DEFINING "EMERGENCIES": WHAT THE UNITED STATES CAN LEARN FROM THE UNITED KINGDOM ABOUT NATIONAL EMERGENCIES AND THE RULE OF LAW

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I. INTRODUCTION

Courts in the Anglo-American tradition have grappled with the tension between the rule of law and exercise of executive power since at least 1608, when Sir Edward Coke boldly declared to an outraged King James that even the King was subject to the law.[1] One of the core functions of a liberal democracy governed by the rule of law is to promote the supremacy of law over arbitrary power.[2] However, as the political theorist Carl Schmitt cynically wrote, "sovereign is he who decides on the exception."[3] Thus, the tension between the rule of law and the role of a chief

1. David Grey Adler, *The Steel Seizure Case and Inherent Executive Power*, 19 CONST. COMMENT. 155, 160 (2002); *see also* Sir William Searle Holdsworth, 5 A HISTORY OF ENGLISH LAW 428-31 (Methuen, 1937).

2. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 42 (8th ed., LibertyClassics1915) (1885).

3. David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order*, 27 CARDOZO L. REV. 2005, 2006 (2006).

executive to determine what the law is, and how it shall or shall not be followed in exceptional circumstances, is a foundational issue that lays at the heart of liberal democracy.

In modern times, the tension endures and is particularly visible when executives claim power to act unilaterally in times of national emergency.[4] For example, there are 136 distinct powers that are available to the President of the United States in a national emergency situation, ranging from mundane powers, such as appointing new public notaries, to alarmingly invasive powers, such as the power to shut down or take over radio broadcasting stations.[5] Of these 136 emergency powers, only thirteen require a congressional declaration of an emergency.[6] The remaining ninety-six powers can be assumed by the President by simply signing an emergency declaration.[7] What are the rule-of-law constraints over such assertions of executive power during emergencies? By whom shall limits on these powers be defined and imposed? These are the questions which spurred the writing of this Note and that guide its inquiry and arguments.

This Note will compare the national emergency declaration powers of the executives in the United States' and United Kingdom's constitutional systems. It will compare the powers of the President of the United States and the Senior Ministers of Government in the United Kingdom to declare and administer national emergencies in their respective countries. The Note will analyze the legal and historical contours of the emergency declaration powers in the two countries and discuss some of the policy rationales behind allowing them to wield such emergency powers, as well as some of the implications for liberal democracy.

Specifically, this Note will argue that Congress should amend the National Emergencies Act of 1976 (NEA), which controls presidential promulgation of national emergencies, in order to better define the types of emergencies that can trigger the use of executive power. Put succinctly, this Note will contend that the NEA should be amended to (1) include a definition of "national emergency" that specifies the circumstances under which the President can declare a national emergency, using language that is at least as restrictive as the definition of "emergency" in the United Kingdom, as defined by Section 19 of the UK's Civil Contingencies Act 2004 (CCA); and (2) to automatically terminate declared national emergencies after a set period unless they are congressionally endorsed, in a similar manner as provided by Section 27 of the CCA 2004.

4. *See generally id.* at 2012.

5. *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUSTICE, (Dec. 5, 2018), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [hereinafter "*A Guide to Emergency Powers and Their Use*"].

6. *Id.*

7. *Id.*

II. THE NATURE OF NATIONAL EMERGENCIES AND THEIR STATUS IN A CONSTITUTIONAL ORDER

The nature of modern constitutional emergency powers, such as those exercised in the United States and the United Kingdom, are by and large based on the ancient model of the Roman dictatorship.[8] Under the Roman Constitution, Rome was governed by a Senate and two consuls, who wielded executive authority and commanded the armies.[9] Rome's Constitution shared the modern American and British preoccupation with constraining executive power and imposed a very elaborate system of checks and balances on the Roman government.[10] This framework maintained the complex system of rights to which Roman citizens had become accustomed.[11] However, this complicated division of authority prevented the government from functioning effectively during times of crisis.[12] To remedy this defect, the Roman Senate could direct the consuls to appoint a dictator to serve for up to six months during times of emergency or strife, during which time the dictator was authorized to suspend rights and use the military to deal with the threat of invasion or insurrection.[13] When the dictator finished this job his orders were abrogated, and he was expected to step down and relinquish power.[14] In these respects, the purpose of the dictator was fundamentally "conservative" and rule based.[15]

In the same way, modern constitutional emergency powers are also supposed to be conservative and constrained by rules; emergency powers in modern constitutions are to be used to deal with extraordinary, temporary circumstances and restore a country to a state where the law can function normally.[16] Typically, the holder of emergency powers, such as the President or Prime Minister, is not permitted to *make* law and is restricted to issuing temporary orders *within* the Constitutional system, at least theoretically.[17] The crucial feature of modern, legitimate, and constitutional exercises of emergency powers is that a constitution itself is not to be changed during periods of national emergency.[18]

Machiavelli rediscovered the idea of the Roman-style dictatorship, while Harrington and Rousseau described it as a necessary component of a healthy

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8. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 211 (2004).
9. *Id.* at 211-12.
10. *See* NICCOLO MACHIAVELLI, DISCOURSES ON LIVY, Book I, ch. 34 (Jon Roland ed., Henry Neville trans., 1675) (1517) (in English) [hereinafter "DISCOURSES ON LIVY"].
11. Ferejohn & Pasquino, *supra* note 8, at 212.
12. *Id.*
13. *Id.*
14. *See id.*
15. *Id.*
16. Ferejohn & Pasquino, *supra* note 8, at 212.
17. *Id.*
18. *Id.*

republic.[19] These thinkers served as a kind of bridge between the Roman model of dictatorship and the modern idea of constitutional emergency powers, which some scholars, such as John Ferejohn and Pasquale Pasquino, call the "neo-Roman model."[20] As Pasquale and Ferejohn explain, "[m]odern constitutions do not vest special powers in a person outside of government but many vest emergency powers in an elected president," or prime minister.[21] Additionally while the Roman dictator was chosen from among highly qualified men, the official who wields emergency powers in the modern constitutional systems is usually selected through a democratic process.[22]

The fundamental irony—and the fundamental danger—about emergency powers in constitutional systems is that, while official national emergencies are declared by law,[23] they, by their very nature, become legal instruments used to upend the law from its typical form.[24] While one of the functions of constitutionality and post-Enlightenment liberalism in general is to constrain government power by subjecting all political authority to the rule of law,[25] the fundamental reality concerning states of emergency is that they act as somewhat lawless voids, where legal norms cease to function as they normally do during non-emergency times.[26] In this way, national emergencies function as one of Schmitt's so-called exceptions to traditional legal norms.[27]

Some argue that this exception is necessary and that no sacrifice is too great to sustain democracy, even the temporary sacrifice of the democracy itself.[28] Indeed, Clinton Rossiter argued that the complex system of a democratic, constitutional state is designed to function during peace and is often "unequal to the exigencies of a great national crisis."[29] Therefore, Rossiter contended, in a time of crisis, the system of government must be "temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions."[30]

There is a strong countervailing consideration, however. Writing in the British constitutional context, A.V. Dicey argued that nations governed under the rule of law ought to exclude the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.[31] Dicey further

19. *Id.* at 213; JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA 88 (1656); *see also* DISCOURSES ON LIVY, *supra* note 10.

20. Ferejohn & Pasquino, *supra* note 8, at 213.

21. *Id.*

22. *Id.*

23. Dyzenhaus, *supra* note 3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.*

28. *See* Dyzenhaus, *supra* note 3, at 2012.

29. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 5 (Princeton Univ. Press 1948).

30. *Id.*

31. DICEY, *supra* note 2, at 120.

contended that the rule of law requires "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts."[32] Since the governments of the United States and the United Kingdom are both constitutional democracies, there is a concern that when they upend the law during times of emergency they are burning the village in order to save it; they are, in essence, largely ignoring the rule of law because they find it to be inconvenient.[33]

III. NATIONAL EMERGENCY POWERS FRAMEWORK IN THE UNITED STATES

A. Constitutional Framework

The declaration of a national emergency by the President is an executive power exercised via either a proclamation or an executive order, and thus, it is necessary to review the American constitutional framework regarding the promulgation of executive authority.[34] Looking to the Constitution for firm answers is often fruitless, and case law on executive power in the United States is woefully underdeveloped.[35] The concept of "emergency" is not defined in the US Constitution.[36] Moreover, it is unclear whether the framers deliberately left emergency powers out of the Constitution and intended the usual system of checks and balances to also apply in emergency situations.[37]

The American constitutional framers were certainly aware of the Roman model of emergency dictator, as evidenced by Alexander Hamilton's comments in *The Federalist No. 70*:

> Every man the least conversant in Roman history, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community

32. *Id.*

33. Michael L. Principe, *Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain*, 22 LOY. L.A. INT'L & COMP. L. REV. 357, 359 (2000).

34. *See* Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 446 (1999); *see also* 50 U.S.C. § 1621.

35. *See* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 509-10 (2008).

36. *See generally* U.S. CONST.; Anna Kronlund, *Emergency Rhetoric in the US Congress: Debating the National Emergencies Act of 1976*, 27 RES PUBLICA: REVISTA DE FILOSOFÍA POLÍTICA 143, 148 (2012).

37. *See* Kronlund, *supra* note 36.

> whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.[38]

Indeed, the American Revolution was itself akin to a sort of emergency dictatorship: as Commander-in-Chief, George Washington largely functioned as a congressionally-appointed dictator for the duration of the war.[39] By 1787, however, the framers seemed to think that a unified, energetic, and independent executive would obviate the need for a special, dictatorial office.[40] Thus, the US Constitution provides only a limited grant of explicit emergency powers, which are given to Congress in Article I, and which permit suspensions of habeas corpus in some circumstances.[41]

The language of Article II, however, may suggest an array of *implied* powers that authorizes presidential emergency rule, such as the power of the president to act as Commander-in-Chief of the armed forces.[42] As a result of these possibly implied powers, as well as the general structure of the Constitution, American constitutional law on the subject of executive power remains frustratingly ambiguous.[43]

Generally speaking, the text of Article II is dubiously sparse.[44] Commentators have read the enigmatic and spare provisions of Article II in contradictory fashion continuously over the course of American history, beginning with the Hamilton-Madison debates about the power of the Washington Administration, through later important debates about what Arthur Schlesinger Jr. termed the "Imperial Presidency,"[45] to the current moment of vigorous debates about presidential power to invoke emergency powers to build a southern border wall between the United States and Mexico.[46] Much of the debate arises from the fact that Article II's vagueness serves as a stark contrast to the robustness of Article I, which lays out the duties, powers, and limitations of Congress in comparatively

38. THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
39. Ferejohn & Pasquino, *supra* note 8, at 213.
40. *See* THE FEDERALIST NO. 70, *supra* note 38, at 393.
41. U.S. CONST. art. I, § 9, cl. 2.
42. *See* U.S. CONST. art. II, § 2, cl. 1.
43. Ferejohn & Pasquino, *supra* note 8, at 214.
44. Julia Azari, *The Constitution Doesn't Say Enough About Executive Power*, Vox, (Apr. 11, 2019, 4:00 PM), https://www.vox.com/mischiefs-of-faction/2019/4/11/18306412/constitution-executive-power-limits.
45. David Grey Adler, *The Steel Seizure Case and Inherent Executive Power*, 19 CONST. COMMENT. 155, 155 (2002); *see also* ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY 164 (Houghton Mifflin Co. 1973).
46. *See* Ilya Shapiro, *Wall Emergency, Even If Legal Under Existing Law, Violates the Separation of Powers*, THE CATO INST. (Feb. 15, 2019, 2:40 PM), https://www.cato.org/blog/wall-emergency-even-legal-under-existing-law-violates-separation-powers.

meticulous detail.[47] Since jurists and commentators have precious little text with which to work, they are hard pressed to interpret exactly what "executive Power" means in the American constitutional context and what the limits on that power are.[48]

Second, it often can appear that the text of the Constitution is in tension with itself when it comes to executive power. While Congress has the longer list of powers, such as the power to officially declare war, ratify treaties, and lay and collect taxes,[49] the structure of the US government puts the President in a position to act more efficiently than Congress.[50] The vagueness of Article II, combined with the fluid nature of American and global politics, gives the President tremendous practical power to act faster than Congress, which requires debate, negotiation, and consensus before taking action.[51] By constitutional decree, the President has the power to "take care that the laws be faithfully executed,"[52] and this execution often occurs with little or no meaningful oversight.[53]

Moreover, as Mark Tushnet highlights, courts are reluctant to second-guess executive authority, especially in cases of alleged national emergencies.[54] One reason for this is that US courts tend to move slowly in their consideration of litigation relating to national emergencies.[55] Additionally, presidents have an array of lawful techniques they can use to slow the pace of judicial proceedings, including withholding information until ordered to reveal it by the highest court.[56] Tushnet further explains that, "even when courts extract information from the executive branch, they may be unable to assess it confidently, or may not have access to all the information relevant to making a sound decision."[57]

Presidential power is even more massive[58] when viewed through the lens of the inherent executive power theory. Inherent executive power theorists assert that the phrases "executive Power" and "Commander-in-Chief" in Article II of the US Constitution grant the President broad power over foreign policy and national security-related affairs, and that this power is so inherently "executive" in nature

47 . *Compare* U.S. CONST. art. I. *with* art. II. *See also* U.S. CONST. art I, § 8.
48. Azari, *supra* note 44.
49. *See* U.S. CONST. art. I, § 8.
50. *See* Azari, *supra* note 44.
51. *See id.*
52. U.S. CONST. art. II, § 3.
53. Azari, *supra* note 44.
54. *See* Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation*, 3 INT'L J. L. CONTEXT 275, 277 (2007).
55. *Id.*
56. *Id.*
57. *Id.*
58. Azari, *supra* note 44.

that the President does not need prior congressional authorization before acting in these policy domains.[59]

Unsurprisingly, the inherent executive theory of presidential power has also proven exceedingly popular with presidents themselves, who have often claimed inherent power to do whatever they decide to be necessary to further the national interest as they see it.[60] George Washington started a small political crisis that ended with the resignation of his Secretary of State, Thomas Jefferson, when he asserted presidential power to unilaterally declare neutrality in the war between Great Britain and France in 1793.[61] President Lincoln was tactful in expressing his belief in a strong executive when he explained that, given the exigent, emergency circumstances created by the US Civil War, he "felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[62] President Nixon infamously asserted that, "[w]hen the President does it, it's not illegal."[63] A more recent example is from 2002, when the infamous "Torture Memos" concluded that a federal statute criminalizing torture, 18 U.S.C. § 2340(A), was not applicable to the Bush administration's torture of terrorism detainees because the Constitution vests the President with an unenumerated executive power involving matters of national security that could not be limited by Congress or the courts.[64]

US Supreme Court Justice Robert Jackson, in his landmark concurrence to the famous *Steel Seizure* cases, attempted to divine some principled meaning out of the murky waters of Article II when he outlined the basic constitutional framework for evaluating exercise of presidential powers, holding that presidential powers are not fixed, but instead fluctuate, "depending upon their disjunction or conjunction with those of Congress."[65] Under the *Steel Seizure* analysis, "when the President acts pursuant to an express or implied authorization of Congress," such as when the President acts in accordance with the National Emergencies Act, the President's authority is at its maximum.[66] In cases where the President acts with congressional

59. *See* Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2484 (2006); *see also* U.S. CONST. art. II, §§ 1-2.

60. *Id.*

61. Azari, *supra* note 44.

62. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* 2 LINCOLN: SPEECHES & WRITINGS**,** 1859-1865, at 585 (Don E. Fehrenbacher ed., 1989).

63. *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977**,** at A16.

64. *See, e.g.*, Draft Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 9, 2002), at 2, 34-35, https://upload.wikimedia.org/wikipedia/commons/7/7e/Yoo_memo.pdf; *see also* Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002).

65. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

66. *Id.*

assent, the exercise of presidential power would include all the authority that the President possesses in the President's own right plus all that Congress can delegate.[67] Contrarily, when the President enacts measures or takes actions that are incompatible with or directly contravene the expressed or implied will of Congress, the President's power is at its lowest.[68] In these cases, the President can rely solely upon the scarce enumerated constitutional powers of the Executive, "minus any constitutional powers of Congress over the matter."[69]

However, under Justice Jackson's analysis, the question of whether an exercise of executive power is legitimate becomes more complicated when the President acts in absence of either a congressional grant or denial of authority.[70] Such complications arise where Congress has been silent, and the President can only rely upon the independent powers of the Executive, "but there is a 'zone of twilight' in which [the President] and Congress may have concurrent authority, in which its distribution is uncertain."[71] Therefore, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[72] In this zone of twilight, the actual exercise of power is likely to depend on the surrounding context—the "imperatives of events and contemporary imponderables" as Justice Jackson called them—rather than on "abstract theories of law."[73]

Furthermore, the Supreme Court has long recognized that there are fundamental differences between the exercises of executive power in a domestic versus foreign setting.[74] In *United States v. Curtiss-Wright Export Corp.*, the Court upheld the constitutionality of an indictment pursuant to a proclamation issued by President Roosevelt, which banned the sale of arms to Bolivia and Paraguay, who were engaged in a war in the Chaco region of South America.[75] The *Curtiss-Wright* Court invoked John Marshall's argument to the House of Representatives in March of 1800, in which he contended that the President is "the 'sole organ' of the nation in its external relations, and its sole representative with foreign nations."[76]

In practice, however, the reality is that presidential power, including the power to declare national emergencies, has been determined more by how it has been actually exercised than by any textual command or judicial or congressional

67. *Id.*
68. *Id.* at 637.
69. *Id.*
70. *See Youngstown Sheet & Tube*, 343 U.S. at 637.
71. *Id.*
72. *Id.*
73. *Id.*
74. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936).
75. *Id.* at 312-15, 333.
76. *Id.* at 319 (quoting Annals, 6th Cong., col. 613); *see also* Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 140-43 (2007).

direction.[77] Acting in their respective historical moments, presidents not only have crafted power for themselves, but bequeathed it to their successors.[78] In this way, presidents do not act "above" the law when they promulgate national emergencies; they create it. This creation of law by the executive is problematic and potentially dangerous, as it directly contravenes one of the cardinal rules of constitutional democracy: The holder of power in a national emergency situation is not supposed to use the emergency to generate new powers.[79] As the arc of executive power over time has bent outward, powers that have been seized by presidents, gone unopposed by Congress, and have not been denied by the courts, have become accepted arrows in the executive quiver.[80] This expansion of executive power, including executive emergency power, often comes at Congress' expense and expands far beyond the boundaries delineated by the neo-Roman model. Such an expansion, if left unchecked, risks undermining the entire separation-of-powers doctrine embedded within the US Constitution,[81] as well as the general principles of the rule of law.

B. Legal Framework

In the United States, the procedure by which the President can declare and officiate national emergencies is controlled by the NEA.[82] In the years following the politically tumultuous Vietnam War, extensive debates concerning the presidential use of emergency and wartime powers arose in the United States.[83] In 1972, US Senators Charles Mathias and Frank Church helped charter the Senate Special Committee on National Emergencies and Delegated Emergency Powers (hereinafter the "Special Committee") in order to study the implications of terminating the 1950 proclamation of national emergency that was being used to continue the Vietnam War "to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary."[84]

In July of 1974, the Special Committee unanimously recommended that Congress establish a standard procedure for the presidential declaration and promulgation of national emergencies. [85] The proposal also changed many of the

77. *See* Marshall, *supra* note 35, at 510.
78. *See id.*
79. *See* Ferejohn & Pasquino, *supra* note 8, at 212.
80. *See* Marshall, *supra* note 35, at 510.
81. *See* Ilya Shapiro, *Wall Emergency, Even If Legal Under Existing Law, Violates the Separation of Powers*, THE CATO INSTITUTE (Feb. 15, 2019, 2:40 PM), https://www.cato.org/blog/wall-emergency-even-legal-under-existing-law-violates-separation-powers.
82. 50 U.S.C. §§ 1601-51 (1976).
83. Kronlund, *supra* note 36, at 143.
84. L. Elaine Halchin, CONG. RESEARCH SERV., 98-505, NATIONAL EMERGENCY POWERS 7 (2019).
85. *Id.* at 8.

existing emergency powers that were delegated to the President via statute.[86] The Special Committee made these recommendations after consulting with various executive branch agencies about the nature of executive emergency power.[87] This recommended legislation was introduced by Senator Church in 1974 and passed the Senate floor in October of that year, but was not taken up by the House, as the chamber was preoccupied with the Nixon impeachment inquiry.[88] The legislation was reintroduced into both chambers with the convening of the next Congress and was eventually passed by Congress and signed into law by the President in 1976.[89]

The Special Committee issued its final report in May 1976, in which it "[reemphasized] that emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the National Emergencies Act to end a potentially dangerous situation."[90] However, Congress did not address all of the issues raised by the Special Committee.[91] For example, the Special Committee was hopeful that Congress would also review the existing statutory emergency powers themselves, limit the President's ability to exercise these powers, and possibly eliminate some of them altogether.[92]

The first section of the NEA,[93] 50 U.S.C. § 1601, terminates all previously declared national emergencies that were in effect in September of 1976.[94] The following section[95] is the specific federal law that actually grants the President the express power to declare national emergencies, pursuant to congressional authorization.[96] These proclamations are supposed to be immediately sent to Congress and then published in the Federal Register.[97] Section 1628 provides that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect . . . only when the President. . . specifically declares a national emergency . . . ."[98] Such powers can only be exercised in accordance with the remainder of the NEA.[99]

National emergencies in the United States can be terminated in one of two ways: Either Congress can pass a joint resolution terminating an emergency or the President may issue a proclamation doing the same.[100] After an emergency is declared, Congress must review the emergency and hold a vote as to whether to

86. *Id.*
87. *Id.*
88. *Id.*
89. Halchin, *supra* note 84, at 9.
90. S. REP. NO. 94-922, at 19 (1976).
91. Halchin, *supra* note 84, at 9.
92. S. REP. NO. 94-922, at 10.
93. National Emergencies Act, 50 U.S.C. § 1601.
94. *Id.*
95. *Id.* § 1621(a).
96. *Id.*
97. *Id.*
98. National Emergencies Act, *supra* note 93, § 1621(b).
99. *See id.*
100. *Id.* § 1622(a)(1)-(2).

terminate it once every six months.[101] Declared emergencies will automatically terminate on the anniversary of their declaration, unless, within the ninety-day period prior to each anniversary date, the President publishes a notice that the emergency will continue for another year in the Federal Register and transmits such a continuance to Congress.[102] Crucially, the NEA does not define the term "national emergency" nor does it require that the powers invoked relate to the nature of the emergency.[103]

However, most of the practical power that the President wields in cases of national emergencies does not come from the NEA, which is largely a procedural law designed to standardize the method used to declare and terminate national emergencies. Rather, the President assumes whatever power was granted by Congress in whichever specific law the President cites as legally authorizing the declaration of a specific emergency.[104] There are a wide variety of federal statutes that confer specific emergency powers onto the President, and these statutes can be found across the U.S. Code.[105] These statutory emergency powers cover a myriad of subject areas—everything from foreign policy areas like the military and international trade, to domestic areas such as agriculture, transportation, communications, and criminal law.[106]

Some of these laws immediately stand out for their potential for abuse.[107] For example, the Food, Drug, and Cosmetic Act allows the President to potentially test chemical and biological agents on unwitting human subjects.[108] Section 606(c) of the Communications Act of 1934 allows the President to shut down or take over radio stations as a part of the President's war powers, if the President deems such action necessary to national security during a time of war.[109] The President can commandeer wire facilities as well, upon declaring a threat of war.[110] The International Emergency Economic Powers Act (IEEPA) allows the government to freeze any asset or block any financial transaction in which a foreign national has an interest, even if the asset belongs to an American or the transaction is between Americans.[111]

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101. *Id.* § 1622(b).

102. *Id.* § 1622(d).

103. *See generally* National Emergency Act, *supra* note 93, §§ 1601-1651.

104. *See A Guide to Emergency Powers and Their Use*, *supra* note 5 (Top Line Observations).

105. *E.g.* 21 U.S.C. § 360(bbb)(3) (2017); 47 U.S.C. § 606(c) (1984).

106. *A Guide to Emergency Powers and Their Use*, *supra* note 5 (Top-Line Observations).

107. *Id.*

108. *See id.*

109. *See* 47 U.S.C. § 606(c) (1984).

110. *A Guide to Emergency Powers and Their* Use, *supra* note 5 (Top Line observations); *see also* 47 U.S.C. § 606(d).

111. *See* International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(B) (2001).

As the Brennan Center's well-noted guide to presidential emergency powers explains, 96 of the 136 authorities available to the President in a national emergency situation only require the President's assent and signature on the emergency declaration.[112] Twelve of these authorities contain a *de minimis* restriction, such as a requirement that an agency head certify that the exercise of emergency power is necessary, but the President can likely order the agency head to provide this certification.[113] Another 15 "contain a more substantive restriction, such as a requirement that the emergency relate to a particular subject matter or that it involve the use of armed forces." [114]

IV. NATIONAL EMERGENCY POWERS FRAMEWORK IN THE UNITED KINGDOM

A. Constitutional Framework

The ability of the British executive to promulgate national emergencies lies within a different constitutional framework in the United Kingdom (UK). Unlike most modern democracies, such as the US, the UK does not have a singular written or codified document that specifies and delineates the power of its government.[115] In his seminal work, *Introduction to the Study of the Law of the Constitution*, A.V. Dicey stipulates three descriptive principles of law around which he organizes the concepts of the British Constitution: the legislative sovereignty of Parliament, the rule of law, and the "dependence in the last resort" on "conventions of the constitution . . . ."[116] Put simply, rather than a codified, written document, the UK's unwritten Constitution is composed of Acts of Parliament, court judgments, and political conventions.[117]

British constitutional history can be traced back to the pioneering medieval constitutional documents of England, including the "great Charter of the Liberties of England," commonly known as the *Magna Carta*, which sought to curb unilateral exercise of royal power.[118] The Magna Carta was the first English document to formally curb the powers of the monarchy and reserve certain rights and duties to

112. *A Guide to Emergency Powers and Their* Use, *supra* note 5 (Top Line observations).

113. *Id.*

114. *Id.*

115. *See* Roger E. Michener, *Foreword* (1982) to ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, xvii (8th ed., Macmillan 1915) (1885).

116. *See id.*; *see generally* DICEY, *supra* note 2.

117. Robert Blackburn, *Britain's Unwritten Constitution*, BRITISH LIBRARY (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution.

118. *Id.*; *see generally The Magna Carta 1215*, THE AVALON PROJECT, https://avalon.law.yale.edu/medieval/magframe.asp (last visited Oct. 20, 2020).

the nobility.[119] However, the landmark act in British constitutional history is the enactment of the English Bill of Rights of 1689, which was passed after the forced removal of King James II and established the supremacy of Parliament over the Crown..[120]

Parliamentary sovereignty is the dominant characteristic of British constitutional law.[121] Parliament is composed of the Monarch (known as the Queen-In-Parliament), the House of Commons, and the House of Lords.[122] However, in modern practice, the House of Commons dominates the legislative agenda and wields the true power in Parliament.[123] Parliamentary authority in the UK is absolute, supreme, and overwhelming; Parliament may even, by its own unilateral action, fundamentally alter the structure, composition, and function of the UK's constitutional system,[124] a power denied to Congress in the US Constitution.[125]

As the sovereign, Parliament possesses "the right to make or unmake any law whatever" in the UK,[126] and no person or body—not the Prime Minister nor the Monarch—is recognized by UK law as having a right to override or set aside Parliament's legislation.[127] Consequently, and in contrast to the focus on limited government that permeates the US Constitution, Parliament is under "no legal restrictions on the subject matter over which it may legislate" under the UK Constitution.[128] Parliament may limit civil liberties or expand government power in accordance with the national interest, should the need arise during an emergency situation.[129]

Aside from the English Bill of Rights, the Parliament Act 1911 established the modern relationship between the constituent parts of the Parliament of the UK[130] Prior to the passage of the Parliament Act 1911, no act of Parliament of any kind could be passed without the consent of the House of Lords in addition to the Commons.[131] The Parliament Act 1911 removed all legislative power from the Lords regarding any Money Bill, removed the Lords' final veto power on any Public

119. *See generally The Magna Carta 1215*, *supra* note 118.

120. Blackburn, *supra* note 117.

121. *See* DICEY, *supra* note 2, at xxxvi.

122. *Id.* at 3.

123. *See* Parliament Act 1911, 1 & 2 Geo. 5 c. 13, (Gr. Brit.).

124. 1 WILLIAM BLACKSTONE, COMMENTARIES *160-62 [hereinafter "COMMENTARIES"].

125. *See* U.S. CONST., art. I., § 8; U.S. CONST., art. V.

126. DICEY, *supra* note 2, at 3.

127. *Id.*; Blackburn, *supra* note 117.

128. Principe, *supra* note 33, at 361.

129. *Id.*

130. *See generally* Parliament Act 1911, 1 & 2 Geo. 5 c. 13, (Gr. Brit.); DICEY, *supra* note 2, at xxxvii-xl.

131 .DICEY, *supra* note 2, at xxxvii.

Bill, and allowed the Commons to bypass the Lords entirely for certain legislation.[132]

The second major component of Britain's unwritten constitution is the emphasis on the rule of law. As articulated by Dicey, the concept of the rule of law consists of three characteristics. First, no person may be punished or made to suffer under law unless they distinctly breach a law in a manner that is "established in the ordinary legal manner before the ordinary Courts of the land."[133] This principle is designed to deter tyranny by differentiating the British constitutional system from those systems of government in which public officials may wield arbitrary, wide, or wholly discretionary power to punish people for certain behavior.[134] Second, rule of law in the British constitutional system demands equality under the law; no class of people, including public officials, are above the law, and the law must be applied to everyone equally, regardless of their station.[135] Third, rule of law in the UK respects the power of the judiciary to interpret the law in accordance with common-law precedent and apply it to individuals in specific cases.[136] The UK Constitution largely lacks a listed declaration or definition of rights that is commonly found in other constitutions.[137] Instead, many of the UK's most important constitutional principles are the fruits of judge-made law, which result from legal controversies and not legislation.[138] Indeed, as Dicey puts it, the UK's Constitution, "in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law."[139]

Finally, since the UK's Constitution is unwritten, political conventions play an enormous role in the practical application of the UK's constitutional system.[140] For example, as a matter of constitutional theory, the Queen has the absolute, judicially unchallengeable power to refuse her assent to a bill passed by Parliament.[141] However, convention dictates that she automatically gives her assent to any bill that has been lawfully passed by the houses of Parliament, regardless of her personal disposition toward the legislation.[142]

The convention that is most relevant to executive authority is the convention of Ministerial Responsibility, which exists within the Westminster-Whitehall model of government currently employed by the UK Ministerial responsibility refers to the convention that executive ministers are responsible to

132. Parliament Act 1911, 1 & 2 Geo.5 c. 13, §1-3 (Gr. Brit.).
133. DICEY, *supra* note 2, at 110.
134. *Id*.
135. *See id.*, at 114.
136. *See id*. at 115-16.
137. *Id.* at 116.
138. DICEY, *supra* note 2, at 116.
139. *Id.*
140. *See generally* Blackburn, *supra* note 117.
141. *Id*.
142. *Id*.

Parliament for the conduct of their ministry and government.[143] Ministerial responsibility is central to the democratic parliamentary system, because it ensures that the government is accountable to the elected legislators who represent the people of the UK[144]

The Westminster-Whitehall model dictates that Government ministers must have a seat in Parliament in order to hold office.[145] This allows for a direct form of executive responsibility and accountability to the legislature and makes Ministerial Responsibility possible.[146] Indeed, the very existence of the office of the Prime Minister (PM), and the PM's designated role as the head of government in the UK, is purely conventional and subject to Parliamentary discretion.[147] The same is true for the method of selecting the PM; the officeholder is whoever commands the confidence of the House of Commons, which is typically the majority party leader, or head of a coalition of parties in a hung parliament.[148]

As with Congress and the President of the United States, the balance of power between Parliament and the Executive—particularly during times of national emergency—is a central issue of contention in British constitutional law.[149] Also, like the separation-of-powers doctrine in the US constitutional model, the power relationship between Parliament and the Executive is dynamic, and it is largely based on political reality and practical scenarios, as opposed to theoretical principles.[150] Parliament, as the national sovereign, has two inherently contradictory roles regarding the executive: to sustain it and to serve as a check on it between elections.[151] Some commentators have observed that Parliament tends to do the former exceedingly well, but struggles with the latter.[152] As Lord Nolan noted, "[t]he task for sustaining the government does not sit well with the task of challenging it and holding it to task."[153]

This tension arises from the political insulation of executive ministers, who are selected from whatever party or coalition controls Parliament.[154] This situation was exacerbated in the Victorian Era, which was a critical period in British political history.[155] The mid-1800s can be described as the zenith for parliamentary control over the Executive; the civil service was modest in size at the time, enabling

143. Andre Munro, "*Ministerial Responsibility*," ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/ministerial-responsibility (last updated Sept. 6, 2016).

144. *Id*.

145. Blackburn, *supra* note 117.

146. *See id*.; *see also* Munro, *supra* note 143.

147. Blackburn, *supra* note 117.

148. *Id*.

149. *See generally*, Matthew Flinders, *Shifting the Balance? Parliament, the Executive and the British Constitution*, 50 Pol. Stud. 23, 23 (2002).

150. *See id.* at 23.

151. *Id.*

152. *Id.*

153. *Id*.

154. *See* Flinders, *supra* note 149, at 24-26.

155. *Id.* at 24.

Parliament to oversee it with relative ease.[156] However, the passage of the second Reform Act in 1867 changed this, as the UK's political parties obtained greater control over its members, restricting their ability to challenge executive power.[157]

Moreover, procedural reforms within Parliament in the early 1880s further strengthened the Executive.[158] Consequently, the Executive became politically insulated from effective scrutiny.[159] This institutional structure stands in contrast to the American political system, where it is entirely possible, and quite frequent, for different political parties—with different political agendas—to control at least one chamber of Congress and the White House.

B. Legal Framework

In accordance with the doctrine of parliamentary supremacy, Parliament has enacted a law that specifically defines "national emergency" and controls the declaration and administration of national emergencies in the UK: The Civil Contingencies Act 2004, c. 36 (Eng.) (CCA 2004).[160] The CCA 2004 is divided into two substantive parts. Part 1 "focuses on local arrangements for civil protection" and "[establishes] a statutory framework of roles and responsibilities for local responders."[161] Part 2 "focuses on emergency powers, establishing a modern framework for the use of special legislative measures that might be necessary to deal with the effects of the most serious emergencies."[162] Part 2 is the more analogous of the two parts to the emergency powers granted to the President in the United States, and will be the focus of this comparison and explanation.

The aftermath of World War II exercised tremendous influence on the evolution of emergency management in the UK[163] Growing fears of a possible nuclear attack by the Soviet Union led to the passage of the Civil Defence Act of 1948.[164] Initially, the UK's central government was quite willing to let local agencies deal with emergencies.[165] The central government did not feel it necessary to require local and municipal organizations to cooperate with each other.[166]

156. *See id.* at 24-25.
157. *Id.* at 25.
158. *Id.*
159. Flinders, *supra* note 149, at 26.
160. *See generally* Civil Contingencies Act 2004, c. 36 (Eng.).
161. *See generally id.* §§1-18.
162. *See generally id.* §§ 19-31; *see also* Civil Contingencies Act 2004, a short guide *(revised)*, CABINET OFFICE: CIVIL CONTINGENCIES SECRETARIAT, (Nov. 18, 2004), https://narueducationcentre.org.uk/wp-content/uploads/2012/12/CCA-short-guide.pdf [hereinafter "Civil Contingencies Act 2004, a short guide"].
163. Geoff O'Brien & Paul Reed, *Future UK Emergency Management: New Wine, Old Skin?*, 14 DISASTER PREVENTION & MGMT. 353, 353 (2005).
164. *Id.*
165. *Id.*
166. *Id.*

Against this background, emergency management in the UK developed as a predominantly local function.[167]

This division of central and local responsibilities remained the norm in the UK emergency management up until the Civil Defence in Peacetime Act of 1986 recognized the end of the Cold War Era.[168] In the late 1980s, a number of civilian disasters highlighted the need for a review of emergency planning procedures.[169] However, institutional reviews in 1989 and 1991 led to the conclusion that there was no need to reform the structure of British emergency planning and response.[170] Consequently, the locally-based system remained in place up to the late 1990s,[171] following the cessation of violence in Ireland as a result of the Good Friday Agreement.[172]

However, the Millennium Bug experience of January 2000 demonstrated that the British government could no longer direct emergency management at a local level.[173] This regime constrained national government departments, because they lacked formal powers to require information or action.[174] This constraint was made even more apparent by the flood events in the autumn of 2000, which were described by the Deputy Prime Minister as a wake-up call for UK emergency management.[175]

The UK's original emergency powers legislation was even older than its civil defense laws.[176] The Emergency Powers Act of 1920 defined an emergency in terms of interference with specified services and resources which could deprive the community of the essentials of life.[177] The list of services and resources in the 1920 Act was woefully out of date at the time of the passage of the CCA 2004.[178] More fundamentally, the 1920 Act's focus on essential services and resources did not reflect the kinds of emergencies that the UK faces in the modern world.[179] For example, the 1920 Act did not clearly cover terrorist or environmental threats.[180] The Fuel Blockade crisis of September 2000 further accelerated reform efforts.[181]

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167. *Id.*

168. O'Brien & Reed, *supra* note 163, at 353.

169. See *id.*

170. *Id.*

171. *Id.* at 353-54

172. *See* Andrew Fox, *The Implications of the Civil Contingencies Act (CCA) 2004 for Engineers in the UK*, *in* HAZARDS AND THE BUILT ENVIRONMENT: ATTAINING BUILT-IN RESILIENCE 282 (Lee Bosher ed., 2008).

173. O'Brien & Reed, *supra* note 163, at 354.

174. *Id.* at 354.

175. *Id.* at 353-54.

176. *Id.* at 356; *also compare* 10 & 11 Geo c. 55 *with* Civil Defence Act 1948, 12 & 13 Geo. c. 5 (Eng.).

177. *See* Emergency Powers Act 1920, 10 & 11 Geo. 5 c. 55 (Eng.).

178. O'Brien & Reed, *supra* note 163, at 356.

179. Civil Contingencies Act 2004, a short guide, *supra* note 162.

180. *Id.*; *see also* Emergency Powers Act 1920, 10 & 11 Geo. 5 c. 55 (Eng.).

181. O'Brien & Reed, *supra* note 163, at 354.

By February 2001, the Home Office had begun reviewing the UK's existing emergency legislation.[182] By July, the lead review responsibility had been transferred to the new Civil Contingencies Secretariat.[183] This review was much broader than the local responses and was intended to establish a national, regional, and local framework for anticipating and responding to a wide range of threats.[184]

Lastly, the terrorist attacks against the US on September 11, 2001, caused the British government to think even more seriously about modernizing its arrangements for civil contingencies.[185] This shift in focus originally regarded civil defense against military and terrorist threats but has since expanded to include an all-hazards approach, which encompasses all manner of potential threats, including those of a civil, natural, technological, biological, and instrumental nature.[186] This means that national emergency power in the UK could theoretically involve a wide variety of subject matter areas, in a manner similar to the United States. Thus, one of the main goals of the UK's new emergency legislation would be to update the definition of what constitutes an "emergency."[187] The centerpiece of the UK government's new, post-9/11 contingencies agenda was the CCA 2004, which would replace the older emergency legislation.

Parts 1 and 2 of the CCA 2004 begin with an expansive definition of the term "emergency."[188] Indeed, the fact that the CCA defines "emergency" is perhaps the feature that distinguishes it the most from its American counterpart. The definition of emergency in the CCA focuses on the consequences of emergencies, defining an emergency as "an event or situation which threatens serious damage to human welfare; an event or situation which threatens serious damage to the environment; or war, or terrorism, which threatens serious damage to security."[189]

In Part 1 of the CCA, the definition of "national emergency" sets out the range of possible incidents for which local responders must prepare when fulfilling their civil protection duties.[190] Part 2's definition establishes the situations in which the government may use emergency powers, if the appropriate safeguards are met.[191] This does not mean that the definition of "emergency" has the exact same legal interpretation in both Parts. In Part 1, the threat must pose a threat of serious damage to human welfare or the environment of a "place" in the UK[192] This reflects the fact that Part 1 is designed to deal with preparations by local responders for

182. *Id.*
183. *Id.*
184. *Id.*
185. Fox, *supra* note 172, at 282.
186. *See id.*
187. *See* Civil Contingencies Act 2004, a short guide, *supra* note 162.
188. Civil Contingencies Act 2004, c. 36, §§ 1, 19.
189. *See id.*; *see also* Civil Contingencies Act 2004, a short guide, *supra* note 162.
190. Civil Contingencies Act 2004, c. 36, §1.
191. *Id.* § 19.
192. *Id.* §1(1)(a)-(c).

localized emergencies.[193] Contrarily, in Part 2, the threat must pose a threat of "serious" damage to human welfare or the environment of one of the English Regions, or one of the other constituent parts of the UK, such as Scotland, Wales, or Northern Ireland.[194] This higher threshold reflects the fact that Part 2 is designed for use in very serious emergencies that affect a larger geographical area and would likely require a larger, more intrusive—or perhaps even forceful—government response.[195]

Section 20 of the CCA 2004, located in Part 2, permits the Senior Ministers of the Crown to make special temporary regulations to deal with the most serious of emergencies.[196] In order to prevent misuse of these and other portions of the law, the CCA 2004 has safeguarding provisions, which are designed to ensure that emergency regulations are only issued as a last resort and that the ministers who implement them are ultimately responsible to Parliament's legislative discretion. Section 21 sets forth the conditions under which emergency regulations may be issued.[197] First, an emergency must have occurred, be occurring, or be about to occur.[198] Second, the use of this section must be necessary to make provisions for the purpose of preventing, controlling, or mitigating an aspect or effect of the emergency.[199] Third, the need for such a regulation must be *urgent*.[200] In other words, the emergency situation must be dire, such that "existing legislation cannot be relied upon without the risk of serious delay," "there would not be sufficient time to determine whether existing legislation could be relied upon," or "existing legislation would be insufficiently effective."[201]

Finally, Section 27 provides for mandated parliamentary scrutiny of emergency regulations.[202] When emergency regulations are made, a Senior Minister of the Crown must appear before Parliament "as soon as is reasonably practicable."[203] Crucially, any regulations issued pursuant to Section 20 automatically expire seven days after they are issued, unless each House of Parliament passes a resolution approving them.[204]

193. Civil Contingencies Act 2004, a short guide, *supra* note 162.
194. Civil Contingencies Act 2004, c. 36, §19(1).
195. *See* Civil Contingencies Act 2004, a short guide, *supra* note 162
196. Civil Contingencies Act 2004, c. 36, §20.
197. *Id.* § 21.
198. *Id.* § 21(2).
199. *Id.* § 21(3).
200. *Id.* § 19(4).
201. Civil Contingencies Act 2004, c. 36, § 21(5)-(6).
202. *Id.* § 27.
203. *Id.* § 27(1)(a).
204. *Id.* § 27(1)(b).

V. RECOMMENDED AMENDMENTS

In order to better control the promulgation of national emergencies in the US, and to ensure executive accountability, Congress should amend the NEA to mirror the CCA 2004. Specifically, Congress ought to define "national emergency" by either inserting the definition of "emergency" from the CCA 2004 into the NEA or by drafting a definition that is similar in scope and in its limiting effect on the President's power to determine what a national emergency is. Congress also ought to introduce a mandatory sunset clause on all presidentially declared national emergencies, removable only upon Congressional assent to the emergency declaration.

While the NEA was envisioned by the Special Committee as a significant legislative control on executive national emergency declaration power, the reality is that it is not. Indeed, as Elizabeth Goitein has bluntly put it, the law has failed by any objective measure.[205] Goitein notes that the NEA has not limited the amount of emergencies that have been declared, and highlights the fact that "[t]hirty states of emergency are in effect today — several times more than when the act was passed."[206] Most of these declarations have been continually renewed since their original promulgation, and, during the 40-year life of the NEA, Congress has never met for the purpose of voting on whether to end an emergency.[207] Whatever legal regime the NEA was designed to create is nonexistent, and Congress must use its constitutionally granted legislative powers to bolster the safeguards on executive power that can so often be lost in times of emergencies.

The NEA should be amended to include a definition of the term "national emergency" that includes similar language as is found in Section 19 of the CCA 2004. It is worth noting upfront that the CCA 2004's definition is itself relatively vague. Indeed, one of the express aims of the British government was to develop an expansive definition of emergency to encompass the variety of situations that the government could encounter in the modern age that might warrant emergency action.[208]

However, even an expansive definition of national emergency would create better guardrails than nothing. The Supreme Court has held that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, and common meaning.[209] Despite certain historical, legal paradigms that describe national emergency situations, the common, contemporary definition—or even the conception—of what

205. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (Jan. 2019), https://www.theatlantic.com/magazine/archive/2019/01/ presidential-emergency-powers/576418/.

206. *Id.*

207. *Id.*

208. O'Brien & Reed, *supra* note 163, at 354.

209. Perrin v. United States, 444 U.S. 37, 42 (1979) (quoting Burns v. Alcala, 420 U.S. 575, 580-81 (1975)).

exactly constitutes a "national emergency" remains vague and problematic.[210] Thomas A. Dine, a foreign policy staffer of the US Senate, succinctly stated the problem during the NEA committee hearings in 1973, when he said that, "[i]n my discussions and research, I have yet to come across a definition. There is no objective or standard definition [of national emergency] . . . . If the President says so, it is a national emergency."[211]

The last sentence of Dine's comment highlights the core of the problem: Absent any sort of legally defined parameter for courts to interpret, the American executive has very little practical restraints on its ability to determine what is and is not a "national emergency," aside from political inconvenience; a constraint that is of questionable merit.[212] As a result, the President's claimed national emergency authority hemorrhages into an almost limitless list of policy areas, most recently including global trade.[213]

Unlike its American counterpart, the CCA actually defines "emergency," with its definition being based on the *consequences* of an emergency event.[214] This allows the UK's emergency legislation to maintain the necessary flexibility to accommodate for unforeseen emergency situations, while still limiting executive authority to decide what qualifies as a "national emergency," and attempting to limit such declarations to events that actually result in some sort of damage. For example, each of the three parts of the definition of emergency in Part 1 of the CCA 2004 are expanded upon in order to cover a range of ways that an event or situation can "threaten serious damage," while Part 2 confers exceptional emergency powers on the executive only in relation to an event that "threatens serious damage" in the "United Kingdom or in a Part or region."[215] This is an example of an effort to legislate for the law's own suspension, albeit with an attempt to control exceptional measures through standard judicial and parliamentary accountability mechanisms.[216]

The emergency powers in Part 2 were subject to legal discussion and contest, and, if implemented, their use would be subject to a series of tests and protections.[217] During Parliamentary debate, one frequent criticism of the draft Bill was that its emphasis on "consequences" was too vague and risked, dangerously

210. *See* Kronlund, *supra* note 37, at 147.

211. *Id. at* 147-48 (quoting STAFF OF S. SPEC. COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, COMMITTEE PRINT 96-270 (Comm. Print 1973)).

212. *See* Tushnet, *supra* note 54, at 277.

213. Zeke Miller, *Powerful, Obscure Law basis For Trump 'Order' On Trade*, ASSOCIATED PRESS (Aug. 25, 2019), https://apnews.com/be18b8619cde4658a418dda4f416968a.

214. *See* Ben Anderson & Peter Adey, *Governing Events and Life: 'Emergency' in UK Civil Contingencies*, 31 POL. GEO. 24, 28 (2012).

215. *Id.*

216. *Id.*

217. *Id.*

expanding the scope of emergency powers.[218] In response, a clause that would have included "threat[s] to political, administrative or economic stability" in the definition of "emergency," was stricken from the draft bill.[219] Another power constraining aspect of the legislation is the requirement that an emergency have a minimum geographical extent before Part 2 emergency powers may be triggered.[220] In Part 1 emphasis is on a "place" (a term that, admittedly, is not defined in the Act and does not have a standard legal meaning) that is used to delineate "more localized events or situations, whereas the scale of an event or situation must be greater before emergency powers may be used."[221] While the definition of emergency still maintains some ambiguity in Part 2, the exercise of the tremendous national powers that this part enables is nonetheless subject to what scholars Ben Anderson and Peter Adey describe as the "triple lock mechanism," which requires seriousness, necessity and geographical proportionality.[222]

This triple lock mechanism is key to understanding how Parliament constrains the executive and, in like manner, how Congress ought to control the President. Put succinctly, the NEA should be amended to include this triple lock definition of "emergency" in order to cabin the same sort of executive discretion about which Parliament was worried. The President should not be the sole legal arbiter regarding what is and is not national emergency. By statutorily requiring that a potential national emergency be serious, that unilateral executive power actually be necessary to bringing about normal conditions again, and that the proposed executive response be proportional to the geographic scale of the problem, Congress could narrow the realm of possibilities in which a national emergency could be declared by the President. If Congress is serious about controlling what kinds of events the President can declare to be "national emergencies," than it should follow Parliament's lead, and mimic the triple lock mechanism found in the NEA.

Lastly, Congress should amend the NEA to automatically terminate declared national emergencies after a set period unless they are congressionally endorsed, in a similar manner as provided by Section 27 of the CCA 2004. Such a provision would ensure Congressional involvement in determining whether the circumstances for a national emergency exist and could lower the number of declared national emergencies. It is entirely possible that modern national security and emergency threats can still be appropriately disposed of through constitutionally allocated authority and traditional checks and balances.[223]

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218. *Id.*

219. Anderson & Adey, *supra* note 210, at 28 (quoting U.K. Cabinet Office, (2004c)).

220. *Id*.

221. *Id*. (quoting U.K. Cabinet Office, 2004c:5).

222. *Id.* (emphasis added).

223. *See, e.g.*, VICTOR HANSEN & LAWRENCE FRIEDMAN, THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR (Rutledge ed. 2016).

VI. CONCLUSION

Genuine national emergencies certainly occur, and when they do, they can be disastrous if managed poorly. Thus, it is important that national executives, such the US President, have both the power and the requisite discretion necessary to preserve the security of their country and return the state to a place where democratic norms can function normally. However, there simply cannot be a freewheeling national emergency exception to the rule of law. The principles of the rule of law demand that there be guardrails on unilateral exercises of power, even in apparently dire circumstances. The President is not a Roman dictator in perpetuity. Given the broad powers assumed by a president upon the declaration of a national emergency, Congress ought to prioritize monitoring national emergency declarations to stave off potential for abuse and preserve the rule of law.

Of course, defining "national emergency" and requiring Congressional assent as a prerequisite to extending national emergencies are only two possible solutions that could achieve this end. Goitein has suggested that Congress could pick up where the 1974 Special Committee left off and review the current statutory delegations of emergency powers and declarations.[224] Based on that review, Goitein further suggests that Congress could repeal delegations of emergency authority that are no longer necessary.[225] It could also further insulate the emergency declaration regime from abuse by requiring a connection between the nature of the emergency and the powers invoked and establishing a non-movable sunset clause for all emergency declarations.[226] This Note is meant to serve as a starting place for evaluating the NEA; it is not the definitive remedy shop for all that ails it.

To conclude, one could argue that the greatest tests of the rule of law come not during times of security, but during those times of national insecurity—legitimate or perceived—where the rule of law appears to be a hindrance to the national interest. It is in these situations that a country discovers how much it truly values the rules-based system it purports to protect. Shortly after the September 11 attacks, General Ralph Everhart, the US General in charge of the Pentagon's newly created Northern Command to oversee domestic security, admonished the United States against the precipitous abridgment of civil liberties, even given in the surrounding security context, by saying that, "We just have to be very, very careful that we don't misread some things we see, that we don't jump to conclusions, that we don't do things [in contravention of] . . . our Constitution and all the amendments."[227] Amidst the current global rise of authoritarianism, where liberty

224. *See* Goitein, *supra* note 205.

225. *Id.*

226. *Id.*

227. Federic Block, *Civil Liberties during National Emergencies: The Interactions between the Three Branches of Government in Coping with Past and Current Threats to the*

appears to find ever-dwindling places in which to seek refuge, the United States would be wise to heed General Everhart's admonition. Defining what exactly a "national emergency" is would be a good place to start.

Nation's Security, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 524 (2005) (quoting Gen. Ralph E. Eberhart, Interview, Threats and Responses: Excerpt from Comments on Terrorists, N.Y. TIMES, Dec. 13, 2002, at A26).