to Congress to convene on July 4, 1861. See, supra note 54, at 52. The delay in summoning Congress gave him a free hand for two and a half months.

of Congress.”²⁸² The statement seemed to concede that his acts were of dubious legality. Yet he went on to recount that he had authorized the military to suspend the privilege of the writ and argue that the Constitution simply must authorize executive suspension.²⁸³ As he put it, any other answer would mean that there might be moments, as when Congress could not meet, that the writ could not be suspended during an invasion or rebellion.²⁸⁴ Yet this argument’s logic suggested that the President must have power to do whatever is necessary to meet the crisis at least until Congress can act, meaning that he would have the power to expend unappropriated funds, raise armies and navies, and so on. In other words, the argument about the need for presidential action in crises when Congress was in recess suggested that all of his acts were legal, a position he had earlier failed to embrace.

Lincoln’s partisans and defenders read the Constitution as justifying many, if not all, of his emergency measures, much in the manner that some Jacksonians had.²⁸⁵ Eventually, Lincoln laid out his views about habeas corpus and martial law in a letter to some Albany Democrats. The Albany politicians had denounced the suspension of habeas corpus and the use of military trials as being inconsistent with the Constitution.²⁸⁶ Lincoln responded that the Constitution applied differently in a time of war,²⁸⁷ and vigorously defended the constitutionality of his decisions to suspend habeas corpus and to institute military trials.²⁸⁸

Lincoln’s emergency measures were a two-fold success. First, they helped defeat the South and recreate the Union that had been split asunder. Whether, counterfactually, the forces of the Union would have pre-

²⁸² Abraham Lincoln, Special Session Message (July 4, 1861), in 6 *A Compilation of the Messages and Papers of the Presidents 1789–1908*, at 20, 24 (James D. Richardson ed., 1909).

²⁸³ *Id.* at 24–25.

²⁸⁴ *Id.* at 25.

²⁸⁵ McGinty, *supra* note 280, at 108–15, 123–31.

²⁸⁶ See Resolutions Adopted at the Meeting Held in Albany, N.Y., on the 16th of May, 1863, *reprinted in* *The Truth from an Honest Man: The Letter of the President 4* (Philadelphia, King & Baird 1863).

²⁸⁷ See Letter from Abraham Lincoln to Erastus Corning (June 12, 1863), *reprinted in* *The Truth from an Honest Man*, *supra* note 286 at 7, 13–14.

²⁸⁸ *Id.* at 13–15. Though he defended military trials, Lincoln delicately referred to them as “proceedings” and denied that they were criminal prosecutions. *Id.* at 7–8. Neely claims that Lincoln “did not readily admit that [military commissions] even existed” and speculates that Lincoln hoped that the “war’s end would erase the military trials of civilians from national memory.” Neely, *supra* note 280, at 174–75.

2013]

Imbecilic Executive

1417

vailed absent his vigorous measures is something incapable of being answered with any certainty. One reasonably might suppose that, at a minimum, the war would have lasted longer and that Union forces would have suffered more casualties had the President been more timid in his exertions.²⁸⁹

Second, Lincoln's measures clearly were successful in further altering the terms of the constitutional debate. While Congress retroactively ratified many of the President's military orders,²⁹⁰ and thus lent a measure of legislative support for his measures, these statutes are sometimes forgotten in discussions of his emergency measures.²⁹¹ Instead, his bold, unilateral actions and the justness of his cause supply fertile ground for broad and vigorous executive power in times of emergency until this day. Any executive who wishes to act expeditiously and unilaterally in times of emergency can now cite Lincoln and attempt to ride his long constitutional coattails.²⁹² Hence comes the claimed presidential authority to set up military tribunals to try alleged war criminals²⁹³ and to take private property.²⁹⁴

Yet, as we know from modern times, the debate over presidential emergency powers is hardly over. Those favoring a presidential crisis

²⁸⁹ One could argue that Lincoln's vigorous measures were counterproductive because they split the Union coalition into those who favored winning above all else and those who favored winning while scrupulously preserving civil liberties. This divide dissipated resources away from the principle aim of Union. While true enough, such effects were likely overwhelmed by the utility of suppressing those in the North who impeded the war efforts in various ways, either by speech or deed. In other words, suppression of civil liberties was net positive, if we take restoring the Union as the overriding goal.

²⁹⁰ See, e.g., Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326; see also Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (indemnifying executive officers for following presidential orders).

²⁹¹ See, e.g., Paulsen, *supra* note 6. Congressional ratification and indemnification of Lincoln's measures cloud the issue of whether members of Congress saw Lincoln's actions as legal under the Constitution or as illegal until congressionally sanctioned.

²⁹² See, e.g., George W. Bush, *Decision Points* 163 (2010) (defending warrantless surveillance by reference to Lincoln's actions during Civil War). But see *id.* at 155 (saying that Lincoln overreached when he suspended habeas corpus).

²⁹³ See *Legality of the Use of Military Commissions to Try Terrorists*, 25 Op. O.L.C. 1, 9–10, 13 (2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf> (citing use of military commissions during the Civil War and citing *Military Commissions*, 11 Op. Att'y Gen. 297 (1865)).

²⁹⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 668, 685–86 (1952) (Vinson, C.J., dissenting) (citing Lincoln's actions during the Civil War, including the seizure of property); see also Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* 37, 101 (1977) (discussing Truman's appreciation of Lincoln's use of unspecified powers during a crisis).

power can cite Lincoln and Jackson. Their opponents can point to Washington and Madison, neither of whom believed that commanders in chief could declare martial law or suspend habeas corpus. And so the debate is joined between those who find slight presidential power in crises and those who read Article's II seemingly vague phrases as fonts of broad emergency powers.

V. FROM ALMOST IMBECILIC TO VIRTUALLY OMNIPOTENT

We have spent a good deal of time discussing the first hundred years, with little attention to the modern era. Perhaps a comparison of the original and modern crisis regimes is in order. Before the Civil War, the federal crisis regime had three legs. As a matter of constitutional law, the President could take whatever limited crisis measures the Constitution authorized. Second, Congress could delegate generous crisis authorities via statute. These first two legs formed a system of *ex ante* authorization. When the President acted in conformity to it, all his acts generally were seen as legal.²⁹⁵ Finally, executives could take illegal emergency actions when necessary and seek indemnification in the form of an *ex post* legislative act.²⁹⁶

The modern crisis regime has three legs as well. Presidents are widely seen as having broad, if uncertain, constitutional authority. They also benefit from sweeping statutory delegations, the result of an accretion of crisis delegations. Finally, Presidents refuse to acknowledge that any of their acts are illegal. Instead, when they act in a crisis, they tend to cite their indefinite constitutional and statutory authorities. While some Presidents might welcome specific legislative sanction for their emergency

²⁹⁵ There were some who argued that the implied bar on the delegation of legislative power forbade delegations to the President. This claim was made in the context of the 1863 statute that supposedly delegated suspension power to the President. See Neff, *supra* note 280, at 38 (describing Wisconsin case). I believe the Constitution permits Congress to enact extremely broad crisis delegations because such measures are necessary and proper for implementing governmental powers during emergencies.

²⁹⁶ Typically, lower level executive officials sought legislative indemnification. I am unaware of any occasion where a President sought such legislative aid. While Jefferson spoke of securing sanction "from the nation" for the Louisiana Purchase, see Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *in* 8 *The Writings of Thomas Jefferson* 261, 262 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1897), he never sought any *post hoc* forgiveness for his supposed violation of the Constitution. See Everett S. Brown, *The Constitutional History of the Louisiana Purchase 1803–1812*, at 28–29 (Augustus M. Kelley Publishers 1972) (1920).

acts, it is often unnecessary because they often will claim *ex ante* authority arising from the Constitution, existing federal statutes, or both.

A. The Original Framework

Eighteenth-century executives were not as imbecilic as the President of the Pennsylvania Executive Council supposed or as they must seem to the modern acolytes of executive discretion in crises. While constitutions of that era conveyed few crisis powers to their executives, legislatures were sensible and delegated sweeping authority when necessary. Hence, though executives were imbecilic by virtue of their constitutions alone, their constitutions did not mandate imbecility. Additionally, though executives generally were to adhere to the law, their obedience was not meant to be blind or foolish. Rather, the pre-Civil War regime relied upon a measure of executive illegality in times of crisis. When the situation demanded action and the law posed a barrier, executives were supposed to act and then hope for *ex post* legislative sanction. This was not executive authority to act *contra legem* or a legal duty to do so. Rather this leg of the regime rested on a common sense judgment that adherence to the law, in all times and seasons, was imprudent.

During the Revolutionary War, American assemblies regularly delegated crisis powers to executives.²⁹⁷ Recall that Congress occasionally conveyed sweeping powers to George Washington, leading some to conclude that he had been made a dictator.²⁹⁸ Facing the same existential threat, many state legislatures also granted broad crisis powers to their executives.²⁹⁹ Indeed, the Pennsylvania President of the Supreme Executive Council blamed his state of imbecility, in part, on the expiration of a law authorizing seizures, a complaint that fairly proved that the executive was not doomed to imbecility.³⁰⁰ A constitution that left the executive powerless in crisis *and* precluded legislative delegations would have been irredeemably imbecilic.

Legislatures did not have to delegate crisis authority only in the teeth of crisis. In advance of any emergency (but perhaps with one on the

²⁹⁷ See *supra* notes 112–15 and accompanying text.

²⁹⁸ See Edward G. Lengel, *General George Washington: A Military Life 189* (2005) (quoting contemporary sources describing General Washington as a “dictator” by virtue of statutory grants).

²⁹⁹ MacMillan, *supra* note 24, at 73–84 (describing acts ceding dictatorial powers to state executives).

³⁰⁰ See, e.g., *id.* at 92 (quoting correspondence from Joseph Reed to George Washington).

horizon or in recent memory), legislatures could and did delegate crisis authority to executives. Congress, via the Militia Act of 1792,³⁰¹ dictated generic conditions under which the President could call forth the militias to deal with invasions, rebellions, and law execution.³⁰² Similarly, the Alien Enemies Act³⁰³ authorized the President to arrest and deport aliens in a declared war or invasion.³⁰⁴ Finally, the 1793 yellow plague (discussed earlier) prompted Congress to enact legislation authorizing the President to alter the venue of Congress whenever it was dangerous for members to gather at the appointed place.³⁰⁵

When neither statutes nor constitutions granted authority, executives facing a crisis could act illegally. During crises, executives acted pursuant to the law of necessity, a law of nature having no positive sanction. The idea was that executives should do what is necessary and trust that either the legislature would pass a bill indemnifying them after the fact or that the public would forgive their illegal trespasses. If the executive had not exaggerated the threat, all would be forgiven and an indemnity bill might pass. If no indemnity bill passed, the officers executing the illegal measures might be liable for damages and ousted from office. Executive officers ran the risk that observers would disagree about whether there was a genuine crisis or whether the particular crisis measures were necessary.

We saw evidence of this regime in the wake of England's Corn Crisis, discussed in Part II. Once Parliament decided that the Crown's ban on the export of grain was a good idea, it chose not to impeach the ministers who recommended the ban or the officials who implemented it. Rather Parliament indemnified all these officers, thereby ensuring that they suffered no harm.³⁰⁶

This sequence of illegal executive action followed by acts of indemnity was also seen during the American Revolution. State legislatures would review unlawful acts and exonerate if appropriate.³⁰⁷ After Virginia Governor Thomas Nelson illegally impressed supplies, the assembly "indemnified and exonerated [him] from all penalties and damages"

³⁰¹ Militia Act of 1792, ch. 28, 1 Stat. 264, 264–65.

³⁰² *Id.* The Act came with an expiration date. But Congress subsequently enacted a new militia act with no expiration. Militia Act of 1795, ch. 36, 1 Stat. 424, 424–25.

³⁰³ An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).

³⁰⁴ *Id.*

³⁰⁵ Act of Apr. 3, 1794, ch. 17, 1 Stat. 353.

³⁰⁶ 6 Geo. 3, c. 7 (1767).

³⁰⁷ MacMillan, *supra* note 24, at 99.

on the grounds that his measures were “evidently productive of the general good and warranted by necessity.”³⁰⁸ Similarly, the Virginia assembly indemnified men for quashing an insurrection because even though “the necessary measures taken for that purpose may not be strictly warranted by law,” they were justified “from the immediate urgency and imminence of the danger.”³⁰⁹

The Constitution did not extinguish the idea of retroactive legislative approval of illegal, emergency acts by the executive. Opposing a statutory grant of a removal power to the President in 1789, one Virginia Representative said “[i]t would be better for the President to extend his powers on some extraordinary occasions [and remove an officer], even where he is not strictly justified by the Constitution.”³¹⁰ He praised Governor Nelson’s willingness to take illegal measures and the Virginia legislature’s ex post approval of them. The pattern of executives acting beyond their limited authority during crisis and seeking indemnification “corresponds with the practice under every limited Government,” or so the legislator avowed.³¹¹

Thomas Jefferson endorsed the practice as well. After the British vessel *Leopard* had defeated the *Chesapeake*, Jefferson ordered the purchase of military supplies without the sanction of an appropriation.³¹² He subsequently notified Congress of his action, defending it as “indispensable” and hoping that they would approve his expenditure.³¹³ While some complained that Jefferson should have called Congress into session precisely because there was a crisis,³¹⁴ Congress passed an appropriation,³¹⁵ thereby forgiving the executive’s violation of the Appropriations Clause.³¹⁶

³⁰⁸ 10 William Waller Hening, *The Statutes at Large Being a Collection of All the Laws of Virginia*, supra note 121.

³⁰⁹ Act of Oct. 1779, ch. 34, 10 Va. Stat. 195.

³¹⁰ Speech of Alexander White (June 18, 1789), in 11 *Documentary History of the First Federal Congress* 954 (Charlene Bangs Bickford et al. eds., 1992).

³¹¹ *Id.* at 955.

³¹² Gerhard Casper, *Separating Power: Essays on the Founding Period* 94–95 (1997).

³¹³ See Seventh Annual Address to Congress (Oct. 27, 1807), reprinted in 1 *A Compilation of the Messages and Papers of the Presidents* 425, 428 (James D. Richardson ed., 1907).

³¹⁴ Casper, supra note 312, at 95–96.

³¹⁵ William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 38 (1994).

³¹⁶ See U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

After he left office, Jefferson defended the illegal acts he took after the Leopard's attack:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means. . . .

. . . The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the constitution, and his station makes it his duty to incur that risk. But those controlling powers, and his fellow citizens generally, are bound to judge according to the circumstances under which he acted.³¹⁷

Jefferson went on to discuss Governor Nelson's seizing of property during the Revolutionary War and General Wilkinson's arbitrary acts in New Orleans, saying that both were justified by the law of necessity.³¹⁸ But, as Jefferson noted, the law of necessity was not part of "written" or actual law.³¹⁹ Rather he argued that an executive occasionally should take illegal measures, either to "advantage" the public or to mitigate a crisis, and thereby "risk" being held accountable for such acts should an indemnity not be forthcoming.³²⁰

While illegal presidential actions were rare,³²¹ Presidents might order others to take acts that courts subsequently deemed contrary to law.

³¹⁷ Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 *The Writings of Thomas Jefferson* 279, 281 (Paul Leicester Ford ed., New York, The Knickerbocker Press 1898).

³¹⁸ *Id.* at 280.

³¹⁹ *Id.* at 279.

³²⁰ *Id.* at 280–81. Jefferson's theory of laudable executive illegality was tied to the magnitude of the opportunity or crisis. *Id.* at 280. In his view, if great good might be accomplished, or great harm avoided, via illegal acts, the executive should take those unlawful measures, thereby risking himself, and hope that the "controlling powers" agreed with the decision. *Id.* at 281.

³²¹ Perhaps the first illegal presidential act occurred during the Whiskey Rebellion. The administration used funds provided in the general War Department appropriation for the costs of marching the militias. But that appropriation did not specify that it could be used to fund the militia's march. In his annual address, Washington mentioned the need for "necessary appropriations" and the "expenditures into which we have driven by the insurrection"—the closest he came to admitting illegality as a result of a crisis. See Sixth Annual Address to

2013]

Imbecilic Executive

1423

When courts ordered damages against these officers, Congress might indemnify them out of a sense that such legislation was appropriate.³²² For instance, after the Supreme Court decided that Captain George Little's capture was contrary to law (despite the President's order commanding such seizures),³²³ Congress belatedly indemnified Little for damages owed the plaintiff.³²⁴ Other times, Congress would proactively relieve victims prior to any suit, likely out of a sense that this was the proper thing to do and that otherwise there would be a successful suit against the offending executive officers.³²⁵

One indemnification warrants further discussion. During the War of 1812, a military officer ordered the suppression of individuals thought to be supporting England.³²⁶ Local authorities soon arrested two of the military officers charged with the task on the grounds that the arrests he ordered were illegal.³²⁷ After the arrestees sought and received damages against the commander, the latter petitioned Congress for an indemnification. The Secretary of War advised a committee of Congress that if sometimes "in the exigencies of war" a commander should "transcend his legal power, Congress ought to protect him" from the consequenc-

Congress (Nov. 19, 1794), *reprinted in* 1 A Compilation of the Messages and Papers of the Presidents, *supra* note 313, at 168. Although some claimed that Washington ought not to have spent the money on unauthorized purposes and should have convened Congress instead, see Banks & Raven-Hansen, *supra* note 315, at 35 (citing complaints of Albert Gallatin), Congress later appropriated funds for the "expenses attending the militia in their late expedition." Act of Dec. 31, 1794, ch. 4, 1 Stat. 404. In other words, Congress ratified the transfer. Banks & Raven-Hansen, *supra* note 315, at 35–36.

To my knowledge, only one early President was sued in his official capacity, albeit after leaving office. Edward Livingston sued Thomas Jefferson after the President ordered the destruction of some of the former's property. Livingston sued Jefferson in Virginia, with John Marshall dismissing the case for lack of jurisdiction. *Livingston v. Jefferson*, 15 F. Cas. 660, 662 (C.C.D. Va. 1811) (No. 8,411). For a general discussion, see Ronan E. Degnan, *Livingston v. Jefferson—A Freestanding Footnote*, 75 Calif. L. Rev. 115 (1987). Because Marshall dismissed the suit, there was no need for a congressional indemnity for Jefferson's official acts.

³²² See, e.g., Act of Jan. 31, 1805, ch. 12, 6 Stat. 56 (satisfying damages awarded against naval officer for capture); Act of Apr. 14, 1802, ch. 27, 6 Stat. 47 (same).

³²³ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 175–77 (1804).

³²⁴ Act of Jan. 17, 1807, ch. 4, 6 Stat. 63.

³²⁵ See Act of Mar. 1, 1815, ch. 46, 6 Stat. 151 (compensating homeowner and indemnifying military officers for the destruction of homeowner's residence).

³²⁶ Alan Taylor, *The Civil War of 1812*, at 277 (2010).

³²⁷ *Id.*

es.³²⁸ The Attorney General agreed that the commander's order to arrest citizens was unlawful,³²⁹ apparently saying nothing about indemnification.

The committee agreed with the Secretary of War that indemnification for illegal acts could be proper, and it added two additional points. First, the committee noted that an "illegal or unauthorized seizure of property . . . belonging to a citizen . . . is seldom allowed in a state of war."³³⁰ Apparently the committee had in mind any seizure not authorized by statute. Second, the committee claimed that military arrests of civilians "should be more cautiously guarded" against.³³¹ Nonetheless, in view of the exigency and the "apparently suspicious character"³³² of those arrested, the committee recommended an indemnity, which thereafter became law.³³³ The episode is instructive because it shows deliberation over the illegality of executive crisis measures and a determination that sometimes such measures ought to be indemnified with an appropriation.

During the Civil War, even as the administration claimed legal authority for much of its extraordinary actions and even as those actions were undermining the existing crisis regime, Congress passed an indemnity act. The March 1863 Act³³⁴ granted immunity from prosecution and suit to all those involved in enforcing the President's orders. Such orders were defenses to any action or prosecution involving "any search, seizure, arrest, or imprisonment."³³⁵ The indemnity was needed because many thought that some of the President's wartime orders were illegal. Many had sought damages from executive officers and a few courts had

³²⁸ See Letter from John C. Calhoun to the House of Representatives (Jan. 2, 1818), *in* American State Papers: Class IX: Claims 545, 546 (Walter Lowrie & Walter S. Franklin eds., Washington, D.C., Gales & Seaton 1834).

³²⁹ See Indemnity for Judicial Proceedings Against an Officer of the Army (Jan. 23, 1818), *in* American State Papers: Class IX: Claims, *supra* note 326, at 545, 546 (referencing opinion of the attorney general); see also Taylor, *supra* note 326, at 278 (claiming that administration admitted that using troops to enforce smuggling laws was illegal).

³³⁰ See Indemnity for Judicial Proceedings Against an Officer of the Army, *supra* note 328, at 545, 546 (referencing opinion of the attorney general).

³³¹ *Id.*

³³² *Id.* at 546.

³³³ See Act of Apr. 20, 1818, ch. 85, 6 Stat. 210.

³³⁴ Act of Mar. 3, 1863, ch. 81, § 4, 12 Stat. 755.

³³⁵ *Id.* at 756.

2013]

Imbecilic Executive

1425

awarded them,³³⁶ and the Act was meant to preclude damage awards and criminal punishment.

The last leg of the stool—illegal executive action coupled with legislative indemnification—may lead some to query how meaningful it is to say that the executive crisis acts were illegal when indemnification was routine. After all, if the legislature always indemnified illegal but necessary crisis acts, the executive might act as if all its necessary crisis acts were authorized.

To assess the claim that necessary but illegal acts were always indemnified, one would have to carefully canvas the universe of illegal crisis acts and determine whether some or all were legislatively indemnified. This I have not done. Hence I cannot refute the idea that indemnification was so routine as to make the idea of “illegal” crisis acts somewhat beside the point. Despite not having conducted the empirical inquiry, I very much doubt that pre-Civil War executives could rely upon legislative forgiveness. The war hero and President, Andrew Jackson, was not compensated for the fine imposed by Judge Hall until decades after the War of 1812. And even then, the reimbursement was hotly contested. If Congress had to be pushed and prodded to grant Jackson a belated indemnification, consider how difficult it must have been for marshals, captains, or majors to secure theirs. In my view, legislative indemnification was something that an executive could hope for, but could not expect as of right.

In sum, the pre-Civil War crisis regime was one of limited constitutional authorization, often broad statutory delegation, and occasional illegal executive unilateralism coupled with statutory indemnification. These mechanisms proved sufficient to survive rebellions, invasions, and plagues.

B. The Modern Regime

The modern regime combines change and continuity. Carried forward is the leg of generous statutory delegations; indeed, the scope and number of those delegations have burgeoned, likely a response to the perception that the world is a more dangerous place. The new elements are a

³³⁶ See Jonathan White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* 91 (2011). For a discussion of the Act, see generally James G. Randall, *The Indemnity Act of 1863: A Study in the Wartime Immunity of Governmental Officers*, 20 *Mich. L. Rev.* 589 (1921).

puffed-up sense of executive crisis power under the Constitution and an extreme commitment to executive legalism.

Consider the changes first. To begin with, the original executive's impotence in emergencies is largely lost, buried amidst the rubble of the Civil War. When there is a crisis, Presidents typically spring into action. We have come to expect as much because we know that the President alone is capable of acting with alacrity. He has the information and the vast resources of the government at his disposal.

The recent calls for the President to issue debt unilaterally are revealing. In 2011 and 2012, when it seemed that the government might be unable to borrow any more funds due to a statutory limit on the issuance of new debt, there were calls for the President to ignore the statutory debt ceiling. Some said that the Fourteenth Amendment, which provides that the "validity of the public debt of the United States . . . shall not be questioned,"³³⁷ permitted the President to take whatever measures were necessary to prevent a default.³³⁸ Others argued that the critical situation called for presidential unilateralism, whatever the Constitution might provide.³³⁹ In a show of self-restraint, the administration concluded that the President lacked constitutional power to raise the debt ceiling whatever the circumstances.³⁴⁰ It thereby weakened its hand in negotiations with Republicans. Whether the President would have renounced that legal conclusion had Congress failed to adjust the debt ceiling cannot be said.

This is but the most recent example of the call for presidential unilateralism in crises. The Constitution expressly authorizes Congress to issue debt.³⁴¹ Moreover, there is nothing in the Constitution that specifi-

³³⁷ U.S. Const. amend. XIV, § 4.

³³⁸ Jack M. Balkin, *How Obama Can Prevent Another Debt-Ceiling Crisis*, *Atlantic* (Dec. 9, 2012, 4:30 AM), <http://www.theatlantic.com/politics/archive/2012/12/how-obama-can-prevent-another-debt-ceiling-crisis/266053/>; cf. *All Things Considered: Week in Politics: Debt Ceiling* (NPR radio broadcast July 29, 2011), <http://www.npr.org/2011/07/29/138830612/week-in-politics-debt-ceiling>.

³³⁹ Eric A. Posner & Adrian Vermeule, *supra* note 15.

³⁴⁰ See Press Briefing by Press Secretary Jay Carney (Dec. 6, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/12/06/press-briefing-press-secretary-jay-carney-12062012> ("This administration does not believe the 14th Amendment gives the president the power to ignore the debt ceiling—period."); see also Press Briefing by Press Secretary Jay Carney (July 29, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/29/press-briefing-press-secretary-jay-carney-7292011> (expressing similar view).

³⁴¹ U.S. Const. art. I, § 8, cl. 2.

2013]

Imbecilic Executive

1427

cally grants the President any concurrent authority in this area. Assuming that the Fourteenth Amendment makes default on the debt unconstitutional (hardly the only reading), the natural way to read Article I, Section 8 and the rest of the Constitution is to imagine that *Congress* must take the measures necessary to avoid any default that might stem from the failure to pay interest and principal on existing debt. The idea that the Fourteenth Amendment authorizes the President to issue debt has no more validity than the idea that the President may raise taxes or cut spending to ensure that the federal government does not repudiate the debt. Or, more accurately, the fact that the Constitution arguably makes a federal default unconstitutional hardly means that the federal executive can take whatever measures to prevent that default any more than it means that a state court or a sheriff may do so. That this idea was sincerely advanced by some shows how far constitutional thought has evolved from the Founding and the continued relevancy of Lincoln.³⁴²

The second leg of the modern regime is a continuation from the old order, namely a willingness to delegate crisis powers. Dozens of statutes grant the President authority when a crisis strikes.³⁴³ The triggering events for these statutes greatly vary. Sometimes the delegation vests upon an invasion, war, or declaration of war. Sometimes there must be a terrorist attack or a natural disaster. Sometimes the President must make a finding before he receives crisis authority. Sometimes a third party must make a finding. The point is that modern Congresses have mitigated, to a tremendous extent, the Presidency's imbecility.

Despite the proliferation of statutes, there are gaps. But these gaps often get filled after a new crisis strikes, with Congress quickly acting. If the President sees a gap in his authority in the wake of a crisis, Congress is often happy to oblige because passing legislation is the way for the latter to show that it is "doing something" in response to the emergency.

³⁴² Those who believed that the President could issue new debt in order to avoid a debt default were being somewhat disingenuous. In truth, federal revenues were more than sufficient to service the debt. The question was whether those revenues would be sufficient to cover all the other items that Congress had authorized and appropriated. If they were not, one could make a constitutional case that interest on the debt had to be paid first, lest the failure to pay such interest constitute a repudiation. In short, a failure to issue more debt would not, by itself, have caused a debt repudiation.

³⁴³ Harold C. Relyea, Cong. Research Serv., GOV 98-505, National Emergency Powers 2, 3 (2007).

Consider the Patriot Act,³⁴⁴ which passed in the wake of the September 11th attacks.³⁴⁵ The President received new powers to combat enemies of the United States.³⁴⁶

The last leg of the modern regime is an extreme devotion to executive legalism.³⁴⁷ Today, the executive must always be seen as acting legally, or at least as having a colorable claim of doing so. Any executive who admits that he has acted illegally likely faces a level of public censure above what his predecessors might have expected. The condemnation would be more severe because admissions of illegality from the executive are so rare, such that they would strike the public as especially problematic.³⁴⁸ Pouncing critics will question why such measures were necessary, especially when other crises were (seemingly) weathered without illegal measures.

Executive confessions of illegality are rare in part because of the broad sense of executive crisis power, a sense arising from the first two legs of the regime. Most defenders of presidential crisis power cannot specify the precise contours of the executive power or the Commander in Chief authority,³⁴⁹ but those boundaries are capacious enough to permit the President to take whatever measures he deems necessary. Moreover, as discussed earlier, emergency delegations have proliferated to an amazing degree, meaning that statutes often either supply crisis authority or a colorable basis for a claim.

Given these two fertile sources of legal authority, Presidents often can readily secure an opinion from the Office of Legal Counsel supporting their actions.³⁵⁰ They also can forum shop by seeking out other executive

³⁴⁴ USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S. Code).

³⁴⁵ *Id.*

³⁴⁶ See Eric Lichtblau, *Bush's Law: The Remaking of American Justice* 8 (2008).

³⁴⁷ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *Yale L.J.* 1011, 1111 n.426 (2003).

³⁴⁸ See Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 *U. Ill. L. Rev.* 1135, 1155.

³⁴⁹ Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (noting that “just what authority goes with the name [Commander in Chief] has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends”).

³⁵⁰ Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 *Harv. J.L. & Pub. Pol'y* 213, 227–31 (2012).

branch sources, as President Obama did with respect to the question of whether the War Powers Act applied to the bombings during Libyan civil war.³⁵¹ In the extreme, Presidents may choose not to seek a formal opinion from any executive branch lawyer, especially when they have a sense that lawyers may rebuff them. Whether they secure an opinion or not, modern Presidents are careful to have a colorable claim of having acted legally.

So we have a somewhat rickety, three-legged stool composed of a broad reading of presidential emergency power under the Constitution, many, sometimes sweeping statutory grants, and an extreme aversion to admitting illegality. The statutory grants of crisis powers sit uneasily with expansive views of the President's constitutional authority. The statutory delegations of emergency powers hint that the Chief Executive otherwise lacks such authority, for why else would Congress grant that authority by law? Presidential actions in crisis sometimes suggest the exact opposite conclusion—that the President does not need any statutory authority because the Constitution authorizes (almost) anything necessary in crises. Moreover, the claim that the Constitution cedes the President broad crisis powers suggests that statutory delegations are constitutionally problematic insofar as these delegations impose restrictions on what the President may do in crises. A statute ceding power to take any of three specific actions in a crisis could be read to imply that those are the only actions permitted.³⁵² Sometimes the grant of a few statutory powers does not invite executive unilateralism that goes beyond those conveyed by law.³⁵³ Finally, the executive's aversion to admitting illegality and seeking ex post legislative sanction means that when the executive relies on constitutional and statutory arguments in times of crisis, observers (Congress, the court, and the public) will tend to uphold those claims because the alternative is so unpalatable. If we cannot conceive of forgiving violations of the law and the executive will not admit to any wrongdoing, some will be tempted to say that there was no transgression in the first place.

³⁵¹ Charlie Savage, 2 Top Lawyers Lose Argument on War Power: Obama Rejects Stance Over Libya Mission, N.Y. Times, June 18, 2011, at A1.

³⁵² Some of the opinions in *Youngstown* make this move. See, e.g., *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring) (noting that because "Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure," the President acts contrary to the will of Congress when he does not act pursuant to the three statutory grants of authority).

³⁵³ But see *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (claiming the contrary).

C. The Modern Regime in Action

Three familiar incidents highlight features of the modern regime. First, the *Youngstown Sheet & Tube Co. v. Sawyer* case. Although the executive lost in *Youngstown*, the closeness of the vote and the many routes to victory the Justices left open suggest that a majority of the Court did believe in some sort of executive crisis power. The openness to such a power is an artifact of the modern-felt need that crises require an empowered and vigorous executive, one capable of *sometimes* acting unilaterally.

To begin with, President Harry Truman might have prevailed had there been a sense that the Korean “police action” might have been jeopardized in the absence of the seizures.³⁵⁴ There was skepticism about whether the President merely wished to assist a political ally, the unions, in a tussle with the steel companies.³⁵⁵ The fact that Truman did not use his statutory authority to prevent a strike, because doing so involved using the hated Taft-Hartley Act,³⁵⁶ suggests that there was no crisis. Moreover, Truman might have triumphed had he adopted a hard time limit on his seizure (for example—the seizure would end in 30 days unless Congress provided otherwise), as opposed to the faux constraint he trumpeted (the seizure would end when Congress disapproved).³⁵⁷ Finally, Justice Robert Jackson’s opinion mentions that Congress had never declared war and expresses astonishment that the President could declare a crisis and then seize crisis powers.³⁵⁸ His discussion suggests that had Congress formally declared war or had North Korean forces attacked the United States, perhaps the presidential seizure of property would have been permissible.

Arguably, *Dames & Moore v. Regan*³⁵⁹ came to a different result than *Youngstown* because President Jimmy Carter faced an unforeseen emergency in the form of the Iranian Hostage Crisis. American lives were at

³⁵⁴ See Bellia, *supra* note 53, at 257–58 (doubting whether there was a true emergency).

³⁵⁵ See Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* 256–58 (1977).

³⁵⁶ Labor Management Relations Act (Taft-Hartley Act), Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 401–531 (2006)).

³⁵⁷ See Bellia, *supra* note 53, at 257–58. Truman’s pledge to halt the seizure should Congress disapprove placed the tremendous onus of overcoming legislative inertia on those who disagreed with his policy. It also left open the possibility that he might veto any such legislation, for his veto gave him a tremendous influence on what might pass.

³⁵⁸ *Youngstown*, 343 U.S. at 642–43 (Jackson, J., concurring).

³⁵⁹ *Dames & Moore*, 453 U.S. at 669, 690.

stake and the Supreme Court was unwilling to second-guess the presidential unilateralism that set the hostages free.³⁶⁰ Hence, the Court permitted the President to extinguish claims that Americans had against the Iranian government and companies even though it was hardly obvious that the Constitution, as it was previously understood, granted the President a broad power to settle American claims against foreign nationals and governments.³⁶¹ Had the ancient regime remained in place, one can imagine the Court ruling in favor of *Dames & Moore* and mentioning that Congress could pass ex post legislation implementing the Executive Agreement.

Finally, consider the controversy over whether the Bush Administration violated the Foreign Intelligence Surveillance Act (“FISA”).³⁶² The Act seemingly grants the executive the power to wiretap foreign operatives.³⁶³ To conduct those wiretaps, the Act requires that the executive secure warrants from the judiciary.³⁶⁴ Yet the Bush Administration surveilled some individuals suspected of having links to Al-Qaeda without securing such warrants, fearing that if it secured them, its surveillance would become well known or that its wiretapping authority would eventually expire.³⁶⁵

Critics of the administration charged that it had violated FISA.³⁶⁶ The executive branch, for its part, insisted that it had constitutional authority to surveil those suspected of aiding the enemy.³⁶⁷ The Bush Administration never asserted that even if the executive lacked authority to surveil

³⁶⁰ See Harold H. Bruff, *The Story of Dames & Moore: Resolution of an International Crisis by Executive Agreement*, in *Presidential Power Stories* 369, 390–91 (Christopher Schroeder & Curtis Bradley eds., 2009).

³⁶¹ See, e.g., Lee R. Marks & John C. Grabow, *The President’s Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 *Cornell L. Rev.* 68, 75, 101 (1982).

³⁶² Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–85(c) (2006 & Supp. V 2011).

³⁶³ 50 U.S.C. §§ 1801(a), 1802(a)(1)(A).

³⁶⁴ *Id.* § 1805.

³⁶⁵ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts: Secret Order to Widen Domestic Monitoring*, *N.Y. Times*, Dec. 16, 2005, at A1.

³⁶⁶ See, e.g., Letter to Members of Congress 1–2 (Jan. 9, 2006), <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf> (criticizing the Bush Administration’s constitutional claim that it could conduct warrantless wiretapping in contravention of FISA).

³⁶⁷ U.S. Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 6–10 (2006), <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf>. The administration also claimed that the Authorization for Use of Military Force created an exception to the FISA regime.

without the warrants, the actions were so evidently necessary that it should be excused for having violated the law. The tradition of admitting illegality and seeking forgiveness was not even adverted to as an alternative (and honorable) argument in a situation where the administration made what seemed to many a dubious claim of legality. Such is the unwillingness on the part of the executive to admit that it has acted *contra legem*. In the modern era, whatever must be done must be legal.

CONCLUSION

The Constitution was framed against a backdrop of executive impotence. State executives lacked generic emergency powers, temporary or otherwise. Similarly, the Commander in Chief of the Continental Army lacked crisis powers, *ex officio*. Legislatures could remedy such impotence with statutory delegations, some of which were so sweeping that the resulting executives were seen as dictators. When statutory and constitutional authority failed to supply legal authority, executives were supposed to act illegally and hope for a legislative indemnification.

The Constitution created a far more powerful executive than any that had existed in independent America. The executive, being almost wholly unitary, was built for speed and vigor. Many remarked that the Constitution's Presidency resembled a monarchy, in all but name. Perhaps its monarchical features might serve the nation well in crises.

Yet with respect to emergency powers, the Constitution mirrored prevailing sensibilities and changed little. Like the state constitutions before it, the federal Constitution did not grant a broad array of emergency powers to the President. He could pardon, appoint officers during a Senate recess, and summon Congress on extraordinary occasions. He could not take property, suspend habeas corpus, declare martial law, expand the army, or expend unappropriated funds. The President was only slightly less imbecilic in times of crisis than his state predecessors.

With some exceptions, this was the prevailing sense of the Constitution until the Civil War. No jurist or treatise writer before the Civil War imagined that the President could suspend habeas corpus or declare martial law. But military men were more imaginative when it came to their own powers. Andrew Jackson, and a string of others, imposed military justice upon civilians and ruled by military decree. Their superiors frowned on such actions, denying their legality. The harshest (and clearest) lesson came from James Madison, who admonished Jackson that only Congress could suspend habeas corpus and declare martial law.

2013]

Imbecilic Executive

1433

Abraham Lincoln was not a military man. Though he served in the militia for about two months, during the Blackhawk War, he never saw any fighting. Nonetheless, he adopted the arguments of the military men when he imposed an embargo, suspended habeas corpus, imposed martial law, and seized private property. Lincoln (as well as his many able defenders) was involved in a form of creative destruction: obliterating narrow conceptions of executive crisis power and replacing them with broader theories.

The modern crisis regime that Lincoln bequeathed to us has three legs. The first two legs are broad and indefinite constitutional power for the executive in times of crisis and extensive statutory delegations that come into force during crises. These first two legs justify broad executive action even as they are in tension with each other. The last leg of the stool is an extreme reluctance to admit illegality, a tendency that predictability leads executives to press rather sweeping readings of their constitutional and statutory authorities.

Thus, with the passage of time, our nation's highest office has evolved from a somewhat imbecilic executive to a muscular one that enjoys extensive and undetermined crisis authority. On most accounts, the Presidency is still not omnipotent. But today the federal executive is somewhat closer to enjoying something like a Lockean prerogative to do what he deems necessary in times of crisis.

