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Fortifying American Emergency Power: A Multinational Comparison to Contain Crises

Courtney DeVore

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Fortifying American Emergency Power: A Multinational Comparison to Contain Crises

ABSTRACT

Countries will inevitably face emergencies. Historically, governments have exercised immense power in response to emergencies. For responses to be quick and effective, emergency power operates outside of the normal rule of law. While disbanding the normal rule of law may be necessary from time to time to protect national security, the unilateral ability of government to take such action creates perverse incentives to abuse the power. Abuses of emergency power are found across the globe, most notably occurring in the United States recently.

In the wake of the Trump Administration, this Note seeks to identify how and why the US emergency power system failed both to protect against abuse and to assist in effective decision-making. While the Trump Administration has magnified problems with emergency power in the United States, the perverse incentives are certainly not unique to this administration or country.

This Note takes a multinational approach to the emergency power problem, identifying the most—and least—effective safeguards adopted by countries around the world. This Note then offers a solution that balances national security and individual rights. Designed for the United States, this solution provides a way for president-elect Joe Biden to yield power back to the country, a legacy that should long outlast his presidency and one that should garner bipartisan support. While US-centric, these protections are not US-specific. Other countries facing emergency power problems should also take note of the multinational comparison to implement a system that acknowledges the need for swift action during emergencies while also protecting against abuses of individual rights.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1688
II.	THE PROBLEM.....	1690
III.	THE TENSIONS POSED BY EMERGENCY POWER	1695
	A. <i>Preventing Abuses of Power</i>	1696
	B. <i>Ensuring Effective Responses to Emergencies</i>	1698
IV.	MULTINATIONAL DISCUSSION.....	1699
	A. <i>Defining the Actor Responsible for Leading Emergency Responses</i>	1700
	1. Systems in which the President Controls Most Emergency Power	1704
	2. Minister Control: Systems Empowering Ministers to Respond to Emergencies	1705
	3. Legislature Control: Systems that Require Legislative Action in Times of Emergency.....	1706
	B. <i>Codification</i>	1707
	C. <i>Availability of Judicial Review for Emergency Action</i>	1711
	D. <i>Summary of Safeguards</i>	1715
V.	SOLUTION.....	1717
	A. <i>Legislating with Specificity</i>	1718
	B. <i>Requiring Consensus Among a Multi-Member Body</i>	1720
VI.	CONCLUSION	1724

I. INTRODUCTION

Exercises of emergency power are sometimes necessary to protect national security. By temporarily suspending the normal rule of law, emergency power allows governments to rapidly respond to crises. However, the use of emergency power often comes at the expense of individual rights and liberties, especially when used outside the realm of imminent danger.¹ If wielded frequently or improperly, emergency power will erode the rule of law. It creates perverse incentives, allowing government officials to usurp the political process and

1. See ERNST-WOLFGANG BOCKENFORDE, *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances* [1978], in CONSTITUTIONAL AND POLITICAL THEORY 108, 115–121 (Mirjam Kunkler & Tine Stein eds., Thomas Dunlap trans., Oxford University Press 2017) (explaining the commonly accepted principles of emergency power).

unilaterally expand their own power at the cost of individual freedom.² Emergency power provides a quasi-legal scheme for the degradation of individual rights.

On the flip side, a failure to effectively utilize emergency power in times of crisis jeopardizes national security and human lives. When emergency power regimes lack coherence, officials may be unable, or perhaps unwilling, to use them in dire situations. The great potential of emergency powers to protect a country from an imminent, dangerous situation is eroded when government officials fail to use them effectively. The risks associated with emergency power are immense.

This problem is especially pronounced in the United States. Former President Donald Trump, in various instances, was criticized for both unjustified and ineffective uses of emergency power. He used emergency powers to build a border wall despite substantial political opposition, even within his own political party.³ His administration's response to the national emergency caused by the Covid-19 pandemic was ineffective; the response lacked coherence and was fundamentally unable to stop the spread.⁴ In both of these scenarios, President Trump's actions revealed the troubles of the US emergency power regime.

While the Trump administration revealed the problems with emergency power in the United States, the problems are not unique to the United States. This Note evaluates the form and function of emergency power systems across the globe to identify the most effective safeguards, ultimately recommending a system that protects the rule of law while also providing for effective governance in unprecedented circumstances.

This Note proceeds as follows. Part II describes the global concerns associated with emergency powers, tracing governmental responses to emergencies in various countries. These responses illustrate the challenges of emergency power structures and set the context for why reform is vital. Part III provides the framework for analyzing exercises of emergency power, describing the tension between respecting individual rights and protecting national security. Part IV discusses emergency power structures across the globe—the

2. See CLEMENT FATOVIC, *OUTSIDE THE LAW* 7–10 (Sanford Levinson & Jeffrey K. Tulis, eds., 2009) (discussing the relationship between executive and congressional power during emergencies, acknowledging that constitutional ambiguity exists).

3. Meagan Vazquez & Priscilla Alvarez, *White House Extends National Emergency on the Southern Border*, CNN (Feb. 14, 2020), <https://www.cnn.com/2020/02/13/politics/southern-border-national-emergency-continuation/index.html> [<https://perma.cc/6LJD-JAMX>] (archived Sept. 28, 2020).

4. Lori Aratani, *Oversight Report Calls Trump Administration Response to the Pandemic a "Failure,"* WASH. POST (Oct. 30, 2020), https://www.washingtonpost.com/local/trafficandcommuting/trump-coronavirus-response-failure/2020/10/29/cb58e066-1a15-11eb-82db-60b15c874105_story.html [<https://perma.cc/XC4K-9UFT>] (archived December 29, 2020).

safeguards, risks, and benefits. Part V proposes a solution to emergency power problems: specific legislation and a multi-member body that prepares for and advises on national emergencies. Taking inspiration from the German model, this Note proposes a highly codified system for emergency power that protects the rule of law in the age of modern emergencies. Part VI briefly concludes.

II. THE PROBLEM

On February 15, 2019, President Donald Trump declared a national emergency concerning the southern border of the United States.⁵ President Trump alleged that unlawful migration of criminals and gang members at the southern border presented a crisis that threatened “core national security interests and constitute[d] a national emergency.”⁶ The president acknowledged the “long-standing” problem of “large-scale unlawful migration” but claimed that the situation had worsened in recent years.⁷ The president’s declaration was pursuant to the National Emergency Act (NEA), which grants access to a variety of laws that are normally dormant.⁸ Pursuant to these laws, the president diverted funds from other departments and federal programs to construct a border wall between the United States and Mexico.⁹

The emergency declaration and subsequent diversion of funds were extremely controversial. On the campaign trail, President Trump promised to construct a border wall between the United States and Mexico at Mexico’s expense.¹⁰ He tweeted disparagingly about Mexican immigrants: “They’re bringing drugs. They’re bringing crime. They’re rapists.”¹¹ Meanwhile, Mexico continually refused to pay for the wall.¹² Once President Trump took office, he attempted to secure congressional funding for the wall.¹³ But when Congress failed to pass

5. See generally Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019).

6. *Id.* at 4949.

7. *Id.*

8. National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018); L. ELAINE HALCHIN, CONG. RSCH. SERV., REP. # 98-505, NATIONAL EMERGENCY POWERS (2020).

9. Proclamation No. 9844, 84 Fed. Reg. at 4949–50.

10. See Michael C. Bender, *How the Border Wall, Trump’s Signature Campaign Promise, Turned into a National Emergency*, WALL ST. J. (Feb. 15, 2019), <https://www.wsj.com/articles/trump-promised-to-build-that-wall-then-ran-out-of-time-and-options-11550262854> [<https://perma.cc/K6W7-BEUG>] (archived Sept. 28, 2020) (describing President Trump’s statements).

11. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult/> [<https://perma.cc/7UBC-RWEC>] (archived Sept. 28, 2020).

12. See Bender, *supra* note 10 (explaining the timeline of the emergency declaration and noting the challenges with funding).

13. *Id.*

legislation to build the wall, despite Republican control of both houses for two years, President Trump threatened to declare a national emergency to start construction—a threat that he followed through on.¹⁴

Given this context, many Americans felt that President Trump declared a national emergency to usurp the political process and legislate his animosity against Mexico, as well as against Hispanic and Latino Americans.¹⁵ In addition to experiencing political and emotional dissatisfaction with the president's decision, many Americans were stunned that the president possessed the unilateral power to legislate his own policy preferences so easily.¹⁶ Congress promptly passed a resolution to terminate the emergency declaration, but President Trump vetoed the resolution.¹⁷ Congress lacked the two-thirds support necessary to overturn the veto, so the state of emergency remained,¹⁸ and President Trump continued to possess broad emergency powers.¹⁹ Because President Trump acted under congressional authorization through the NEA, litigation was futile from the start.²⁰

14. See David Hopkins, *Why Trump Didn't Build the Wall When Republicans Controlled Congress*, WASH. POST (Jan. 25, 2019), <https://www.washingtonpost.com/outlook/2019/01/25/why-trump-didnt-build-wall-when-republicans-controlled-congress/> [<https://perma.cc/GGW3-9V7W>] (archived Dec. 29, 2020); see also Bender, *supra* note 10 (explaining the timeline for the funding dispute).

15. See Anthony Romero, *Trump's 'Emergency' Declaration is Illegal*, AM. CIV. LIBERTIES UNION (Feb. 20, 2019), <https://www.aclu.org/blog/civil-liberties/executive-branch/trumps-emergency-declaration-illegal> [<https://perma.cc/C5FK-8RV2>] (archived Sept. 28, 2020) (describing the lack of legal basis for the emergency declaration and the corresponding hostility that the president is promoting).

16. See Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html> [<https://perma.cc/L433-JSAW>] (archived Sept. 7, 2020) (detailing the public concern surrounding the emergency declaration).

17. *H.J.Res. 46: Relating to a National Emergency Declared by the President on February 15, 2019*, American Immigration Lawyers Association [AILA], <https://www.aila.org/advo-media/whats-happening-in-congress/pending-legislation/hjres-46-national-emergency-february-15-2019> (last visited Nov. 4, 2019) [<https://perma.cc/K3WL-FG5J>] (archived Sept. 7, 2020) [hereinafter *AILA*].

18. *Id.*

19. See Tackett, *supra* note 16 (detailing the consequences of Congress' failure to pass the resolution barring the declaration).

20. Vazquez & Alvarez, *supra* note 3; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 636–37 (1952) (holding that the president's power is weakest when acting in opposition to Congress). Some litigants argue that the NEA is a violation of the non-delegation doctrine, although that doctrine is largely non-existent today. See generally *Clinton v. New York*, 524 U.S. 417 (1998) (the only modern non-delegation case, holding that some guiding standards are required for congressional delegations). There is a possibility that the current Supreme Court may reconsider the nondelegation doctrine. For example, see *Gundy v. United States*, 139 S.Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (suggesting that the intelligible principle doctrine is insufficient).

Thousands of miles away in France, emergency declarations also have a history of controversy. In 1961, the French president declared an emergency during the Algerian war.²¹ The escalated crisis arguably existed for only four days but the president exercised emergency powers for five months.²² The emergency powers increased police power and circumvented normal rules.²³ In 2015, the French president declared a national emergency related to a terrorist attack; the government then conducted intrusive searches and imposed restrictive house arrest requirements on Muslim individuals in a discriminatory way.²⁴ Beyond allegations of discrimination, critics also maintain that the actions taken pursuant to the emergency declaration were too expansive, eroding the rule of law.²⁵ Law enforcement conducted 3,200 searches authorized through the emergency declaration, which many argue was a disproportionate response to the stated emergency.²⁶

The national emergency declarations at the US southern border and in France are examples of leaders harnessing emergency powers beyond what is necessary to respond to an emergency situation. The border wall is an extended project that will require continued funding and support—placing America within a state of emergency for an extended period of time.²⁷ The crisis in France was handled in a discriminatory and overly-expansive way.²⁸ These exercises of power are contrary to the notion that emergency power should be exercised in discrete moments with the normal state of affairs resuming as soon as possible.²⁹ These emergency declarations demonstrate the broad danger with large delegations of emergency power—that leaders may unilaterally usurp the legislative process to enhance their own power.

A little over one year after President Trump's emergency declaration at the Southern Border, he declared an emergency once

21. CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS* 103–04 (2005).

22. *Id.* at 103.

23. *Id.* at 103–05.

24. *France: Abuses Under State of Emergency*, HUMAN RIGHTS WATCH (Feb. 13, 2016, 7:01 PM), <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency> [<https://perma.cc/Z5PP-UXF2>] (archived Sept. 28, 2020).

25. *See id.* (“The police have used their new emergency powers in abusive, discriminatory, and unjustified ways.”).

26. *Id.*

27. *See* CONSTRUCTION DIVE EDITORS, *Building the Wall: A Construction Timeline*, CONSTRUCTION DIVE (April 4, 2019), <https://www.constructiondive.com/news/building-the-wall-a-construction-timeline/551050/> [<https://perma.cc/Z92L-UN4Y>] (archived Sept. 7, 2020) (detailing the anticipated length of the border wall construction). The strategy of using emergency declarations to expand executive power indefinitely is not unique to President Trump. In response to terrorism and the possibility of an emergency, then Vice President Dick Cheney said that the struggle “may never end.” FATOVIC, *supra* note 2, at 261.

28. HUMAN RIGHTS WATCH, *supra* note 24.

29. *See* BOCKENFORDE, *supra* note 1, at 116–17 (explaining the basic restraints on emergency power).

more—this time in response to the Covid-19 pandemic.³⁰ While China had been battling Covid-19 for months, the Trump Administration downplayed the risk of global spread.³¹ Before long, countries across the globe began taking measures to contain the virus.³² Some countries legally mandated lockdowns, others—including the United States—simply encouraged their citizens to stay home.³³ President Trump did not coordinate a national response to the pandemic, and the US response to Covid-19 can now be characterized as an utter failure, with thousands of deaths a week.³⁴ For a country with such vast emergency power and a president unafraid to use such power in politically convenient moments, the United States failed to effectively manage the virus, support healthcare needs, and protect the citizenry.

Every day, the news reports another way in which the Trump Administration failed its people.³⁵ For example, health officials can muster no reasoning for why the Trump Administration refused to purchase a sufficient stock of vaccines from one manufacturer, even when given multiple opportunities to do so.³⁶ As President Trump approaches his final days in office and continues his failed Operation Warp Speed, other countries have bought up the vaccines and states struggle to implement an effective vaccination rollout.³⁷ The US emergency power system is not only ripe for abuse—seen through the Southern Border—this Note argues that it is also ineffectual—seen through the failed response to the Covid-19 pandemic.

A sharp contrast exists across the globe. In New Zealand, Prime Minister Jacinda Ardern imposed significant emergency restrictions in

30. See generally Proclamation No. 9994, 85 Fed Reg. 15337 (Mar. 13, 2020).

31. Juana Summers, *Timeline: How Trump Has Downplayed the Coronavirus Pandemic*, NPR (Oct. 2, 2020), <https://www.npr.org/sections/latest-updates-trump-covid-19-results/2020/10/02/919432383/how-trump-has-downplayed-the-coronavirus-pandemic> [https://perma.cc/CPE9-ASCJ] (archived Dec. 29, 2020).

32. *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), <https://www.who.int/news/item/29-06-2020-covid-timeline> [https://perma.cc/6LDS-6RUN] (archived Dec. 29, 2020) [hereinafter WHO].

33. See *id.* (describing the global response to Covid-19); Summers, *supra* note 31 (contrasting the US response with the global response).

34. *The U.S. Passes 4 Million Cases in November Alone, Doubling October's Tally*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/live/2020/11/28/world/covid-19-coronavirus> [https://perma.cc/94C9-JFS3] (archived Dec. 29, 2020) [hereinafter TIMES].

35. See *id.* (tracking the timeline of cases and deaths in the United States).

36. Sharon LaFraniere, Katie Thomas & Noah Weiland, *Trump Administration Passed on Chance to Secure More of Pfizer Vaccine*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/us/politics/trump-pfizer-coronavirus-vaccine.html> [https://perma.cc/J7KE-LLA9] (archived Dec. 29, 2020).

37. See *id.* (describing the Trump Administration's failure to purchase needed vaccines); see also Tucker Higgins, *Funding for Vaccine Distribution at Stake in the Push for a New Covid Relief Bill*, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/coronavirus-vaccine-distribution-money-at-stake-in-covid-relief-talks.html> [https://perma.cc/WPH6-KCYB] (archived Dec. 29, 2020) (explaining states' struggles with funding for vaccination rollout).

response to Covid-19.³⁸ By utilizing large grants of statutory emergency power—like President Trump at the US southern border—Ardern required nearly everyone to stay at home and imposed penalties for noncompliance.³⁹ The Civil Defence Emergency Management Act 2002 granted Ardern powers of requisition, the power to close roads, and the power to direct people to stop doing activities substantially contributing to the emergency.⁴⁰ While Ardern's use of the Civil Defence Emergency Management Act may have felt extreme at the time, perhaps pushing the boundary of acceptable emergency power, New Zealand is thriving today as the majority of the rest of the world struggles to contain the pandemic.⁴¹

New Zealand's pandemic response demonstrates that exercises of emergency power are difficult to evaluate *ex ante*. Other countries, such as the United States, should not respond to abuses of emergency power by shutting down all avenues for swift and effective responses. Ardern's exercise of immense power—in response to an imminent crisis and with her country's support—has allowed the country to return, generally, to the normal state of affairs and rule of law. But those same powers may not have been effective in other countries and perhaps even subject to abuse.

Nevertheless, the problems and risks associated with emergency power affect countries across the globe. While particularly relevant in the United States today, the concerns are not unique to President Trump or to the US system.⁴² This Note proceeds by discussing the tensions posed by emergency power and then analyzing emergency power regimes across the globe.

38. Michael G. Baker, Nick Wilson & Andrew Anglemyer, *Successful Elimination of Covid-19 Transmission in New Zealand*, 383 NEW ENGL. J. MED. E56(1), e56(1)–(3) (2020).

39. See Kelly Buchanan, *New Zealand: New COVID-19 Public Health Response Legislation Enacted*, LIBRARY OF CONGRESS (May 28, 2020), <https://www.loc.gov/law/foreign-news/article/new-zealand-new-covid-19-public-health-response-legislation-enacted/> [<https://perma.cc/YPB2-T2TK>] (archived Dec. 29, 2020) (describing New Zealand's response to Covid-19).

40. *Id.*

41. See Baker, Wilson & Anglemyer, *supra* note 38 (describing New Zealand's effective elimination in response).

42. See Jordan Fischer, *Presidents Have Declared Emergencies 60 Times Since 1976—but Trump's Is Unprecedented*, WUSA (Feb. 14, 2019), <https://www.wusa9.com/article/news/local/dc/presidents-have-declared-emergencies-60-times-since-1976-but-trumps-is-unprecedented/65-6d957d8f-c534-43dd-9d31-af2844a2c6e1> [<https://perma.cc/Z5QY-UBNQ>] (archived Sept. 7, 2020) (detailing historic exercises of emergency power in the United States, with President Clinton declaring eighteen emergencies during his presidency).

III. THE TENSIONS POSED BY EMERGENCY POWER

Emergency power can be an effective mechanism for containing crises by facilitating swift alterations of the normal state of affairs. It can be used to quickly stop a crisis before it escalates, largely benefitting society. But it comes at a cost—emergency power entrusts individuals to rewrite basic laws, a job traditionally reserved for legislatures and requiring great consensus.⁴³ Trustworthy individuals, especially when possessing a deep understanding of and care for their country and the crisis, can utilize emergency power to shorten the extent and degree of a crisis.⁴⁴ Prime Minister Jacinda Ardern did just this in response to Covid-19. The New Zealand government, under Ardern's command, was able to utilize existing law to rapidly control the spread of the pandemic. New Zealand controlled the virus in a matter of months.⁴⁵

However, trustworthy individuals with a deep understanding and commitment to their country, or even effective government actors for that matter, are not guaranteed. The emergency power structures that allow for swift, unilateral action are ripe for abuse. In the United States, President Donald Trump declared a national emergency at the southern border, unrelated to an imminent crisis, as a tool to implement a policy promise—a border wall.⁴⁶ And when a true crisis arose—Covid-19—President Trump failed to effectively utilize existing law to contain it.⁴⁷

These two responses, contrasted to one another, caution against hasty judgment when redesigning an emergency power system. The existence of an effective response in New Zealand, under the leadership of a trustworthy prime minister, ought not suggest that all countries adopt that system. The problems in the United States, under the leadership of a deceitful president, ought not suggest that emergency power be eliminated entirely.

Instead, the divergent responses should inform the analysis of emergency power systems. Emergency power can protect a nation, but it can also be abused and misused—either to expand power at the cost of individual rights or by failing to appropriately respond to novel emergencies. This Part discusses the goals of emergency power

43. For example, in the United States, the constitution protects basic rights, such as the right to travel. Laws restricting such rights face strict scrutiny at the Supreme Court. See *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that Tennessee may not impose a durational residency requirement on voting as such a requirement does not further a compelling state interest justifying its intrusion on the right to travel).

44. See FATOVIC, *supra* note 2, at 5–6 (discussing the value of virtue in leaders).

45. See Baker, Wilson & Anglemeyer, *supra* note 38.

46. See Bender, *supra* note 10 (describing how President Trump's policy promise of a border wall was funded through a national emergency declaration).

47. See TIMES, *supra* note 34 (documenting the ways in which the Trump Administration has failed to respond to Covid-19).

systems and analyzes how best to prevent abuses of power and ensure effective responses to emergencies.

A. Preventing Abuses of Power

In times of emergency, liberal democracies face a tension between respecting individual rights and protecting national security.⁴⁸ To respect individual rights, liberal democracies promulgate rules in advance and seek to prevent consolidation of power.⁴⁹ These safeguards slow down decision-making and demand consensus across government. But emergencies require swift lawmaking, which entails suspending the normal legal regime from time to time.⁵⁰ These situations pose a dilemma for liberal democracies in a variety of ways.

First, liberal democracies protect individual liberties by requiring the government to act within the law in a generally predictable manner.⁵¹ Supporters of liberal democracy oppose discretionary lawmaking because it erodes individual rights, which are central to democracy.⁵² To encourage predictable lawmaking, liberal democracies promulgate impersonal rules in advance. This system limits government officials' ability to increase their own power at the direct cost to individual rights by reducing *ad hoc*, discretionary, and arbitrary rulemaking.⁵³

Yet, rigid adherence to impersonal laws can render a society unable to protect itself in unforeseen circumstances.⁵⁴ Without such protection, the value of rights may be eroded. Governments may need to wield discretionary powers from time to time to adequately respond to crises. In those instances, temporary restraints on individual rights can be necessary for long-term protection.⁵⁵ Nevertheless, these instances are ripe for abuse.

For example, the government may restrict movement in response to an emergency, perhaps a travel ban restricting travel to and from certain states. If this occurred once for a limited amount of time, the benefit to national security may outweigh any infringement on individual rights. Perhaps the states from which travel is banned lack effective security screening systems and the ban expires promptly after

48. FATOVIC, *supra* note 2, at 3–4.

49. *Id.*

50. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 34–40, 60 (Cambridge University Press, 2006) (describing the challenges emergencies pose to the rule of law).

51. FATOVIC, *supra* note 2, at 3–4.

52. *Id.*

53. See *id.* (proposing solutions to arbitrary rulemaking).

54. See DYZENHAUS, *supra* note 50, at 34–40 (explaining the scholarly debate over the role of rule of law during exceptional situations).

55. FATOVIC, *supra* note 2, at 3; see also DYZENHAUS, *supra* note 50, at 34–40 (describing why emergency situations may require suspension of the rule of law).

security upgrades. However, if restrictions happen frequently or for extended periods of time—beyond what is necessary to respond to the emergency—the emergency action may be normalized, with people simply accepting that travel to and from certain regions is indefinitely disallowed. In such a situation, the government, as a whole, gains new power over its people without consent.⁵⁶

Second, liberal democracies seek to prevent consolidation of power.⁵⁷ Whether it be through federalism, multiple branches of government, a multi-party system, or some combination of those approaches, liberal democracies exist with separated powers so that one individual or group does not obtain disproportionate, dangerous power. The existence of multi-member bodies, such as a congress or parliament, is a key way power is separated because multi-member bodies must obtain consensus before acting.⁵⁸ While consensus alone is not sufficient to counter large majoritarian influences, requiring multiple members to agree lessens the relative weights of individual self-serving views.⁵⁹

Unfortunately, slow rulemaking is a consequence of separated powers. Emergencies require speed, and therefore may necessitate consolidation of power on occasion. This is generally done by empowering a governmental actor to take action outside of the normal realm of law.⁶⁰ Rather than obtaining consensus from many groups, possibly slowing down the process, the governmental actor is empowered to swiftly declare an emergency and promulgate regulations that remedy the situation.⁶¹

For example, a prime minister may be empowered to declare an emergency to respond to an imminent crisis without consulting parliament first. To ensure a swift response, the prime minister gains substantial rulemaking power. This can be necessary in certain circumstances. But by knowing this route exists, a self-serving prime minister could, unfortunately, be incentivized to declare an unnecessary emergency to pass rules that would otherwise face

56. See BOCKENFORDE, *supra* note 1, at 125–27 (“[A]n explicit regulation of the state of emergency is thus indispensable if the goal is to avoid the undefined comprehensive authorization of a supralegal state of emergency that would, in the final analysis, dissolve the constitutional state.”).

57. See Note, *Recent Emergency Legislation in West Germany*, 82 HARV. L. REV. 1704, 1717, 1719–20 (1969) [hereinafter *Recent Emergency Legislation*] (detailing the debate over who ought to possess emergency power).

58. *Id.* at 1719–20.

59. See *id.* at 1719 (explaining how legislative bodies, when entrusted with emergency powers or oversight of emergency powers, can serve as a check against abuses by self-interested politicians).

60. FATOVIC, *supra* note 2, at 4–5.

61. See *id.*; *Recent Emergency Legislation*, *supra* note 57, at 1718–20 (while the main actor likely must convince some others in his cabinet to support his action, this cabinet is largely made up of political appointees and other individuals who support his views). Note that the lead executive official is often most privy to national intelligence.

opposition by the larger legislative body. This concern is that one governmental actor will obtain disproportionate power over other governmental actors.

B. *Ensuring Effective Responses to Emergencies*

Emergencies generally present unusual, imminent, and grave threats, typically meaning war or natural disaster. But the modern age brings new threats, most notably terrorism and pandemics. The emergency structure designed to respond to war—equipping the military—or natural disasters—providing for rescue and aid—is weak when used to combat modern emergencies that tend to be more unpredictable and long-term. The United States has been involved in the “war on terror” for over twenty years.⁶² The Covid-19 pandemic spread like wildfire across the globe and will affect international operations for years to come.⁶³ While some swift responses are still necessary to mitigate modern crises, the discretionary rulemaking provided for by many emergency power structures is ill-equipped to facilitate reasoned responses to modern emergencies.

Consolidating power in response to emergencies is questionable outside of the realm of known, typical emergencies. While one government actor or small cabinet may be the best positioned to swiftly champion a federal response to something occurring often, like a tornado, they are less equipped to respond to a something novel, like a pandemic.⁶⁴ In unfamiliar emergencies, swiftness ought not always be prioritized over reasoned lawmaking. Consolidating power in the hands of the executive branch can lead to an array of issues—mishandling concerns, spread of misinformation, and a lack of coordinated response.⁶⁵ Any of these issues can prolong an emergency

62. *A Timeline of the U.S.-Led War on Terror*, HISTORY (May 5, 2020), <https://www.history.com/topics/21st-century/war-on-terror-timeline> [https://perma.cc/UT9V-T5MV] (archived Dec. 30, 2020).

63. Helen V. Milner, Susan Peterson, Ryan Powers, Michael J. Tierney & Erik Voeten, *Argument, Trump, COVID-19, and the Future of International Order*, FOREIGN POLICY (Oct. 8, 2020), <https://foreignpolicy.com/2020/10/08/international-relations-experts-polling-pessimism-global-order-trump-covid/> [https://perma.cc/KCV9-KBUN] (archived Dec. 30, 2020) (arguing that Covid-19, and President Trump’s response to Covid-19 will lead to “declines in the number of democracies and opportunities for trade and investment, and dramatic increases in civil wars, human rights abuses, and collapsing state institutions.”).

64. See Mark Dornauer, *Why Was America So Unprepared for the COVID-19 Pandemic?*, FOUND. FOR RESEARCH ON EQUAL OPPORTUNITY (Aug. 5, 2020), <https://freopp.org/why-was-america-so-unprepared-for-the-covid-19-pandemic-8c0602a971ec?gi=fb181dffdd3f> [https://perma.cc/6AA6-DFGD] (archived Jan. 21, 2021) (explaining why the US struggled to respond to the novel coronavirus).

65. For example, during the 2020 Covid-19 pandemic, the Trump administration contributed to the spread of misinformation due to its polarized and disjointed response. See Sheryl Gay Stolberg & Noah Weiland, *Study Finds ‘Single Largest Driver’ of Coronavirus Misinformation: Trump*, N.Y. TIMES (Oct. 22, 2020),

situation. As emergencies change the normal state of affairs, advocacy and representation from multiple bodies is more important than ever.

When one individual is the main entity entrusted to coordinate a nationwide response to an ongoing pandemic, accountability and effective leadership are undermined. While the executive branch encompasses more than the president, it disproportionately weighs the view of one individual quite heavily, putting the nation at the will of one person's preferences with no requirement of larger consensus.⁶⁶

For example, a president may be empowered to declare an emergency in response to a terror attack because damage control is the priority, which demands swift action. For one day or one week, vast delegations of power to one individual make sense to immediately contain the crisis. But as the national effort continues and the need to prevent further attacks remains, damage control turns into the implementation of policy preferences by one individual. Beyond potential violations of individual rights discussed above, the implementation of policy preferences through blank-check legislation cuts against reasoned decision-making. In contrast, requiring consensus from a multi-member body—perhaps the legislature—for long-term emergencies would prioritize effective lawmaking over swift action, hopefully decreasing the length and severity of emergencies in the long run.⁶⁷

IV. MULTINATIONAL DISCUSSION

Emergency power is not a new idea—countries have been exercising emergency power for centuries. Historically, the basis for emergency power was the doctrine of necessity, which is the notion that a state is permitted to take actions necessary to preserve itself. In authoritarian regimes or systems without democratic control, this

<https://www.nytimes.com/2020/09/30/us/politics/trump-coronavirus-misinformation.html> (archived Dec. 30, 2020) [<https://perma.cc/LK4S-E2GF>] (summarizing a Cornell University study); Vera Bergengruen & W.J. Hennigan, “You’re Gonna Beat It.” *How Donald Trump’s COVID-19 Battle Has Only Fueled Misinformation*, TIME (Oct. 6, 2020), <https://time.com/5896709/trump-covid-campaign/> [<https://perma.cc/2BVW-DVLQ>] (archived Dec. 30, 2020) (discussing the reasons why President Trump led to the spread of misinformation).

66. See Ailsa Chang & John Yoo, *Former Deputy Assistant AG Offers Perspective on Unitary Executive Theory*, NPR (May 8, 2019), <https://www.npr.org/2019/05/08/721552525/former-assistant-ag-offers-perspective-on-unitary-executive-theory> [<https://perma.cc/92JU-X3CT>] (archived Jan. 21, 2021) [hereinafter *Assistant AG Perspective*] (“[T]he Constitution... grants him a reservoir of executive power...that allows him to act as leader of the executive branch to enforce the laws and to defend the country in times of crisis and emergency.”); see also *Recent Emergency Legislation*, *supra* note 57, at 1718–21. (explaining how power is separated, or not separated, in the executive branch).

67. For example, consider the Joint Committee in Germany. See *infra* Part IV.

doctrine makes sense. The state possesses the power to rule, so it can also change the rules in an emergency. But, as discussed in Part III, liberal democracies are skeptical of broad notions of national security—including the power of necessity—as those justifications come at the price of individual rights.

Nevertheless, there is a general consensus today that national governments are empowered to respond to emergencies. Rather than stripping the necessity power, liberal democracies focus on who exercises emergency power within government, where that power stems from, and how exercises of that power can be reviewed. These concerns lead liberal democracies to constrain emergency power through law and structure. This Part analyzes the emergency power laws and structures across the globe.

A. *Defining the Actor Responsible for Leading Emergency Responses*

While consensus exists among liberal democracies that power should not be consolidated in one person, experts debate how to effectively separate power within government during an emergency. This subpart highlights proposals for separating power in emergencies before discussing the current separation of powers across the globe.

First, the entity declaring the emergency can be separated from the entity creating regulations.⁶⁸ For instance, the legislative branch would be the only entity permitted to declare a state of emergency. Once the legislature declared a state of emergency, the executive would take the lead to create the regulations that remedy the emergency situation. This would help reduce perverse incentives for the declaring body to declare an emergency to increase its own power.⁶⁹ However, this solution requires multi-member consensus in the declaration phase, which potentially prevents the country from acting swiftly in urgent situations.⁷⁰ So while this approach protects against abuses of power, it may fail to effectively protect the nation.

Second, the legislature can promulgate specific standards for emergency declarations in advance and require legislative approval for

68. See BOCKENFORDE, *supra* note 1, at 125–31 (proposing possible solutions to the emergency power problem). To pass constitutional muster in the United States, this type of protection would need to ensure it does not purport to take away any inherent emergency power incident to commander-in-chief and chief executive power. See *infra* Part IV.

69. See BOCKENFORDE, *supra* note 1, at 128–29 (describing the benefits of an emergency system that separates the declaration from exercises of power pursuant to the declaration). It is worth noting that, by this same logic, if the legislature is dominated by one party, the risk of abuse increases but the risk of delay decreases.

70. See *id.* (describing the challenges associated with an emergency system that separates the declaration from exercises of power pursuant to the declaration).

any declarations outside that scope.⁷¹ For example, the legislature could stipulate that the executive may only declare a state of emergency when a threat of an armed attack within the next seventy-two hours exists. The president would be empowered to unilaterally declare an emergency pursuant to that law if responding to such a threat but would need to seek approval to declare an emergency under any other circumstance. This limitation would provide the executive with some flexibility, particularly in imminent situations, to ensure swiftness. At the same time, it protects against abuses by requiring some multi-member consensus when the normal rule of law may be suspended.

Third, the legislature can promulgate specific proportionality requirements for the use of power during emergencies.⁷² This approach provides broad power to the executive to determine when a state of emergency is declared, but reduces the power vested by such declaration.⁷³ The legislature could scale the powers unlocked by such a declaration based on the severity or imminence of the threat.⁷⁴ For example, the legislature could permit the president to declare a state of emergency when he determines necessary, but limit the use of military force in the absence of physical invasion.

This approach helps reduce the incentive to declare an unjustified emergency to expand powers in unrelated areas.⁷⁵ However, the structure may incentivize the executive to declare the most “severe” type of emergency, regardless of the situation’s actual severity, to unlock substantial power. To reduce this incentive, the legislature would need to promulgate specific requirements for each type of declaration.⁷⁶ Unfortunately, this solution requires the legislative branch to legislate with specificity, which is challenging to do in advance and with limited information.

71. See *id.* at 131 (differentiating between major and minor states of emergency). Germany provides an example of this. Grundgesetz [GG] [Basic Law], art. 115a, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/V5HJ-2ERY] (archived Sept. 4, 2020).

72. See ANNA KHAKEE, SECURING DEMOCRACY? A COMPARATIVE ANALYSIS OF EMERGENCY POWER IN EUROPE 7, 17, 27 (Geneva Centre for the Democratic Control of Armed Forces ed.) (2009) (discussing the use of a proportionality requirement).

73. See *id.* at 27 (describing how a proportionality requirement operates in a system with a broad definition of emergency).

74. For similar analysis, see BOCKENFORD, *supra* note 1, at 131 (discussing major and minor emergencies).

75. See *id.* at 112–14 (discussing the perverse incentives of emergency law).

76. For an example of how specific requirements can reduce these concerns, see Eur. Consult. Ass., *State of Emergency: Proportionality Issues Concerning Derogations Under Article 15 of the European Convention on Human Rights*, Doc. No. 14506 (Feb. 27, 2019).

Countries have adopted different versions of these safeguards, described in the table below:

Table 1

Country	Emergency Actor	Basis of Power
US	President	The president's authority is conferred implicitly through the constitution and explicitly through legislation. ⁷⁷ Most emergency declarations are pursuant to legislation. ⁷⁸ The legislature must use traditional lawmaking mechanisms to overturn national emergency declarations made pursuant to legislation. ⁷⁹ The legislature has little to no review power over emergency declarations pursuant to constitutional power, but such declarations are rare. ⁸⁰
UK	Crown Prime Minister	The crown's authority is conferred implicitly through the unwritten constitution, of which there is little review. ⁸¹ The prime minister's authority is explicitly conferred through legislation. ⁸² Parliament can annul an emergency regulation via resolution. ⁸³

77. See U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."); National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018) (creating procedural requirements for national emergency declarations and granting access to dormant emergency power).

78. See Kendall Heath, *Here's a List of the 31 National Emergencies That Have Been in Effect for Years*, ABC NEWS (Jan. 10, 2019), <https://abcnews.go.com/Politics/list-31-national-emergencies-effect-years/story?id=60294693> [<https://perma.cc/XUS8-Z23E>] (archived Dec. 30, 2020) (documenting long-lasting national emergencies); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 636–37 (1952) (holding that the president's constitutional powers are weakest when in opposition to Congress).

79. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding that one house of Congress may not override a presidential veto alone).

80. The main check Congress has is impeachment, perhaps abuse of power. See H.R.755, 116th Cong. (2019) (resolving to impeach President Trump for abuse of power).

81. See BOCKENFORDE, *supra* note 1, at 121–23 (describing the royal prerogative).

82. Civil Contingencies Act, 2004 c. 36, §§ 19–28 (Eng.).

83. PUBLIC ADMINISTRATION AND CONSTITUTIONAL AFFAIRS COMMITTEE, PARLIAMENTARY SCRUTINY OF THE GOVERNMENT'S HANDLING OF COVID-19, 2019-21, HC 277 (UK) <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubadm/377/37705.htm> [<https://perma.cc/J4UB-NVDT>] (archived Dec. 30, 2020) [hereinafter PARLIAMENTARY SCRUTINY].

France	President	The president's authority is conferred by the constitution and legislation. ⁸⁴ The president must consult with the prime minister, presidents of the assemblies, and the Constitutional Council; Parliament determines the length of emergencies. ⁸⁵ In extreme emergencies, the president has vast, unilateral power to respond. ⁸⁶
Israel	Prime Minister	The prime minister's authority is conferred by statute. ⁸⁷ The legislature must approve of emergency declarations within seven days. ⁸⁸
New Zealand	Prime Minister	The prime minister's authority to declare an emergency is conferred by statute. ⁸⁹ Some emergency power is implied through an unwritten constitution. ⁹⁰ For certain types of emergencies, the House of Representatives may revoke an emergency declaration. ⁹¹
Germany	Legislature Joint Committee	The legislative bodies' authority is conferred by the constitution. ⁹² The Joint Committee's authority is also conferred by the constitution when the legislative bodies are unable to meet. ⁹³

84. 1958 CONST. arts. 16, 36 (Fr.); Loi 55-385 du 3 avril 1955 relative à l'état d'urgence [Law 55-385 of April 3, 1955 instituting a state of emergency and declaring its application in Algeria], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 1, 2018; see also KHAKEE, *supra* note 72, at 22 (explaining that the exceptional presidential powers are wide-ranging and little regulated but are specifically codified in Article 16 of the Constitution).

85. See KHAKEE, *supra* note 72, at 22–24 (describing the French emergency power system).

86. *Id.* at 23–24.

87. *Declaring a State of Emergency*, KNESSET, https://knesset.gov.il/lexicon/eng/DeclaringStateEmergency_eng.htm [<https://perma.cc/W84K-7DYY>] (archived Sept. 6, 2020) [hereinafter Knesset Declaring].

88. *Id.* For more analysis about states of emergency in Israel, see Adam Mizock, *The Legality of the Fifty-Two Year State of Emergency in Israel*, 7 U.C. DAVIS J. INT'L L. & POL'Y 223, 238 (2001).

89. Civil Defence Emergency Management Act 2002 (N.Z.).

90. Matthew J McKillop, *Emergency Powers of the New Zealand Government* 39–42 (Oct. 2010) (LLB Dissertation, University of Otago).

91. *Id.* at 20–21.

92. Grundgesetz [GG] [Basic Law], art. 115a.

93. *Id.* art. 115e.

1. Systems in which the President Controls Most Emergency Power

In the United States and France, the constitution divides power between entities in government. The United States operates under a separation of power with three coequal branches of government—the executive, legislative, and judicial branches—which have some overlapping powers.⁹⁴ France’s government is interconnected, with the legislature and president sharing power.⁹⁵ The United States and France are very different from countries with parliamentary supremacy, especially in the context of emergency power.

Both the United States and France empower the president to act in times of emergency.⁹⁶ This structure allows for swift action. In fact, the French structure of interconnected governance was largely created to avoid “chronic governmental instability” of purely parliamentary systems.⁹⁷ The risks associated with swiftness during emergencies are supposedly mitigated by the separation of powers; the power belongs to the legislature and is exercised by the president after delegation. By separating the power and involving more entities, raw political will is checked. While this separation theoretically protects against abuse better than systems with consolidated power, such as one where the legislature controls and executes, it also creates a perverse incentive.

When the president ascribes to a different political party than the legislature or parliament, they may be incentivized to declare an emergency to avoid the legislative process under the guise of legality.⁹⁸ President Trump’s emergency declaration at the southern border is an example of this problem, although his political party even dominated government at that time.⁹⁹ The risk is especially challenging when the legislature lacks sufficient opposition power to overturn an emergency declaration.¹⁰⁰ The notion that separation of power is a sufficient check on a large delegations of emergency power is challenged by this

94. See generally *Separation of Powers*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/separation_of_powers_0 (last visited Dec. 31, 2020) [<https://perma.cc/X8EX-LYS3>] (archived Dec. 31, 2020) (describing the separation of powers in the United States).

95. Nicolas Boring, *National Parliaments: France*, LIBRARY OF CONGRESS (Jan. 2016) <https://www.loc.gov/law/help/national-parliaments/france.php> [<https://perma.cc/ULA2-92PN>] (archived Dec. 31, 2020).

96. For information about the United States, see Elizabeth Goitein, *The Alarming Scope of the President’s Emergency Powers*, ATLANTIC (Jan./Feb. 2019) <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [<https://perma.cc/3PMZ-W5M5>] (archived Dec. 31, 2020) (describing the president’s emergency power in the United States). For information about France, see KHAKEE, *supra* note 72, at 22–24 (describing the emergency power structure in France).

97. Boring, *supra* note 95.

98. *Infra* Part II.

99. *Id.*

100. *Id.*

perverse incentive to unnecessarily utilize emergency power, especially in times of divided government.

2. Minister Control: Systems Empowering Ministers to Respond to Emergencies

The United Kingdom and New Zealand are systems of parliamentary supremacy.¹⁰¹ In systems of parliamentary supremacy, power is consolidated; parliament grants power to the prime minister, and the prime minister is answerable to parliament.¹⁰² Both the United Kingdom and New Zealand empower their prime ministers and cabinets to respond to emergencies.¹⁰³

Proponents of parliamentary supremacy argue that it is the system most subject to democratic control. Constituents of parliamentary supremacy systems know exactly who to hold accountable when unhappy: the majority party. Unified government makes it easier for swift action and makes accountability more practicable.

This contrasts with countries that have separation of power. For example, separation of power means the majority party of the legislature can often be of a different party than the president's party. And even if one party controls both the legislature and presidency in the United States, it is still constrained by certain principles enforced by the Supreme Court due to constitutional supremacy. This structure makes it challenging to pin down responsibility and vote out the responsible party.

But the parliamentary system and its attribute of robust democratic accountability is not foolproof. Democratic accountability—in systems of parliamentary supremacy—is much weaker during national emergencies than in normal moments. While citizens may be able to identify the individuals responsible for exercises of emergency power—the majority party—there are less institutional protections for them. For example, if a prime minister, empowered by the parliament, acts against the country's best interest, parliament is less likely to call out the prime minister because he represents the parliament's own party. While this is also true in systems of constitutional supremacy when government is united, it is a guaranteed risk in systems of parliamentary supremacy.

101. McKillop, *supra* note 90, at 39–42.

102. See Boring, *supra* note 95 (explaining the operation of parliamentary systems).

103. For the United Kingdom, see *PARLIAMENTARY SCRUTINY*, *supra* note 83. For New Zealand, see Civil Defence Emergency Management Act 2002, pt. 3 (N.Z.) and McKillop, *supra* note 90, at 3–16.

3. Legislature Control: Systems that Require Legislative Action in Times of Emergency

Germany's system is unique. The current German Constitution, the Basic Laws, sets out procedures for emergency declarations.¹⁰⁴ It permits the legislative bodies to declare a state of emergency when the country is "under attack by armed force or imminently threatened with such attack."¹⁰⁵ The Constitution differentiates between permission for actions taken against an *actual* attack and those taken to prevent an *imminent threat* of attack. If Germany is under attack by armed forces and the legislative bodies are unable to meet, a state of emergency is presumed.¹⁰⁶ When a state of emergency is presumed—meaning the state is under attack and the legislative bodies are unable to convene—the exercise of emergency power without legislative authorization is permissible.¹⁰⁷ But when facing an *imminent threat*, a state of emergency is not presumed and emergency action is impermissible absent legislative authorization.¹⁰⁸ Unlike during active attacks, the legislative bodies must first declare a state of emergency before action may be taken.¹⁰⁹ Action taken during an imminent threat that is not authorized by the legislative bodies is presumptively illegal.¹¹⁰

The German Constitution seeks to separate power by requiring parliamentary approval for most emergency action taken by the chancellor.¹¹¹ However, the legislative bodies select the chancellor, so the separation alone may not be an effective check on power.¹¹² To remedy this weakness, the Constitution requires a two-thirds majority vote to approve of emergency action, which generally necessitates that some political opponents support the declaration for it to be approved.¹¹³

For imminent threats of attack, the German Constitution provides a safeguard for declaring a national emergency if the legislative bodies

104. Grundgesetz [GG] [Basic Law], art. 115a.

105. *Id.* art. 115a(1).

106. *Id.* art. 115a(1)–(2), (4).

107. *See id.*; *see also Recent Emergency Legislation*, *supra* note 57, at 1720.

108. *See* Grundgesetz [GG] [Basic Law], art. 115a.

109. *Id.* art. 115a(1), (4).

110. *Recent Emergency Legislation*, *supra* note 57, at 1720.

111. Grundgesetz [GG] [Basic Law], art. 115a; *see also Recent Emergency Legislation*, *supra* note 57, at 1720 (discussing the balancing of values in requiring consensus).

112. *See Recent Emergency Legislation*, *supra* note 57, at 1720–21 ("[T]he danger that a truly revolutionary party will be so well represented seems less serious than the danger that the executive will misuse the civil unrest powers with the consent of its parliamentary majority.").

113. *Id.* at 1717–18 (describing that support from political opponents requires debate and discussion within the legislature, precluding decisions made from information outside of the legislature).

are unable to convene.¹¹⁴ The Constitution empowers a Joint Committee to make an emergency declaration in that instance.¹¹⁵ The Joint Committee has a total of forty-eight representatives, composed of members from both legislative bodies that are not also members of the federal government.¹¹⁶ The relative strength of parliamentary groups is the basis for selecting committee members.¹¹⁷ The Joint Committee operates as a safeguard for responding to emergencies, serving as a functional parliament in the face of emergency.¹¹⁸ It balances the need for swift action with the avoidance of unilateral exercises of power, while also prioritizing reasoned decision-making.¹¹⁹ The Joint Committee is capable of swift action because it is relatively small in size—it may quickly convene and reach consensus when necessary.¹²⁰ Moreover, the Joint Committee serves as a barrier to unilateral exercises of power because it is separate from the federal government, which is the entity that the committee authorizes to exercise emergency power.¹²¹ Accordingly, the Joint Committee reduces perverse incentives to unnecessarily declare an emergency to increase one's own power and encourages reasoned decision-making.

B. Codification

Experts disagree on whether emergency powers should be codified—written into law. Some scholars believe that emergency powers should not be codified due to the inherent uncertainty surrounding emergencies.¹²² Attempting to legislate emergency powers could be futile as any law is likely to be both under and over inclusive.¹²³ First, predicting exactly what powers will be necessary in

114. *See id.* (explaining the rationale for an alternative mechanism, “especially the defense emergency—which release extensive special powers and therefore require effective procedural checks may disable the approval mechanism either by preventing it from functioning or by making necessary rapid action beyond the capabilities of a representative body.”).

115. Grundgesetz [GG] [Basic Law], art. 115e.

116. *Id.* art. 53a; *see also* *Role of the Bundesrat in a State of Emergency*, BUNDESRAT, <https://www.bundesrat.de/EN/national-en/ga-en/ga-en-node.html> [<https://perma.cc/3VXC-8JEA>] (archived Sept. 5, 2020) (“The Joint Committee is made up of 32 Bundestag members and 16 Bundesrat members.”).

117. Grundgesetz [GG] [Basic Law], art. 53(a)(1).

118. *See Recent Emergency Legislation*, *supra* note 57, at 1728–32.

119. *See id.* at 1730–31 (“Because the Joint Committee only indirectly represents varied constituent interests and because its smaller size permits more rapid compromise, it seems a logical cure for this dilemma.”).

120. *Id.*

121. *See id.* at 1731–32 (“The decision not to vest the legislative power in the executive if neither the normal parliament nor the Joint Committee can function seems advisable.”).

122. *See* FATOVIC, *supra* note 2, at 262–63 (listing three major problems with emergency legislation).

123. *Id.* at 263.

emergencies is challenging, if not impossible.¹²⁴ Therefore, laws written for emergencies are bound to be inadequate. Second, committing authorizations of emergency power to text may increase the likelihood that officials will unnecessarily invoke the power. As one scholar wrote, the concern surrounding codification is that emergency power declarations may “achieve a degree of legitimacy merely by virtue of their legality.”¹²⁵ Additionally, opponents of codification generally ascribe to the notion that the government has some inherent power to respond to emergencies.¹²⁶ This means that, when a government acts pursuant to inherent emergency powers, it does so at the risk that such an act may be illegal. This risk should incentivize the government to only use emergency powers when absolutely necessary.¹²⁷

In contrast, some scholars zealously advocate for codification of emergency powers through detailed statutes. Such scholars believe that codification is critical to constraining emergency powers because it leads to transparency and oversight.¹²⁸ Acknowledging the elephant in the room by explicitly writing emergency powers into law forces authentic discussion over when and how emergency powers should be used.¹²⁹ In turn, safeguards and substantive limits can be written into the law as well to prevent abuses of the power.¹³⁰ For example, legally requiring the government to declare a state of emergency before exercising exceptional powers helps notify the public that the emergency state is abnormal.¹³¹ It puts the citizenry on notice that they should expect, and demand, that the government resume the normal state of affairs promptly. Without a formal declaration of

124. For example, the terrorist attacks on September 11, 2001 were committed by nonstate, foreign actors, leading to a unique and unprecedented response. For further analysis see BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 13–38 (2007).

125. FATOVIC, *supra* note 2, at 263.

126. *See id.* at 255–64 (explaining the government prerogative to respond to emergencies).

127. The idea is that the emergency actor will exercise caution in responding to an emergency because he cannot absolve himself of responsibility by leaning on written law. Germany faced an issue like this with the Aviation Security Act, which authorized the government to shoot down a hijacked plane. The Supreme Court struck down this law, despite acknowledging that shooting down a hijacked plane might be legally permissible in rare circumstances. *See generally* Tatjana Hornle, *Shooting Down a Hijacked Plane—The German Discussion and Beyond*, 3 CRIM. L. & PHIL. 111 (2009).

128. *See* BOCKENFORDE, *supra* note 1, at 111–15 (describing the risks of a supralegal emergency power structure).

129. *See id.* at 118 (“[I]f the state of emergency is to be circumscribed and controlled by the law, this cannot be accomplished through a refusal, that is, by the assertion that the state of emergency does not occur legally, but only through the availability of powers and modalities that are related to this situation and are fitted to it.”).

130. *See id.* at 119–21 (discussing the “specific nature” of emergency regulations).

131. *Id.* at 119.

emergency, citizens may not be aware that the country is operating under the altered legal scheme until the government has already committed egregious infringements on individual rights.

On both sides of the debate over codification, the goal is to prevent the normalization of emergency powers.¹³² The key disagreement centers on whether committing authorizations of emergency power to text increases the likelihood that officials will unnecessarily invoke the power. Both sides agree that the public only consents to the use of emergency powers during discrete, exceptional times. Therefore, the best system is one that encourages the government to think critically before employing exceptional powers so that they are only used in the circumstances under which the public would consent.

As discussed above, Germany has strict rules on emergency declarations that are codified in the Constitution.¹³³ But this was not always the case. Article 48 of the Weimar Constitution governed emergency powers during World War II and was extremely susceptible to abuse.¹³⁴ The president was permitted to unilaterally declare an emergency, and emergency declarations functionally provided the chancellor with full legislative powers.¹³⁵ While part of parliament was permitted to object to emergency declarations, the president could retaliate to such objections and order reelection of the parliament.¹³⁶ Hitler, serving as chancellor, used emergency power authorizations to gain substantial power before and during World War II.¹³⁷ Germany's current constitution was written against this backdrop and therefore

132. See *id.* at 118 (“[I]t should revert as quickly as possible to the normal state of affairs.”); see also FATOVIC, *supra* note 2, at 263 (“[A]n extra-legal approach might be less likely to have long-lasting deleterious effects on political institutes.”).

133. *Infra* Part III.C.

134. See KHAKEE, *supra* note 72, at 20 (describing how Article 48 made it very easy to establish a state of emergency and restrict basic rights); HANS MOMMSEN, *THE RISE AND FALL OF WEIMAR DEMOCRACY* 57 (Elborg Forster & Larry Eugene Jones trans., 1996) (“[A]lthough the chancellor retained ultimate political responsibility by virtue of his right to countersign any presidential decree, the mistaken perception could very easily arise that in a state of crisis such powers rested solely with the president...this provision encouraged the notion that there was no harm in relying on presidential authority whenever the parties themselves were incapable of reaching a compromise on important governmental matters.”).

135. See David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AM. POL. SCI. REV. 121, 122–23 (describing the president's vast powers under the Weimar Constitution); MOMMSEN, *supra* note 134, at 57 (describing the power of the president and chancellor); see also Jeffrey Herf, *Perspective, Emergency Powers Helped Hitler's Rise. Germany Has Avoided Them Ever Since*, WASH. POST. (Feb. 19, 2019), <https://www.washingtonpost.com/outlook/2019/02/19/emergency-powers-helped-hitlers-rise-germany-has-avoided-them-ever-since/> [<https://perma.cc/Q643-C2C3>] (archived Jan. 9, 2021) (explaining how Germany's vast emergency power contributed to Hitler's rise).

136. See Dyzenhaus, *supra* note 135, at 122–23 (describing how the Weimar Constitution's safeguards were insufficient).

137. *Id.*; KHAKEE, *supra* note 72, at 20.

includes many explicit safeguards.¹³⁸ This concern is shared in other post-World War II constitutions, which robustly codify procedures and protections.

The chart below discusses the degree to which countries codify emergency powers:

Table 2

Country	Degree of Codification
US	<p>The US Constitution does not speak specifically to emergency power.¹³⁹ The president is understood to have some implied emergency power under the constitution incident to his powers as Commander-in-Chief and Chief Executive.¹⁴⁰</p> <p>The US president has expansive emergency powers under statute.¹⁴¹ The statute lacks a definition for national emergency.¹⁴² Under the emergency power statute, an emergency declaration unlocks many other statutory emergency powers otherwise dormant.¹⁴³</p>
UK	<p>There is no written constitution in the UK, but the crown has implied emergency powers under the notion of an unwritten constitution.¹⁴⁴</p> <p>The prime minister’s emergency power is codified by legislation.¹⁴⁵</p>

138. See KHAKEE, *supra* note 72, at 20–21 (comparing the safeguards in Germany to those in other countries, explaining that Germany’s safeguards today are stronger than most).

139. L. ELAINE HALCHIN, CONG. RSCH. SERV., REP. # 98-505, NATIONAL EMERGENCY POWERS 1–3 (2020).

140. *Id.* For further information about implied emergency power in the United States, see Albert L. Sturm, *Emergencies and the Presidency*, 11 J. POL., 121, 125–126 (1949).

141. National Emergencies Act, 50 U.S.C. §§ 1601–1651 (1976).

142. *Id.*

143. HALCHIN, REP. # 98-505, NATIONAL EMERGENCY POWERS at 8–11.

144. See BOCKENFORDE, *supra* note 1, at 121–23 (explaining the role of the royal prerogative in Great Britain).

145. Civil Contingencies Act, 2004, c. 36, §§ 19-28 (Eng.).

France	The French Constitution provides expansive emergency powers to the president. ¹⁴⁶ While most of the president's power is shared with the prime minister, the emergency power is unique and held almost exclusively by the president. ¹⁴⁷ French legislation codifies the president's emergency powers in states of siege. ¹⁴⁸
Israel	In Israel, the prime minister's emergency power is codified by legislation. ¹⁴⁹
New Zealand	The New Zealand prime minister has a narrow implied power through an unwritten constitution to respond to emergencies. ¹⁵⁰ Statute codifies and expands the prime minister's emergency power. ¹⁵¹
Germany	The German Constitution codifies the legislature's emergency powers. ¹⁵² Unlike other countries, this power is not delegated out by the constitution or statute but instead requires legislative consensus. ¹⁵³

C. Availability of Judicial Review for Emergency Action

Systems of parliamentary sovereignty prioritize political accountability over legal accountability—there are few, if any, legal rights protected outside of the legislative action.¹⁵⁴ In contrast, systems of constitutional sovereignty emphasize legal accountability over political accountability—there are domains with which the political branches may not interfere.¹⁵⁵ While constitutional

146. 1958 CONST. arts. 16, 36 (Fr.); CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS 98–99 (2005).

147. SKACH, *supra* note 146, at 98–99.

148. Loi 55-385 du 3 avril 1955 relative à l'état d'urgence [Law 55-385 of April 3, 1955 instituting a state of emergency and declaring its application in Algeria], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 1, 2018.

149. Knesset Declaring, *supra* note 87.

150. Civil Defence Emergency Management Act 2002 (N.Z.); McKillop, *supra* note 90.

151. Civil Defence Emergency Management Act 2002 (N.Z.).

152. Grundgesetz [GG] [Basic Law], art. 115a.

153. *Id.*

154. Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 3–5, 7 (2001) [Hereinafter Lairg].

155. *Id.* at 5–7 (“Constitutional supremacy and parliamentary sovereignty are often perceived as concepts which are polemically opposed to one another, given that the former *limits* legislative power and *entrenches* fundamental rights, while the latter embraces formally *unlimited* power and *eschews* the entrenchment of human rights.”).

supremacy purports to more robustly protect individuals, the protection depends on decisions of unelected judges. As the judiciary changes over time, so do the protections for individuals.¹⁵⁶

The United States is a system of constitutional supremacy.¹⁵⁷ For many reasons, the legislature often punts difficult questions to the judiciary. Rather than legislating protections for marginalized groups or legislating with specificity, the legislature may wait for a controversy to arise, pushing the question to the federal judiciary and, potentially, the Supreme Court.¹⁵⁸

Countries with parliamentary supremacy have substantially less judicial review of legislative acts than in the United States.¹⁵⁹ The parliament, seen as supreme, largely controls emergency power, either to be exercised by a prime minister—answerable to the parliament—or an executive, like a president.¹⁶⁰ Litigants may challenge the legitimacy of a government action under a statute, perhaps that the action is not permitted under the statute, but not the statute itself.¹⁶¹ Traditionally, the only protection against legislative acts was the allegation of *ultra vires* power—that an act was outside the power of the government, perhaps to entrench the government's own power; this type of claim is only successful in “gross usurpation[s] of power” or an

156. *Id.* at 7–8 (“[I]t follows that, while constitutional supremacy is a fixed feature of the U.S. Constitution, the concept is a flexible one, the precise meaning of which is, ultimately, a product of contemporary legal and political thought.”); see also Adam Cohen, *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America* (2020) (discussing how the jurisprudence of the Supreme Court has changed, on a large scale, as individual justices have retired, died, or otherwise left the bench).

157. U.S. Const. art. VI, para. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

158. This norm is not unique to any one area of law. For example, see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the right to marry extends to same-sex couples) and *Roe v. Wade*, 410 U.S. 113 (1973) (holding that it is a woman's right to terminate a pregnancy).

159. See Lairg, *supra* note 154, at 15–21 (discussing the history of judicial review in the UK, as well as the current role of judicial review in systems of parliamentary supremacy).

160. See *id.* at 15–16 (“The courts therefore approach all legislation on the well-founded presumption that Parliament intends to legislate consistently with such principles.”).

161. *Id.* at 15–17.

allegation of procedural defect.¹⁶² In those instances, a court would impose fundamental legal values on a legislature.¹⁶³

While litigants in the United States have more routes to challenge legislative acts, the existence of such review does not necessarily better protect against abuse.¹⁶⁴ The systems of parliamentary supremacy, in contrast, may actually better protect citizens by encouraging the legislature to build safeguards into law. Unlike in the United States, where tough decisions may be punted to the judiciary, courts in systems of parliamentary supremacy have far less power; systems of parliamentary sovereignty have a much weaker backstop.¹⁶⁵ Perhaps this leads to more democratic accountability, incentivizing officials to implement safeguards into legislation so that they are not voted out.

This analysis suggests that the United States should not assume that judicial review sufficiently protects against abuse, at least compared to systems of parliamentary sovereignty. Instead, the United States should be cognizant that all rights are subject to interpretation by unelected individuals, so safeguards ought to be placed into legislation from the get-go, especially in the realm of emergency powers. The incentive for the legislature to do this in the United States should be stronger than in systems with parliamentary supremacy. Parliament elects the prime minister, so building in safeguards means cutting against one's own power. In contrast, the US legislature building in safeguards would protect its own power from being cut into by the executive or judiciary.

162. See Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 482, 505 (deriving norms of judicial review in systems of parliamentary supremacy for application in Israel).

163. See *id.* at 505 ("Under this approach, the use of judicial review would not be perceived as counter-majoritarian. All these methods represent a 'soft' form of constitutionalism that conforms to parliamentary sovereignty.").

164. U.S. Const. art. VI, para. 2; see also *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review of laws, statutes, and government actions under the constitution).

165. Veit Bader, *Parliamentary Supremacy versus Judicial Supremacy*, 12 UTRECHT L. REV. 159, 163–64 (discussing the advantages of judicial review).

The chart below discusses how different countries approach the role of judicial review in the emergency power structure:

Table 3

Country	Role of Judicial Review
US	Judicial review is broadly available for legislative acts, executive actions pursuant to legislative acts, and executive actions pursuant to the constitution. ¹⁶⁶ Courts may strike down legislative acts and executive actions. ¹⁶⁷
UK	Judicial review is available for actions taken by the prime minister pursuant to legislation. ¹⁶⁸ Judicial review may be available for actions taken by the Crown pursuant to implied constitutional power, but courts are likely highly deferential. ¹⁶⁹ Judicial review is not available for legislation. ¹⁷⁰
France	Judicial review of legislation, before promulgation, is available to members of parliament. ¹⁷¹ Judicial review of legislation and executive action is available to private litigants after implementation. ¹⁷²
Israel	Judicial review is available for executive acts and, to some degree, legislation. ¹⁷³
New Zealand	Judicial review is available for executive acts but foreclosed for legislation. ¹⁷⁴
Germany	Judicial review is broadly available for any violations of fundamental rights by public authorities. ¹⁷⁵

166. U.S. Const. art. VI, para. 2.

167. *Marbury v. Madison*, 5 U.S. 137 (1803).

168. See Lairg, *supra* note 154, at 15–18 (discussing how the judiciary protects fundamental norms).

169. *Id.*

170. See BOCKENFORDE, *supra* note 1, at 121–23 (discussing emergency power in the UK). Technically, judicial review for violations of treaties is available but courts lack power to do much. See Lairg, *supra* note 154, at 18–19 (discussing how the Human Rights Act of 1988 constrains government action).

171. See Boring, *supra* note 95 (“[T]he President of the Republic, the Prime Minister, the President of either chamber of Parliament, or a group of sixty deputies or sixty senators, may ask the Conseil constitutionnel to review a bill’s constitutionality before promulgation.”).

172. See *id.* (discussing the QPC procedure).

173. See Weill, *supra* note 162, at 463, 504–05 (discussing the overlap of parliamentary supremacy and constitutionalism in Israel).

174. See McKillop, *supra* note 90, at 22–33 (describing the types of review available in New Zealand).

175. See generally Georg Nolte & Peter Radler, *Judicial Review in Germany*, 1 EUR. PUB. L. 26 (1995).

D. Summary of Safeguards

The prior three subparts discuss how emergency powers differ in application from state to state. While some practical differences are substantial, the structural underpinnings—broad categories such as codification and notice requirements—are actually common across many countries. The fact that many countries utilize the same safeguards exemplifies that the mere existence of a safeguard is not enough to prevent misuse of emergency powers. Instead, safeguards should be designed to be effective both in theory and in practice.

The chart below provides a broad summary of the structural safeguards used in different countries:

Table 4

Country	Summary of Safeguards
US ¹⁷⁶	<ul style="list-style-type: none">• Legislative codification• Requires congressional notification• Requires annual renewal• Congressional termination of emergency by joint resolution (subject to presidential veto)• Judicial review
UK ¹⁷⁷	<ul style="list-style-type: none">• Legislative codification• Requires parliamentary notification• Requires parliamentary approval within seven days• Regulations expire after thirty days, but new regulations may be promulgated• Requires necessity, proportionality, and seriousness to be considered• Some judicial review

176. National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018); *see also* L. ELAINE HALCHIN, CONG. RSCH. SERV., REP. # 98-505, NATIONAL EMERGENCY POWERS 1, 8–21 (2020) (discussing the history and modern use of the National Emergencies Act).

177. Civil Contingencies Act 2004, c. 36, §§ 19–28 (Eng.); *see also* PARLIAMENTARY SCRUTINY, *supra* note 83.

France ¹⁷⁸	<ul style="list-style-type: none"> • Legislative codification • Requires consultation with prime minister, presidents of both houses of parliament, and the Constitutional Council • Parliament determines length of emergency • Requires notification to nation • Distinct levels of emergency • Judicial Review
Israel ¹⁷⁹	<ul style="list-style-type: none"> • Legislative codification • Legislature must declare emergency • Emergency declarations limited to one year, but new regulations may be promulgated • Proportionality requirement • Some judicial review
New Zealand ¹⁸⁰	<ul style="list-style-type: none"> • Legislative codification • Notification to House of Representative required • Requirement that Parliament convene • Necessity and expediency requirement
Germany ¹⁸¹	<ul style="list-style-type: none"> • Substantial constitutional codification • Legislature must declare emergency • Joint Committee to declare emergency if legislature cannot meet; limits on Joint Committee power • Joint Committee advises Chancellor on emergency planning during peacetime • Distinct levels of emergency • Judicial Review

178. 1958 CONST. arts. 16, 36 (Fr.); Loi 55-385 du 3 avril 1955 relative à l'état d'urgence [Law 55-385 of April 3, 1955 instituting a state of emergency and declaring its application in Algeria], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 1, 2018; KHAKEE, *supra* note 72, at 22 (discussing French emergency powers); Boring, *supra* note 95 (discussing judicial review in France).

179. See Knesset Declaring, *supra* note 87 (discussing the operation of emergency powers); Weill, *supra* note 162, at 463, 504–05 (analyzing the relationship between parliamentary supremacy and constitutional review in Israel).

180. Civil Defence Emergency Management Act 2002 (N.Z.); see also McKillop, *supra* note 90, at 22–33 (discussing judicial review in New Zealand).

181. Grundgesetz [GG] [Basic Law], art. 115a.; see also Nolte & Radler, *supra* note 175 (discussing judicial review in Germany).

V. SOLUTION

Countries choose different ways to strike the balance between respecting individual rights and protecting national security during national emergencies. Some countries do this better than others, but it is difficult to directly compare emergency power systems because some countries have effectively relied on trustworthy leaders.¹⁸² When leaders do not abuse power and effectively govern through consensus, emergency power structures may appear sufficiently effective at preventing abuse and protecting the nation.¹⁸³ But when leaders take advantage of emergency power systems, monopolizing on the trust of nation, the need for safeguards becomes more apparent.

The United States is at this juncture now. While past presidents generally used emergency powers in times of bipartisan consensus, the risk of abuse is not new—President Trump simply took advantage of the instability of the emergency power regime.¹⁸⁴ He used it to implement his policy initiatives at the border when facing opposition in Congress. And when true emergency struck—a highly communicable virus—the emergency power structure was quite weak.¹⁸⁵ Perhaps a more trustworthy president would have used the emergency power structure to more effectively respond to the pandemic and a more involved Congress would have passed prompt legislation. But that did not happen.

Instead of standing by over the next four years, the United States should fundamentally alter its emergency power structure. Rather than entrusting national emergency responses to one person with little immediate accountability, the United States should develop a system with robust safeguards, taking notes from other countries across the globe.

The key features of an effective emergency power regime are: 1) legislating with specificity to guide decision-making and allow for robust judicial review, 2) requiring consensus among a multi-member body to encourage reasoned decision-making and avoid disproportionate weight to one person's views.

182. See FATOVIC, *supra* note 2, at 5–8 (discussing the role of a president's character during emergencies).

183. See *infra* Part IV. For example, New Zealand has a system with few built-in safeguards, yet it is not abused.

184. See Liz Hempowicz, *Bipartisan Coalition Urges Senate Leadership to Allow a Vote on Emergency Powers Reform*, PROJECT ON GOV'T OVERSIGHT (Sept. 24, 2019) <https://www.pogo.org/letter/2019/09/bipartisan-coalition-urges-senate-leadership-to-allow-a-vote-on-emergency-powers-reform/> [<https://perma.cc/C2VP-M27D>] (archived Jan. 15, 2021) (describing the long-standing need for emergency power reform).

185. See *infra* Part II (discussing the problems with exercises of emergency power).

A. Legislating with Specificity

An ideal emergency power system includes nuanced, specific legislation authorizing emergency power. Nuanced, specific legislation is particularly important for the United States because the emergency actor is the president—one individual who is not directly answerable to the legislature.¹⁸⁶ The legislature's main role in emergency power is setting up the system before an emergency because the president has nearly entire discretion once a statute is passed as law.¹⁸⁷ Congress has consistently failed to place meaningful safeguards on this discretion in statutes.¹⁸⁸ Legislating with specificity is a prime way for Congress to reassert its proper role in the lawmaking process during emergencies.

Congress should legislate with specificity in two ways. The first step is for Congress to define a national emergency. Second, Congress should impose a proportionality requirement on all exercises of emergency power. This system greatly contrasts to the statutory system utilized today, in which the president's power to declare an emergency is entirely discretionary and such declaration unlocks vast powers of government.

186. *Infra* Table 1; U.S. Const. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. 2, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”); National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018) (creating procedural requirements for national emergency declarations and granting access to dormant emergency power).

187. *See* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding that one house of Congress may not override a presidential veto alone; to overturn a national emergency, both houses of Congress must pass legislation).

188. *See* Hempowicz, *supra* note 184 (“Congress enacted the National Emergencies Act to bolster its oversight of emergencies and to more closely coordinate with the executive in emergency situations. But the law has not worked as Congress intended.”).

The proposed statutory text is below:

To exercise emergency powers otherwise authorized by statute, the president must formally declare a national emergency. A national emergency is defined as an unforeseen dangerous situation, requiring urgent action to prevent abrupt, substantial harm. While statutory emergency powers are not designed for use in long-term crises causing incremental damage, the president may find that a national emergency exists during specific instances of escalation during long-term crises to prevent abrupt, substantial harm.

All exercises of emergency power pursuant to this statute and any other related statute must be proportional in duration, breadth, and intensity to the emergency situation. Within forty-eight hours of an emergency declaration, the president must transmit to Congress a description of the national emergency with sufficient specificity to demonstrate the necessity and proportionality of the emergency response.

Legislating with specificity provides two crucial protections. First, the specific legislation can guide executive decision-making. Congress may use its resources, such as committee hearings, to create a nuanced emergency power structure.¹⁸⁹ By constraining executive discretion and providing more specific guiding principles, the legislation would both empower presidents with tools to make informed decisions during emergencies and would constrain presidents from using emergency power in an arbitrary manner.¹⁹⁰ Second, the specific legislation would

189. See *Senate Committees*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm#4> (last visited Jan. 15, 2021) [<https://perma.cc/DU5D-HNKKW>] (archived Jan. 15, 2021) (discussing the role of committees as to “develop specialized knowledge of the matters” and “monitor on-going governmental operations, identify issues suitable for legislative review, gather and evaluate information, and recommend courses of action.”).

190. Congress must legislate with a certain degree of specificity to avoid nondelegation doctrine concerns, especially with the new makeup of the Supreme Court that has expressed interest in requiring Congress to legislate with more specificity when delegating power to the executive branch. See *Gundy v. United States*, 139 S.Ct. 2116, 2148 (Gorsuch, J., dissenting) (reasoning that “while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code. That ‘is delegation running riot.’”); see also Cary Coglianese, *Opinion, Six Degrees of Delegation*, REGUL. REV. (Dec. 23, 2019), <https://www.theregreview.org/2019/12/23/coglianese-six-degrees-delegation/> [<https://perma.cc/WPK6-GU6M>] (archived Jan. 15, 2021) (describing the “full dimensionality” by which Congress should legislate to avoid nondelegation concerns, specifically: 1) nature of action, 2) basis for decision-

provide federal courts with standards by which they can evaluate emergency declarations and power exercised pursuant to such declarations. As discussed in Part IV, judicial review in the United States has the potential to provide robust protection against presidential abuses of power. More specific legislation would strengthen both legislative and constitutional review. It would help the courts determine whether the president is acting in compliance with the statute—which the court is currently unable to effectively do, given that the NEA does not define a national emergency.¹⁹¹ Additionally, it would help the court determine whether the president is acting in accord with his constitutional role within the separation of powers—that the president is exercising only executive, and not legislative, power.¹⁹² The U.S. Supreme Court has long held that a president's power is at its lowest when acting in opposition to Congress.¹⁹³ Specific emergency legislation would help the courts determine when the president is in fact acting in opposition to Congress, rather than with its implicit approval or acquiescence.

B. *Requiring Consensus Among a Multi-Member Body*

Emergency power is unique in that it involves the rewriting of basic law. Unlike laws passed during normal times that change things like taxes or healthcare, emergency power alters the basic legal structure of a country.¹⁹⁴ Decisions altering the fundamental governing structure pose difficult questions, largely discussed in Part III, that one individual—or even one part of government—should not be entrusted to answer alone.¹⁹⁵ Normally, alterations to the fundamental governing structure require constitutional amendment or at least broad consensus across government, but such a requirement

making, 3) extent of required process, 4) degree of sanctions, 5) range of regulated targets, and 6) scope of regulated activities).

191. Under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 636–37 (1952), the president's power is at its highest when declaring a national emergency since he is acting with explicit legislative approval (or perhaps under implicit approval from Congress, operating in a shared-power space, with the court still often deferring to the president). *Id.*

192. See *Gundy*, 139 S.Ct. at 2148 (Gorsuch, J., dissenting) (reasoning that the legislature may not delegate legislative power).

193. *Youngstown Sheet & Tube Co.*, 343 U.S. at 585, 636–37.

194. See FATOVIC, *supra* note 2, at 5 (“[E]mergencies have the potential to unsettle temporarily the entire system of institutional and procedural checks and balances.”).

195. Liberal scholars have discussed these questions for centuries, recognizing that “the formal strictures of the rule of law were insufficient to prevent executive power from mutating into tyranny in times of emergency.” *Id.* at 6. For an analysis of early liberal scholars and this topic, see *id.* at 1–10. See also BOCKENFORDE, *supra* note 1, at 125–28 (discussing how the state of emergency must be differentiated from the state of emergency to avoid “the integrity of the normal state of affairs slips from its grasp.”).

in an emergency would slow down necessary responses, possibly inhibiting an effective response.

The current US emergency power regime simply requires the president to determine that a national emergency exists—the NEA gives full discretion to the president to make such determination.¹⁹⁶ This amount of discretion is in opposition to a requirement of consensus. And even a reduction in the level of delegated discretion by legislating with specificity, discussed in the subpart above, still vests the power of authorization solely with the president. The president would be constrained from acting unless certain determinations were made, but he alone would be responsible for making those determinations.¹⁹⁷

To remedy this, Congress should create an independent commission for emergencies: The Emergency Power Commission. Germany's system, specifically the Joint Committee, should serve as a model. The commission would both help the president prepare before emergencies—creating guidelines for responding to emergencies—and during emergencies—by undertaking fact-finding, providing recommendations, and collaborating with other agencies.

To advise a president before emergencies, the Emergency Power Commission would promulgate nonbinding guidelines interpreting the emergency statute from Congress. The president could use these guidelines to help determine what conditions are required to declare a national emergency. During these instances, the agency would operate somewhat like the Office of Legal Counsel, providing opinions that can guide the president's actions but are not legally binding.¹⁹⁸ The Emergency Power Commission, like the German Joint Committee, would work with the president to provide expertise and to understand the president's decision-making processes so that the commission can be most helpful during actual emergencies.¹⁹⁹ Additionally, the

196. National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018).

197. It is worth noting that specific legislation would create standards for judicial review, making judicial review a more robust check on the president's discretion. See *infra* Part V.A.

198. The OLC “provides legal advice to the President and all executive branch agencies.” *Office of Legal Counsel*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/olc> (last visited Jan. 15, 2021) [<https://perma.cc/E7NW-M4B6>] (archived Jan. 15, 2021). The Emergency Power Commission would possess the most specialized knowledge on emergency powers but could work with and seek advice from the OLC in generating guidance and recommendations.

199. See *Recent Emergency Legislation*, *supra* note 57, at 1728–30 (discussing peacetime role of the Joint Committee). A US Congressman has recently introduced legislation to create an emergency commission, though its focus is on states rather than the federal government. One notable feature is that the commission would consult both the president and Congress of responses to national emergencies. See Press Release, Brian Fitzpatrick, United States Representative, Fitzpatrick Introduces Bipartisan Bill to Prepare for Future National Emergencies (Apr. 7, 2020), <https://fitzpatrick.house.gov/2020/4/fitzpatrick-introduces-bipartisan-bill-prepare-future-national-emergencies> [<https://perma.cc/A4HR-TS3G>] (archived Jan. 21, 2021).

guidelines could be made public with classified information redacted, contributing to accountability by providing citizens with a roadmap for legal exercises of emergency power. With this knowledge, citizens will be better equipped to identify when exercises of emergency power are improper, empowering them to push for a return to the normal state of affairs.²⁰⁰

During a potential emergency situation, the Emergency Power Commission would assist in fact-finding to help and guide the president. For example, during the declared emergency at the southern border, the commission would have documented the factual underpinnings for such declaration and then advised the president on whether those conditions constituted a national emergency under the statute. The commission would perform any fact-finding that it determined necessary and helpful, as well as fact-finding at the direction of the president. The commission would then issue a recommendation.

The president would not be formally bound by the agency's recommendations, though the recommendations would hopefully be helpful and informative; the president would retain discretion over whether to declare a national emergency.²⁰¹ But if a national emergency declaration were to be challenged in court, judges could use the agency guidelines, factual findings, and recommendations to inform the court's own interpretation of the statute (and the declaration's compliance with the statute). A court may grant the agency some form of *Skidmore* deference, considering the agency's expertise and thoroughness of its process.²⁰² Promulgating nonbinding guidelines is common practice for agencies.²⁰³

The president could request that the commission evaluate an emergent situation before he makes an emergency declaration. The commission would use its guidelines to advise the president on whether an emergency declaration would be appropriate. Doing this would help the president's declaration gain legitimacy with the people, as it would derive from independent consensus and not simply a unilateral, partisan action by the president to increase his own power.

The Emergency Power Commission would effectively balance the necessity of swiftness with reasoned decision-making. Unlike if

200. See BOCKENFORDE, *supra* note 1, at 125–28 (discussing the importance of separating the state of emergency from the normal state of affairs).

201. See *Assistant AG Perspective*, *supra* note 66 (discussing the unitary executive theory).

202. See generally *Skidmore v. Swift*, 323 US 134 (1944) (reasoning that courts may give agency interpretations deference based on the reasoning, consistency, thoroughness of considerations, and persuasiveness).

203. See Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 972–75 (2015) (explaining how the structure and function of independent agencies affect both their autonomy from the executive and legislative branches and their autonomy in making policy decisions).

Congress were required to agree on a response, the committee will be smaller and of particular expertise. The committee will also have time to plan ahead so that it does not have to recreate the wheel for every emergency situation and can work collaboratively with other agencies to guide a coordinated government response.

At the same time, the committee does not formally constrain the president from declaring an emergency during a crisis. If immediate action is necessary and the committee cannot convene or agree, the president may still act. But even in those instances, the committee operates as a safeguard, collecting information and promulgating recommendations that can be evaluated by a reviewing court. Therefore, the commission would serve as a safeguard both before emergency declarations and during emergency declarations.

There is an important distinction between the German system and the proposed US system. The Joint Committee in Germany is a functional legislature for emergencies—it is designed to convene when the legislature is unable to do so.²⁰⁴ While the U.S. Congress could create a legislative agency to guide itself during emergencies, it may not create a legislative agency to guide the president. The US Constitution requires any executive agency to act independently from Congress.²⁰⁵ To satisfy this constraint and survive constitutional scrutiny, Congress should provide the agency with its general purposes and structure and then set the agency free to execute the necessary measures during emergencies.²⁰⁶

This distinction is important for US constitutional reasons, but the US agency will still share many similarities with the German system, as the emergency actor will be the one associated with the multi-member group. In Germany, the legislature is the one empowered to respond to emergencies. In the United States, the power to respond to emergencies has historically been vested in the president. The German Joint Committee works under and with the emergency actor, the legislature. The Emergency Power Commission in the United States would also work with the emergency actor, which is the president.

Unfortunately, removing Congress from the agency deliberations means that more power is vested with the executive, which is made up of one political party. A reasonable compromise is to structure the Emergency Power Commission as an independent agency. Independent agencies, while formally a part of the executive branch,

204. See *Recent Emergency Legislation*, *supra* note 57, at 1718–20 (discussing how the Joint Committee operates as a functional parliament during emergencies).

205. *Bowsher v. Synar*, 478 U.S. 714 (1986).

206. See *id.* at 734 (“Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends.”).

operate one degree apart from the president. While presidents may appoint commissioners to independent agencies, removal of commissioners is generally limited. Additionally, independent agencies can be designed so that appointments are not dominated by one political party.²⁰⁷

Creating the Emergency Power Commission as an independent agency would help depoliticize emergency power as a whole. While Congress would still be unable to directly control the agency, the agency would be, to some degree, insulated from the president's political pressure.²⁰⁸

VI. CONCLUSION

Emergency power is an exception to the normal rule of law. It should be exercised with caution and only in exceptional circumstances. Countries across the globe grapple with the dilemmas of emergency power: prioritizing national security while respecting individual rights and acknowledging the need for swift action while encouraging reasoned decision-making. Some countries have succeeded at designing emergency power systems that robustly protect against abuse, some countries have seen their safeguards fail, while others have effectively relied on trustworthy leaders without the use of safeguards.

Illustrations of emergency power problems are numerous—unjustified declarations of emergency, exercises of emergency power in discriminatory ways, continual extensions of national emergencies, and ineffective responses to crises. The United States is a prime example of the risks of emergency power—experiencing both the use of emergency powers to achieve policy initiatives in the face of substantial political opposition and the failure to effectively use emergency powers to curb a crisis. But the United States is not alone in facing these risks; the problems associated with emergency power persist globally.

This Note analyzed the emergency power structures in various countries to identify the best systems—ones allowing for swift responses, respecting individual rights, and encouraging reasoned decision-making. Taking account of the best features of these systems, this Note proposes a solution for the United States: nuanced, specific legislation and a multi-member body to advise the president during

207. For a preview of future debates over independent agencies, see *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (arguably increasing the degree to which the president must have control of agencies). For an example of appointments not dominated by one political party, see the Federal Trade Commission.

208. *Id.* It would be prudent for Congress to consider the rationale in *Seila Law* when designing the specifics of the Emergency Power Commission so that the commission can survive constitutional review.

national emergencies. While the solution is targeted to the United States, other countries ought to take note too.

The risks of emergency power will never be fully eliminated—stepping outside of the normal rule of law is risky. But as emergencies remain inevitable, emergency power must endure. If well designed, an emergency power system can both safeguard the future of a country while respecting vital rights belonging to the people—even in the hands of distrusted leaders.

*Courtney DeVore**

* J.D. Candidate, 2021, Vanderbilt University Law School; B.A. in Economics, 2018, University of Texas at Austin. I want to thank Vanderbilt Professor Owen Jones for fostering my interest in legal scholarship and for his continued guidance throughout law school. I also want to thank Vanderbilt Professor Ingrid Wuerth for her international law teachings, as well as her counsel while I have navigated serving as Editor in Chief. Finally, I want to thank my friends and colleagues on the Journal for their comments, suggestions, and patience through this strange and uncertain time.
