

States of Emergency: The History and Legal Ramifications

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Emergencies happen globally on a daily basis, underscoring the pivotal role of governmental responses in managing these situations. The extent of a government's ability, specifically its Executive branch, to respond to an emergency can be a determining factor in disaster mitigation and future government stability. In the US, the power of the executive branch has been a longstanding issue, evident in the founders' aim to limit it and prevent a new monarchy in the Early Republic. Despite their intentions, this article highlights the significant increase of executive branch authority during times of emergencies. To explore the historical and legal foundations of State of Emergency jurisprudence, this article details how this concept developed across Europe, but more specifically in the United States. Lastly, further reforms to the doctrine as it is practiced in the United States are proposed.

I. Introduction

Pages upon pages of history books describe catastrophes: wars, disease, famine, and terror. Human suffering is thereby processed, recounted, cataloged, and taxonomized. This article addresses what often becomes occluded in retrospection, namely the immediate response to emergencies, rather than the eventual outcome. The expansion of governmental power in the aftermath of a disaster is the subject of this investigation.

The concept of a “State of Emergency” has existed for centuries without consensus on the limit of government power

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during such times.⁸⁹ Cornell’s Legal Dictionary defines the legal concept as “a government declaration stating that because of some crisis, the normal workings of political and social life are suspended in the given jurisdiction. A state of emergency may alter government operations, order specific action by individuals, and suspend regular civil rights.”⁹⁰

States of Emergency have recently come to the forefront of the news cycle due to events such as the COVID-19 Pandemic, the war in Ukraine, and, most recently, the October seventh terror attacks by Hamas militants on Israel. This article addresses how the U.S. and European countries have grappled with questions such as: what constitutes a State of Emergency, which constitutional procedures and personal liberties can a government suspend, and how long can a State of Emergency last? This article also proposes a mechanism by which Congress can place necessary limits on executive power during States of Emergency and proposes narrowing the definition of the concept.

II. Historical Perspective

A. Europe

Modern invocations of States of Emergency originate from the legal traditions of democracies in nineteenth-century Western Europe.⁹¹ The concept traces back to the ancient Roman practice of designating an *auctoritas*, a dictator, in times of external attack or rebellion within the republic.⁹² The *auctoritas* had the power to grant or suspend laws and operate

⁸⁹ Scott P Sheeran, *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34.

⁹⁰ State of emergency | Wex | U.S. Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/state_of_emergency (last visited Nov 26, 2023).

⁹¹ Scott P Sheeran, *supra* note 89.

⁹² *Id.*



outside the *potesta* (the normal binding power of law).⁹³ In the eighteenth and nineteenth centuries, European states began to codify this Roman tradition into modern law.

The French Revolution constituted the most prominent European event that worked to establish the modern understanding of States of Emergency. The French revolutionaries proposed the idea of suspending the Constitution in response to a great danger.⁹⁴ Subsequently, in 1848, the Second French Republic created a new article for its Constitution, which formalized the definition of a “state of siege.”⁹⁵ The post-Enlightenment definition was, therefore, born in a short-lived democratic historical moment.

Historically, States of Emergency have often been swiftly followed by dictatorships, human rights abuses, and the breakdown of constitutional government. The twentieth century saw a proliferation of States of Emergency, especially during the World Wars.⁹⁶ Governments worldwide took extraordinary measures, from rationing to censorship, to address wartime challenges.⁹⁷ However, this era also witnessed

⁹³ Botha, Marc “Review: Untitled”, Review of: State of Exception by Giorgio Agamben, Kevin Attell, *Oxford Literary Review*, vol. 31, No. 2, pp. 255-259.

⁹⁴ Giordanengo, Davide “The State of Exception”, June 21, 2016, <https://www.e-ir.info/pdf/63909>.

⁹⁵ The Second French Republic is defined by Britannica as the republic established after the revolution which lasted from 1848-1852; Agamben, Giorgio, “The State of Exception” (Kevin Attell trans., Univ. of Chi. Press 2005) (2003). Article 14 of the Constitution granted the government the power to “make the regulations and ordinances necessary for the execution of the laws and the security of the State” and the Acte Additional to the Constitution first mentioned a “state of siege”; Sheeran, Scott P. “Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics” *Michigan Journal of International Law*, vol. 34, Issue 3, pp. 491-557.

⁹⁶ Arend Lijphart, *Emergency Powers and Emergency Regimes: A Commentary*, 18 *ASIAN SURVEY* 401 (1978).

⁹⁷ *Id.*



State of Emergency misuse, with some regimes using the doctrine to justify the suppression of political opposition.⁹⁸ Notably, the breakdown of constitutional government in the Weimar Republic, Germany 1918, was partly due to the abuse of States of Emergency declarations.⁹⁹ Article 48 of the Weimar Constitution described the emergency powers of the president, stating that the president protects against great threats with “measures necessary to reestablish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights.”¹⁰⁰ The drafters of the Weimar Constitution attempted to prevent a situation in which a ruler could take advantage of the State of Emergency laws, but these attempts failed. Article 48 was invoked approximately 250 times throughout the relatively brief lifetime of the Weimar Republic.¹⁰¹ Once Adolf Hitler and the Nazi Party rose to power, they suspended all articles of the Weimar Constitution pertaining to personal liberties.¹⁰² Weimar politicians had made a major mistake—they had “normalized” emergencies. It was all the easier therefore for Nazi’s to end Constitutional norms entirely.

B. *The United States*

The United States played a key role in establishing States of Emergency as a feature in the modern rule of law. Since President Abraham Lincoln’s administration and his suspension of *habeas corpus* during the Civil War, U.S. history

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ The Reich Constitution of August 11th 1919 (Weimar Constitution) with Modifications, PSM DATA, <http://www.zum.de/psm/weimar/weimar-vve.php>.

¹⁰¹ Sheeran, Scott P. “Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics” *Michigan Journal of International Law*, vol. 34, Issue 3, pp. 491–557.

¹⁰² *Id.*



is riddled with instances of Executive use of emergency powers.¹⁰³

The Alien and Sedition Acts of 1798 were a defining moment in the codification of emergency powers. Although a formal State of Emergency was not declared at the time, the United States stood on the brink of the Quasi-War with France, a limited naval conflict centered on American trading rights.¹⁰⁴ The Federalist government of the time, afraid the Democratic-Republic criticism of Federalist policies would endanger the war effort and that ‘aliens’ who were subjects of foreign enemies would sympathize with the French during the conflict, passed four laws known as the Alien and Sedition Acts.¹⁰⁵ The president at the time, John Adams, criminalized criticism of his party through these acts, specifically through The Sedition Act.¹⁰⁶ Freedom of the press was the main freedom curtailed by the Sedition Act which stated that: “if any

¹⁰³ Habeas corpus ad subjiciendum | Wex | U.S. Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/habeas_corpus_ad_subjiciendum (last visited Nov 28, 2023)., defined as ““that you have the body to submit to” in Latin. It is also known as the “Great Writ” and is a writ that is directed to someone detaining another person to inquire as to the legality of the detention; Declared National Emergencies Under the National Emergencies Act | Brennan Center for Justice, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> (last visited Nov 28, 2023).

¹⁰⁴ The Quasi-War with France (1798 - 1801), USS Constitution Museum, <https://ussconstitutionmuseum.org/major-events/the-quasi-war-with-france/> (last visited Dec 6, 2023).

¹⁰⁵ Alien and Sedition Acts (1798), National Archives (2021), <https://www.archives.gov/milestone-documents/alien-and-sedition-acts> (last visited Dec 6, 2023).

¹⁰⁶ The Alien and Sedition Acts (1798) | Constitution Center, <https://constitutioncenter.org/the-constitution/historic-document-library/detail/the-alien-and-sedition-acts-1798> (last visited Dec 6, 2023); Avalon Project - An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States, https://avalon.law.yale.edu/18th_century/sedact.asp (last visited Dec 6, 2023).



person shall write, print, utter or publish [...] any false, scandalous and malicious writing or writings against the government of the United States, [...], or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, [...] shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.”¹⁰⁷ This is a clear restriction of First Amendment free speech and an expansion of executive power during a time of national emergency, although it was not considered as such by President Adams in 1798. These Acts and the subsequent Sedition Act Trials led to a sharp increase in criticism of the Federalist Party and contributed to their defeat in 1800.¹⁰⁸ When Thomas Jefferson won the presidency in 1800, the Acts expired and he pardoned those convicted under them.¹⁰⁹

There were other instances in the past 200 years which include the suspension of *habeas corpus* under President Lincoln, the Espionage Act of 1917 and the amendment to Title I of the Act - the Sedition Act of 1918 which curtailed free speech rights during war-time.¹¹⁰ Additionally, President Franklin Delano Roosevelt declared an Unlimited National Emergency in May of 1941.¹¹¹

¹⁰⁷ *Id.*

¹⁰⁸ Alien and Sedition Acts (1798), *supra* note 105.

¹⁰⁹ The Alien and Sedition Acts (1798) | Constitution Center, *supra* note 106.

¹¹⁰ Espionage Act of 1917 and Sedition Act of 1918 (1917-1918) | Constitution Center, National Constitution Center – constitutioncenter.org, <https://constitutioncenter.org/the-constitution/historic-document-library/detail/espionage-act-of-1917-and-sedition-act-of-1918-1917-1918> (last visited Feb 11, 2024).

¹¹¹ Radio Address Announcing an Unlimited National Emergency. | The American Presidency Project, <https://www.presidency.ucsb.edu/documents/radio-address-announcing-unlimited-national-emergency> (last visited Feb 11, 2024).



In 1976, the U.S. Congress passed the National Emergencies Act (NEA), which created a time limit on existing declared States of Emergency.¹¹² It also included termination methods for a State of Emergency, such as the “automatic termination of national emergency upon its anniversary every year, if the President does not act to renew it.”¹¹³ The NEA aimed to formalize the process of declaring and renewing the State of Emergency.¹¹⁴

III. Legal Framework

A. Constitutional Provisions

Modern constitutions often contain provisions for States of Emergency.¹¹⁵ For instance, the U.S. Constitution allows for the suspension of *habeas corpus* “when in Cases of Rebellion or Invasion the public safety may require it.”¹¹⁶ This principle was called into question in 2001 after the terror attacks on September eleventh, 2001. On November twelfth, 2001, President George W. Bush issued a military order to protect the United States from terrorist attacks, terrorists, or those in any

¹¹² 50 USC Ch. 34: NATIONAL EMERGENCIES, <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter34&edition=prelim> (last visited Nov 26, 2023).

¹¹³ Emergency powers | Wex | US Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/emergency_powers (last visited Nov 26, 2023).

¹¹⁴ Michael Greene, *National Emergencies Act: Expedited Procedures in the House and Senate*, February 21, 2023.

¹¹⁵ States of Emergencies: Part I, HARVARD LAW REVIEW, <https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/> (last visited Mar 5, 2024). “Over 90% of constitutions in force today include emergency clauses that allow the government to step outside of the ordinary constitutional framework and to take actions that would not otherwise be permitted.”

¹¹⁶ U.S.Const., Article 1, Section 9.



way affiliated or suspected to be affiliated with Al-Qaeda.¹¹⁷ The government could detain and try those suspected of being affiliated with Al-Qaeda without applying “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”¹¹⁸ This order led to a landmark case, *Hamdan v. Rumsfeld*, in 2006, which raised questions about the limits on Executive power.¹¹⁹

In the case, Salim Ahmed Hamdan was captured by militia forces in Afghanistan and turned over to the U.S. military, after which he was transferred to the Guantanamo Bay military detention center.¹²⁰ In April of 2004, Hamdan petitioned for a writ of *habeas corpus* in federal district court. However, before the court could rule on his petition, a military tribunal designated him as an enemy combatant.¹²¹ The district court granted Hamdan’s petition and ruled that he must be allowed a hearing to determine his status as a prisoner of war under the Third Geneva Convention before he could be tried by a military tribunal.¹²² This decision was reversed by the Circuit Court of Appeals for the District of Columbia with the rationale that the Geneva Convention could not be enforced by federal courts and that the military tribunals were authorized by Congress and were therefore not unconstitutional.¹²³

The Supreme Court held, in a 5-3 decision, that the Bush Administration’s attempt to try a prisoner of war (the plaintiff) by a military commission was outside the bounds of

¹¹⁷ President Issues Military Order, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html> (last visited Nov 26, 2023).

¹¹⁸ *Id.*

¹¹⁹ *Hamdan v. Rumsfeld*, Oyez, <https://www.oyez.org/cases/2005/05-184> (last visited Nov 28, 2023).

¹²⁰ Peter J. Spiro, *Hamdan v. Rumsfeld*, 126 *S.Ct.*2749, 100 *Am. J. Int. Law* 888 (2006).

¹²¹ *Hamdan v. Rumsfeld*, *supra* note 119.

¹²² *Id.*

¹²³ *Id.*



executive powers and violated the constitutional rights of the plaintiff.¹²⁴ This decision imposed a clear limit on emergency executive authority. However, this constraint was soon disregarded when Congress passed the Military Commissions Act (MCA) in 2006, eliminating the right of *habeas corpus* to prisoners at Guantanamo Bay and other detention facilities.¹²⁵

B. Powers Granted to Government during Emergencies

The United States Constitution does not detail any extraordinary executive powers in times of emergency or war. However, many scholars believe that the Framers implied these powers by creating an Executive Branch that is more efficient than the Legislative Branch.¹²⁶ For this reason, Congress passed the NEA, granting the president 123 statutory powers during a declared emergency—ensuring that during a national emergency, decisions could be made quickly and efficiently to protect the nation.¹²⁷ Seven years later, the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha* emphasized a check to emergency executive power by restating the traditional position that Congress can not veto an administrative decision with a majority vote, a two-thirds

¹²⁴ Office of the Solicitor General | *Hamdan v. Rumsfeld* - Brief (Merits) | United States Department of Justice, (2014), <https://www.justice.gov/osg/brief/hamdan-v-rumsfeld-brief-merits> (last visited Nov 27, 2023); *Hamdan v. Rumsfeld*, United States Reports, June 29, 2006; NCC Staff, “Hamdan v. Rumsfeld: Applying the Constitution to Guantánamo prisoners”, June 19, 2017.

¹²⁵ Legal Resources | Intelligence Committee, <https://www.intelligence.senate.gov/laws/military-commissions-act-2009-title-xviii-national-defense-authorization-act-fiscal-year-2010> (last visited Nov 28, 2023).

¹²⁶ Emergency powers, *supra* note 113.

¹²⁷ Executive Powers Are a National Emergency - Harvard Political Review, <https://harvardpolitics.com/executive-powers-emergency/> (last visited Nov 26, 2023).



majority is required in order to override executive power.¹²⁸ Although this ruling established a greater balance between Executive and Legislative powers, it still did not impose a significant enough limit of Executive power. This “legislative veto” that was reinforced for the NEA following the *Chadha* decision, has led to a situation where it is nearly impossible to collect enough votes to block declarations of emergencies.¹²⁹

Individual states in general have their own separate laws relating to States of Emergency. In times of crisis, the governor has the power to declare a State of Emergency, at which point executive powers are increased. However, state legislatures generally have relatively strong checks on executive power, even in exigent circumstances.¹³⁰ For example, state laws on executive authority cannot be changed by an executive order, and legislatures can create firm limits on executive power.¹³¹ These widespread checks demonstrate that bulwarks against growing executive power are a crucial

¹²⁸ *Immigration and Naturalization Service v. Chadha*, United States Reports, June 23, 1983. This case called into question a section of the Immigration and Nationality Act which allowed either House of Congress to suspend the deportation rulings of the U.S. Attorney General. The Constitutional question was whether the separation of powers doctrine was violated by authorizing a veto of executive power from only one House of Congress. The decision was 7-2, the Court held that the Immigration and Nationality Act did in fact violate the Constitution. The consequences of this were that Congress essentially needed a two-thirds majority to override executive power because a simple majority in both Houses would be vetoed by the President.

¹²⁹ Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—And What to Do About It, N.Y.U. REVIEW OF LAW & SOCIAL CHANGE (2020), <https://socialchangenyu.com/harbinger/trust-the-process-how-the-national-emergency-act-threatens-marginalized-populations-and-the-constitution-and-what-to-do-about-it/> (last visited Mar 5, 2024).

¹³⁰ Legislative Oversight of Emergency Executive Powers, <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> (last visited Nov 26, 2023).

¹³¹ *Id.*



component of preserving the necessary balance of power between the arms of the government of a constitutional republic.

IV. Proposed Reforms

During times of crisis, a fine line must be walked by the Executive branch as to the extent of its powers. However, without proper limits and regulations on Executive emergency powers, there is no guarantee that the Executive branch *will* limit its powers.

“As long as the two elements [law and life] remain correlated yet conceptually, temporally, and subjectively distinct ... their dialectic [...] can nevertheless function in some way. But when they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, the juridico-political system transforms itself into a killing machine.”¹³²

The dangers of an unlimited government cannot be understated. Our current system allows for a situation in which the president seizes considerable power under the guise of protecting the nation against an emergency.¹³³ To address this problem, Congress ought to create a set definition, and/or series of conditions, for declaring a State of Emergency. This would remedy the potential concern that the Executive branch can declare an emergency during a non-emergent situation. However, defining such a broad concept is a difficult feat and Congress would have to create and pass a law that defines and

¹³² Agamben, Giorgio, “The State of Exception” (Kevin Attell trans., Univ. of Chi. Press 2005) (2003), 86.

¹³³ Executive Powers Are a National Emergency - Harvard Political Review, *supra* note 127.



narrows emergency powers. Some disasters are completely unexpected and cannot be anticipated in such a way. In such a case, there should be a condition that Congress must approve of the determination of a State of Emergency. This would prevent unnecessary renewals of States of Emergency and ensure that our rulers cannot take liberties with emergency powers.

V. Conclusion

A potentially dangerous situation is created when the Executive Branch is granted an exceeding amount of power during any national emergency. The argument that this discretion increase is necessary as it expedites a usually lengthy decision-making process during circumstances in which time is often finite, willfully ignores the threat of unrestrained presidential power. Regardless of conditions, unchecked executive power is a threat to democracy.

Delineating between necessary and superfluous power in times of calamity is a difficult job, but one the American legislature must take head-on, considering the history of rampant abuse of emergency executive power.¹³⁴ The 100-plus powers granted to the president during a declared State of Emergency include giving the president the power to deploy U.S. troops to any foreign country, take over domestic communications, and seize American bank accounts.¹³⁵ These powers are enormously broad and, without proper oversight,

¹³⁴ States of Emergencies: Part I, HARVARD LAW REVIEW, <https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/> (last visited Mar 5, 2024).

¹³⁵ Elizabeth Goitein, Joseph Nunn, “Emergency Powers”, Brannan Center for Justice, <https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers>.



can easily be abused by over-ambitious politicians.¹³⁶ Although the NCA exists as a sort of safeguard, it is not strong enough to place adequate restrictions on emergency executive powers—mainly because it fails to define what qualifies as an emergency.¹³⁷ The NCA grants a president the power to declare a State of Emergency simply by signing an executive order. Although the law creates a semi-time limit for these powers, it allows the president to renew the State of Emergency status indefinitely.¹³⁸

The checks and balances put in place by the founding fathers must be protected from erosion. Separation of powers is key to maintaining a limited executive branch, without which there is a danger of dictatorial power. The current legislative framework, while designed with the intention of swift and decisive action in times of crisis, also fails to ensure an equilibrium between executive agility and legislative oversight. Such a balance is crucial not only for safeguarding democratic principles, but also for maintaining public trust in governmental institutions. The development and implementation of stricter guidelines and definitions of States of Emergency would serve as a vital step toward mitigating the risk of abuse. The ultimate goal should be the creation of a framework that allows for the effective management of crises while simultaneously protecting the democratic freedoms and liberties of the United States.

¹³⁶ Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—And What to Do About It, *supra* note 129.

¹³⁷ *Id.*

¹³⁸ 50 USC Ch. 34: NATIONAL EMERGENCIES, <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter34&edition=prelim> (last visited Nov 26, 2023).

