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# Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose

Joshua L. Friedman

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# EMERGENCY POWERS OF THE EXECUTIVE: THE PRESIDENT’S AUTHORITY WHEN ALL HELL BREAKS LOOSE

JOSHUA L. FRIEDMAN\*

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*History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required.*

- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 700 (1952).

## I. INTRODUCTION

The debate over the extent of Presidential authority has been argued since the very formation of our great nation. On September 17, 1787, in Philadelphia, Pennsylvania, thirty-nine state delegates convened at the Constitutional Convention

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\* M.B.A., 2009, University of Baltimore, Merrick School of Business; J.D., 2007, University of Maryland Francis King Carey School of Law; B.A., 2004, University of Maryland, College Park; Attorney Advisor, United States Social Security Administration, Office of Disability Adjudication and Review. All errors and omissions are the author’s own. The views expressed in this article do not represent the views of the Social Security Administration or the United States government. They are solely the views of the author acting in his personal capacity. There is no expressed or implied endorsement of the author’s views or activities by the Social Security Administration or the United States government. The author gratefully acknowledges the contributions and research assistance provided by Victoria Chihos, a second year law student.

and signed the Constitution of the United States into law.<sup>1</sup> At that time, the founding fathers intended to create an effective central government with a wide range of enforceable powers.<sup>2</sup> The President of the United States was intended to be the chief protector and the representative of the populace.<sup>3</sup>

The constitutional executive powers held by the President are broadly defined and vary in application. Chief Justice Marshall once wrote that, while the Constitution's "means are adequate to its ends," it is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs"<sup>4</sup> Therefore, this Article addresses, chiefly, the extent of the President's Executive powers to respond to threats to the security of the United States.<sup>5</sup>

According to the Court in *In Re Neagle*, 135 U.S. 1 (1890), "[the President] is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'"<sup>6</sup> Specifically, the Framers intended the President's constitutional authority to be "a continuation of the English and colonial tradition in war powers."<sup>7</sup> In other words, the founders intended that, aside from Congress, the President should have the primary responsibility along with the necessary and requisite powers to protect the national security.<sup>8</sup> The President is not required to "seek legislative permission before engaging the military,"<sup>9</sup> nor does this create a limitation whereas the executive would "have no power to commence war, or conclude peace, or enter into a final treaty without legislative approval."<sup>10</sup>

The President must also have the latitude to act with "decision, activity, secrecy, and dispatch."<sup>11</sup> This completely autonomous executive decision is sometimes tempered by the constitutional principle of checks and balances, such as the congressional and judicial oversight on executive authority, whether via legislation, inherent powers, or vis-à-vis Presidential deference. Finally, this Article endeavors to answer the profound question that continually faces this nation, in both past and present crises: in an emergency scenario, whether it be a terrorist attack, health crisis, or a natural environmental disaster, how broad, or rather, how substantive are the President's enumerated emergency powers?

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<sup>1</sup> THE OXFORD COMPANION TO UNITED STATES HISTORY 156 (Paul S. Boyer ed., 2001) (1966).

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

<sup>3</sup> John C. Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996).

<sup>4</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952).

<sup>5</sup> See Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 488, 489-90 (2002).

<sup>6</sup> *Cunningham v. Neagle*, 135 U.S. 1, 64 (1890).

<sup>7</sup> Yoo, *supra* note 3, at 252.

<sup>8</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting).

<sup>9</sup> Yoo, *supra* note 3, at 254.

<sup>10</sup> *Id.* at 234.

<sup>11</sup> *Id.* at 254.

Hamilton said it best: “the circumstances which may affect the public safety are [not] reducible within certain determinate limits . . . *there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy.*”<sup>12</sup> These varied occasions, such as martial law, *posse commitatus*, or immediate response, as envisioned by the Framers, were considered constitutional regardless of any limitations they placed on civil rights or liberties.<sup>13</sup> As long as the President followed his duty to faithfully execute the laws of the United States and to preserve, protect and defend the Constitution, he operated within his constitutional authority.

Within the perspective of Hamilton’s admonition against limiting executive authority, this Article endeavors to generally discuss the historical and recent separation of powers issues arising with an active executive branch. Part II gives a brief overview of executive powers and their limitations: first discussing what actions are strictly executive in character, and then presenting Congress’ attempts to question the executive’s emergency powers and addressing the Judicial branch’s struggle with finding a balance between judicial oversight and political question doctrine. Part III reviews specifically enumerated powers of the executive in emergencies where executive action is justified by the constitution, such as the evolution of emergency executive powers during wartime, *force majeure*, and, later on, public health emergencies. *Posse commitatus*, martial law, and immediate response principles are also discussed at length in this vein. In Part IV, the public health emergency section delves into the powers available to the executive, whether it be the President under his federal constitutional authority or the Governor under his State police powers—regardless of executive authority, how far may the executive go without overstepping the bonds of liberty.

Ultimately, this Article posits that the broad grant of executive authority in exigent circumstances is warranted. “With no time for *ex ante* deliberation, and no metric for *ex post* assessments, the executive’s capacities for swift, vigorous, and secretive action are at a premium.”<sup>14</sup> The executive must be ready, willing, and able to act immediately following a national disaster such as a public health emergency where quarantine or isolation principles require the immediate segregation of the populace, presumably against their wishes.<sup>15</sup> In such a case, where the executive acts in favor of the whole,<sup>16</sup> he must not be unduly hindered by judicial review or congressional authority. The constitutional powers of the executive are constantly

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<sup>12</sup> Delahunty & Yoo, *supra* note 5, at 488; THE FEDERALIST NO. 23 (Alexander Hamilton) (emphasis added).

<sup>13</sup> See D. A. Jeremy Telman, *A Truism That Isn’t True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 149 (2001).

<sup>14</sup> Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1565 (2009).

<sup>15</sup> See GEORGE J. ANNAS ET AL., AM. CIVIL LIBERTIES UNION, PANDEMIC PREPAREDNESS: THE NEED FOR A PUBLIC HEALTH – NOT LAW ENFORCEMENT/NATIONAL SECURITY – APPROACH 11 (2008), available at [http://www.aclu.org/pdfs/privacy/pemic\\_report.pdf](http://www.aclu.org/pdfs/privacy/pemic_report.pdf).

<sup>16</sup> THE FEDERALIST NO. 47, at 300 (James Madison) (Henry Cabot Lodge, ed., 1902) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the definition of tyranny.”).

changing, and are certainly broader than those envisioned in the days of Hamilton and Madison. The original constitutional authority reflected the concerns of the eighteenth century and was not “well adapted to current conditions.”<sup>17</sup>

## II. THE AXIS OVERSIGHT

### A. Executive Commander in Chief Powers

*The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.*

- Alexander Hamilton<sup>18</sup>

The constitutional executive powers vested in the President provide him with the ability to speedily act in the nation’s interest. “Decision, activity, secrecy, and dispatch will generally characterise [sic] the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.”<sup>19</sup> The President is vested with these powers to maintain the common good on behalf of societal interest.<sup>20</sup>

The Founders intended to create a government that was “clothed with all the powers requisite to [the] complete execution of its trust.”<sup>21</sup> Congress is granted wide latitude in its authority over the military and the execution of the laws.<sup>22</sup> Article I, Section 8 of the United States Constitution grants Congress the power to “declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.”<sup>23</sup> Congress may also raise, maintain, and provide support for the army<sup>24</sup> and navy,<sup>25</sup> “make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces,”<sup>26</sup> and may “[call] forth the [m]ilitia to execute the [l]aws . . . suppress insurrections and repel Invasions.”<sup>27</sup> Finally, Congress is entrusted with the

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<sup>17</sup> Pearlstein, *supra* note 14, at 1551 n.2 (quoting Eric A. Posner, et al., *Terror in the Balance: Security, Liberty, and the Courts* 56, (2007)).

<sup>18</sup> THE FEDERALIST NO. 74, at 463 (Alexander Hamilton) (Henry Cabot Lodge, ed., 1902).

<sup>19</sup> THE FEDERALIST NO. 70, at 437 (Alexander Hamilton) (Henry Cabot Lodge, ed., 1902).

<sup>20</sup> THE FEDERALIST NO. 70, at 436 (Alexander Hamilton) (Henry Cabot Lodge, ed., 1902) (“Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”).

<sup>21</sup> The Federalist No. 23, at 137 (Alexander Hamilton) (Henry Cabot Lodge, ed., 1902).

<sup>22</sup> U.S. CONST. art. I, § 8.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

ability to organize, arm, and discipline the militia, and to “make all [l]aws which shall be necessary and proper” to execute these powers.<sup>28</sup> These military powers provide Congress with control over undeclared, as well as declared, actions of war.<sup>29</sup>

Conversely, Article II of the Constitution establishes the President as “[c]ommander in [c]hief of the [a]rmy and [n]avy of the United States, and of the [m]ilitia of the several [s]tates, when called into the actual [s]ervice of the United States.”<sup>30</sup> Article II, Section 1, vests the “executive power” with the President, and requires that he faithfully execute the laws of the United States<sup>31</sup> and dictates that the President must, to the best of his abilities, “preserve, protect and defend the Constitution of the United States.”<sup>32</sup>

Article II, Section 2, entails the Commander-in-Chief powers of the President with the power to be “Commander in Chief of the [a]rmy and [n]avy of the United States.”<sup>33</sup> This provides him with “supreme command over the land and naval forces of the country,”<sup>34</sup> and he may order the armed forces to perform any necessary military duties as appropriate for the defense of the United States.<sup>35</sup> The President may also “dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country,”<sup>36</sup> and to “effectuate the defense of the United States.”<sup>37</sup> These specific powers accorded to the President exist both in times of peace, as well as in times of war.<sup>38</sup>

The President is also tasked to recommend to Congress consideration “such [m]easures as he shall judge necessary and expedient.”<sup>39</sup> In any emergency scenario, the President may take unilateral action before seeking Congressional approval, and, when the opportunity presents itself, may subsequently seek verification from Congress.<sup>40</sup> According to John Locke, this unrestrained power can be a concern and a potential threat to the liberty of the people.

[T]he Reigns of good Princes have been always most dangerous to the Liberties of their People. For when their Successors, managing the Government with different Thoughts, would draw the Actions of those

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

<sup>29</sup> Telman, *supra* note 13, at 149.

<sup>30</sup> U.S. CONST. art. II, § 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Delahunty & Yoo, *supra* note 5, at 497.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 498 (quoting Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 61-62 (1941)).

<sup>37</sup> *Id.* at 497.

<sup>38</sup> *Id.*

<sup>39</sup> U.S. CONST. art. II, § 3.

<sup>40</sup> See Yoo, *supra* note 3, at 304.

good Rulers into Precedent, and make them the Standard of their Prerogative, as if what had been done only for the good of the People was a right in them to do, for the harm of the People, if they so pleased; it has often occasioned Contest, and sometimes public Disorders, before the People could recover their original Right, and get that to be declared not to be Prerogative, which truly was never so.<sup>41</sup>

Locke's reference to the "prerogative of the people" rings true even today, as the specific, enumerated powers of the President of the United States have long been subject to dispute.<sup>42</sup> According to Locke, the executive branch must be able to deal with unforeseen issues that arise, especially those which cannot be anticipated by the legislative branch.<sup>43</sup> Where the law does not provide for all scenarios, the President must have the discretion and the latitude to act in a manner not closely proscribed by law, so long as it is exercised for the public good.<sup>44</sup>

The Commander-in-Chief powers are based on the checks and balances system, subject to veto by the legislature, and subject to consideration by the judiciary. While it is true that Congress alone has the power to declare war on other nations, centralizing authority within the executive permits the "unitary executive [to] evaluate threats, consider policy choices, and mobilize military and diplomatic resources with a speed and energy that is far superior to any other branch."<sup>45</sup> According to Alexander Hamilton, a forward-thinking president can reasonably operate within the confines of the Constitution to protect the security of the nation.<sup>46</sup> A strong executive would be far more effective and competent for the nation than a weak one.

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and highhanded combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy . . . It is not less essential to the steady administration of the laws.<sup>47</sup>

The far reaching powers of the executive branch are necessary to protect liberty against any attacks that would create chaos or anarchy within the government.<sup>48</sup>

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<sup>41</sup> Telman, *supra* note 13, at 135 (quoting John Locke, *Second Treatise* § 166, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 396 (Peter Laslett ed., 1988) (1690)).

<sup>42</sup> See Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377 (2011).

<sup>43</sup> Telman, *supra* note 13, at 185.

<sup>44</sup> *Id.*

<sup>45</sup> Delahunty & Yoo, *supra* note 5, at 493.

<sup>46</sup> *See id.*

<sup>47</sup> THE FEDERALIST NO. 70, at 436 (Alexander Hamilton) (Henry Cabot Lodge, ed., 1902).

<sup>48</sup> *See id.*

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson laid out a three-pronged test that determined the validity of an exercise of executive power.<sup>49</sup> First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”<sup>50</sup> In this scenario, Congress has granted explicit congressional authorization for the President to act.<sup>51</sup> When the President and Congress act together to address an emergency situation, the President’s concurrent powers are at their zenith.<sup>52</sup>

Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>53</sup> When the President acts within “a zone of twilight,”<sup>54</sup> he acts without congressional authorization for his actions and may face the ramifications for doing so at a later date. While acting under the “zone of twilight,” the President’s independent (as opposed to concurrent) powers are at their fullest.<sup>55</sup> In this case, the President can act with “all-embracing, swiftly moving authority.”<sup>56</sup>

The powers of the President within this “zone of twilight” must be considered within certain factors. First, whether “necessity” exists to authorize the President’s exercise of powers.<sup>57</sup> This increases the likelihood that a court will later favor the President’s exercise of discretion.<sup>58</sup> The President may act without implied or express congressional approval, but he *cannot* act without necessity.<sup>59</sup> The greater the immediate necessity for Presidential action, the greater likelihood that the courts will sustain the President’s continuing, independent authority.<sup>60</sup>

Finally, the third standard for presidential authority arises “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>61</sup> When the President acts in violation of an act of Congress, his power “is at its lowest ebb”<sup>62</sup>

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<sup>49</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-38; Yoo, *supra* note 3, at 193.

<sup>50</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

<sup>51</sup> *See id.* at 635-37.

<sup>52</sup> Yoo, *supra* note 3, at 193 (citing *Youngstown Sheet & Tube Co.*, 343 U.S. at 635).

<sup>53</sup> *Id.* at 637.

<sup>54</sup> Yoo, *supra* note 3, at 192-93 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637).

<sup>55</sup> Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F.L. REV. 67, 110 (2005).

<sup>56</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 613.

<sup>57</sup> Davies, *supra* note 55, at 109.

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

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 637.

<sup>62</sup> *Id.*



because he acts against congressional authority. This creates substantial risk, both legally and politically, for the President, and his actions must be strongly scrutinized.<sup>63</sup>

This seminal analysis by Justice Jackson in *Youngstown* has remained the foremost interpretation of the President's exercise of his executive powers. Justice Jackson further noted: "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches . . . presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>64</sup> Justice Jackson determined that the decision to deploy military force was reserved to the executive branch and remained among the President's enumerated powers only "to the extent that the constitutional text does not explicitly allocate the power to initiate military hostilities to a particular branch."<sup>65</sup>

The Court has long held that "in the declared exercise of [the President's] powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress."<sup>66</sup> Only "except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress"<sup>67</sup> could any Presidential action be set aside by the courts. Similarly, in the *Prize Cases*, the extent of the President's power to institute a blockade was "to be decided by him" and would be left up to "the political department of the [g]overnment to which this power was entrusted."<sup>68</sup>

The President's constitutional authority flows from both his unique position in the constitutional structure and from the specific grants of authority assigned by Article II.<sup>69</sup> It is clear that, based on *Youngstown* and its progeny, in an emergency situation "the President enjoys full discretion in determining what level of force to use when addressing the emergency situation."<sup>70</sup> The President's enumerated powers dictate that he be granted the power to act specifically for the good of the nation in such situations.<sup>71</sup> This must be in the clear and informed manner that Locke proscribed, to prevent substantial "public disorder."<sup>72</sup>

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<sup>63</sup> Davies, *supra* note 55, at 110-11.

<sup>64</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

<sup>65</sup> Delahunty & Yoo, *supra* note 5, at 495.

<sup>66</sup> *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

<sup>67</sup> *Ex parte Milligan*, 71 U.S. 2, 133 (1866).

<sup>68</sup> Delahunty & Yoo, *supra* note 5, at 490 (quoting *The Amy Warwick*, 67 U.S. 635, 670 (1862)).

<sup>69</sup> *Id.* at 494 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982)).

<sup>70</sup> *Id.* at 490 (quoting *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 670 (1862)).

<sup>71</sup> Telman, *supra* note 13, at 135 (quoting JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 396 (Peter Laslett ed., 1988) (1690)).

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

*B. Judicial Oversight of Executive Powers*

The Supreme Court has historically supported the Executive's decisions and independent powers in emergency scenarios. However, questions still arise over whether the Court has continuing jurisdiction over the actions of the President in such emergency cases.<sup>73</sup> According to Justice Frankfurter in *Youngstown*, the Judiciary is not "the overseer of our government."<sup>74</sup> Justice Frankfurter also noted that "[j]udicial power can be exercised only as to . . . '[c]ases' or '[c]ontroversies' . . . . Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution."<sup>75</sup> Furthermore, he agreed that, as the power of Commander in Chief is assigned solely to the President, the extent of his powers is decided by the President<sup>76</sup> and not by the Courts.<sup>77</sup>

The Court has held that the President has independent authority and the need to be free from interference in a variety of cases.<sup>78</sup> In *Marbury v. Madison*, 5 U.S. 137 (1803), Justice Marshall found that "the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. [B]eing entrusted to the executive, the decision of the executive is conclusive."<sup>79</sup> According to Justice Marshall, the Court does not have the jurisdiction to address political questions, including, for example, issues of emergency health situations, foreign affairs or war making powers.<sup>80</sup> "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this [C]ourt."<sup>81</sup>

The Court has historically held that the President may "employ [his powers] in the manner he may deem most effectual."<sup>82</sup> In *Luther v. Borden*,<sup>83</sup> the Court clarified that the President may "call forth such number of the militia of any other [s]tate or [s]tates, as may be applied for, as he may judge sufficient to suppress such insurrection."<sup>84</sup> In the *Prize Cases*,<sup>85</sup> the Court determined that the President, while

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<sup>73</sup> *Al-Ghizzawi v. Bush*, No. 05-2378(JDB), 2006 WL 2844781, at \*1 (D.D.C., 2006).

<sup>74</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 594.

<sup>75</sup> *Id.*

<sup>76</sup> *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 670 (1863).

<sup>77</sup> *Delahunty & Yoo*, *supra* note 5, at 490.

<sup>78</sup> *Hamdi*, 542 U.S. at 582 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

<sup>79</sup> *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

<sup>80</sup> *Id.* at 170.

<sup>81</sup> *Id.*

<sup>82</sup> *Flemming v. Page*, 50 U.S. 603, 615 (1850).

<sup>83</sup> *Luther v. Borden*, 48 U.S. 1 (1849). Here, the Court held that, whether state governments are protected by the Constitution under Article IV pursuant to the "republican forms of government" clause is an inherently political and non-justiciable question to be resolved by the President and Congress. *Id.* at 32.

<sup>84</sup> *Id.*

fulfilling his duties as Commander-in-Chief, was justified in instituting a blockade against the [s]outhern [s]tates. The Court ruled that it did not have the judicial oversight to question the President's actions, but must leave this decision to "the political department of the [g]overnment to which this power was entrusted."<sup>86</sup>

More recently, in *Hamdi*,<sup>87</sup> the Court held that the President's power to act unilaterally falls squarely within the President's enumerated powers, and that the Court lacks the expertise and capacity to second-guess that decision.<sup>88</sup> According to Justice Thomas, "[t]he power to protect the [n]ation ought to exist without limitation because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."<sup>89</sup> The President is far better equipped to address emergency issues that may arise than the judicial branch; the former has almost unlimited resources and methodology for addressing emergent issues while the latter is limited to judicial oversight.<sup>90</sup>

The Court cannot reasonably prevent the executive branch from accomplishing its constitutionally assigned functions.<sup>91</sup> When circumstances arise that may endanger the safety of the nation, "constitutional shackles" cannot be imposed on the President.<sup>92</sup> The President must be free to act with somewhat unfettered discretion in areas.<sup>93</sup> When the Court extends judicial review into areas "where it does not know, and has no way of finding out, what serious harm it may be doing,"<sup>94</sup> this reduces the vested responsibility of the Executive.<sup>95</sup>

### C. Legislative Oversight of Executive Powers

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

- U.S. CONST. amend. X.

In drafting the Constitution, the Framers changed the division of powers that had traditionally been regarded as "executive," and instead assigned them to Congress in Article I, while expressly maintaining other elements as enumerated executive powers in Article II.<sup>96</sup> For instance, the power to declare war was originally provided

<sup>85</sup> *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 641 (1863).

<sup>86</sup> Delahunty & Yoo, *supra* note 5, at 490.

<sup>87</sup> *Hamdi*, 542 U.S. at 516.

<sup>88</sup> *Id.* at 579 (Thomas, J., dissenting).

<sup>89</sup> *Id.* at 580.

<sup>90</sup> See Delahunty & Yoo, *supra* note 5, at 493.

<sup>91</sup> *Id.* at 490 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

<sup>92</sup> Yoo, *supra* note 3, at 270.

<sup>93</sup> See generally *Morrison v. Olson*, 487 U.S. 654, 688-94 (1988).

<sup>94</sup> *Hamdi*, 542 U.S. at 586 (Thomas, J., dissenting) (quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550-51 (D.C. Cir. 1984)).

<sup>95</sup> *Id.*

<sup>96</sup> Delahunty & Yoo, *supra* note 5, at 494.

to Congress and the Commander-in-Chief authority was expressly reserved for the President.<sup>97</sup> Clearly then, “[i]n the area of domestic legislation, the Constitution creates a detailed, finely wrought procedure in which Congress plays the central role.”<sup>98</sup> This does not appertain to situations where the President must act independently of Congress.<sup>99</sup>

According to Justice Thomas, “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act.”<sup>100</sup> Congress’s power to declare war does not place limitations on the President’s “independent and plenary constitutional authority”<sup>101</sup> regarding the use of military force. The reason for this is because otherwise, “the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action.”<sup>102</sup>

The President’s war-making powers are historically subject to the whim of Congress.<sup>103</sup> While a President requires Congressional approval to declare war on a sovereign nation, Congress may later chose to veto the President’s declaration of war or deny the President the necessary funds to continue the war.<sup>104</sup> However, in the case of an emergency action, such as a disaster occurring within a state whereas the President has to send in the National Guard to maintain order, the President’s powers must be absolute and not subject to congressional or judicial scrutiny.<sup>105</sup>

As Justice Jackson stated, “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>106</sup> Therefore, no statute can place any limits on the President’s decision of how to adequately respond in an emergency situation.<sup>107</sup> These decisions under our Constitution can only be logically made by the President.<sup>108</sup> In *United States v. Midwest Oil Co.*, the United States argued that:

[t]he function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 493.

<sup>99</sup> *Id.* at 491-93.

<sup>100</sup> Hamdi, 542 U.S. at 581 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981)).

<sup>101</sup> Delahunty & Yoo, *supra* note 5, at 493-94.

<sup>102</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 680-81.

<sup>103</sup> Historically, “constitutional materials indicate that the Framers intended a narrowly circumscribed presidential war-making power, with the Commander in Chief Clause conferring minimal policy-making authority except in the case of sudden attacks.” Delahunty & Yoo, *supra* note 5, at 490-91.

<sup>104</sup> Only Congress has the authority to declare war. U.S. CONST. art. I, § 8, cl. 11.

<sup>105</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 598-604.

<sup>106</sup> *Id.* at 635 (Jackson, J., concurring).

<sup>107</sup> *Id.* at 688-89 (majority opinion).

<sup>108</sup> *Id.* at 690.

of the subjects concerning which laws might be made are perforce removed from the possibility of Executive influence. . . . The President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. . . . Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution.<sup>109</sup>

As such, the Executive is tasked with the authority to act for the national protection in scenarios where Congress cannot contemplate judicious action.<sup>110</sup> Despite this, strict scrutiny proponents of presidential authority have claimed that, when the President acts to resolve an emergency scenario, he is not authorized to do so without the express permission of Congress.<sup>111</sup> These claimants bring Section 2(c) of *The War Powers Resolution*,<sup>112</sup> which states that:

[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.<sup>113</sup>

Congress included three mechanisms in the Act designed to ensure congressional participation in the war-making process.<sup>114</sup> First, the President must consult with Congress, whenever possible, before introducing armed forces into hostilities, whether the conflict is imminent or actual.<sup>115</sup> Second, the President must report to Congress within forty-eight hours of introducing such armed forces, detailing why the President sent the troops, describing the constitutional and legislative authority for the action, and estimating the scope and duration of the action.<sup>116</sup> Finally, once the President has submitted his reasoning, he must terminate the intervention within sixty days.<sup>117</sup> The only exceptions are, unless there is a declaration of war, Congress

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<sup>109</sup> *Id.* at 690-91.

<sup>110</sup> *Zweibon v. Mitchell*, 516 F.2d 594, 615-16 (1975).

<sup>111</sup> *Padilla v. Hanft*, 423 F.3d 386, 395 (4th Cir. 2005).

<sup>112</sup> 50 U.S.C. § 1541 (2012).

<sup>113</sup> 50 U.S.C. § 1541(c) (2012).

<sup>114</sup> *Yoo*, *supra* note 3, at 180 (quoting 50 U.S.C. § 1541(c)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 181.

authorizes an extension or Congress cannot meet due to an armed attack on the U.S.<sup>118</sup> The Act also declares that Congress may terminate the President's use of force at any time by concurrent resolution.<sup>119</sup>

The Executive branch has historically taken the position that the War Powers Act is unconstitutional. According to the Justice Department, "section 2(c) of the War Powers Resolution does not constitute a legally binding definition of Presidential authority to deploy our armed forces."<sup>120</sup> Moreover, this legislation is viewed by the Executive as "incomplete or is not meant to be binding."<sup>121</sup> No President has ever acknowledged the constitutionality of the War Powers Resolution, and no President has ever formally complied with its terms in emergencies.<sup>122</sup> In fact, several Attorney Generals have held that Presidential action in times of emergency is expressly constitutional "without specific prior Congressional approval"<sup>123</sup> as long as they are for the purpose of "missions of good will or rescue, or for the purpose of protecting American lives or property or American interests."<sup>124</sup> Attorney General Frank Murphy also stated in a speech to the U.S. Senate on the Emergency Powers of the President:

the Executive has powers not enumerated in the statutes. . . . It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.<sup>125</sup>

Likewise, Attorney General John K. Richards once wrote that the Executive must act to preserve our national integrity and the interests which are entrusted to him.<sup>126</sup> "In the protection of these fundamental rights . . . the President is not limited to the enforcement of specific acts of Congress . . . [t]o do this, he must preserve, protect, and defend those fundamental rights which flow from the Constitution and belong to the sovereignty it created."<sup>127</sup> Mr. Richards' modest views of the Presidency are

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Delahunty & Yoo, *supra* note 5, at 513.

<sup>121</sup> *Id.*

<sup>122</sup> Yoo, *supra* note 3, at 181.

<sup>123</sup> Delahunty & Yoo, *supra* note 5, at 498 (quoting *Authority to Use United States Military Forces in Somalia*, 16 OP. OFF. LEGAL COUNSEL 8, 11 (1992)).

<sup>124</sup> *Id.*

<sup>125</sup> Request of the Senate for an Opinion as to the Powers of the President in Emergency or State of War, 39 Op. Att'y Gen. 343, 347-48 (1939).

<sup>126</sup> Delahunty & Yoo, *supra* note 3, at 499.

<sup>127</sup> *Id.* at 497-99.

echoed by the founders' intent to create presidential authority that superseded congressional oversight when faced with an imminent crisis.

The War Powers Act has a contentious and tumultuous history.<sup>128</sup> Notwithstanding the constitutionality of the Act, the President has the constitutional powers to act independently of Congress when necessary to protect the rights and liberties of the citizens.<sup>129</sup> Any deprivation of the power allocated to the President to determine when to use military force in the case of an emergency would "disrupt the basic constitutional framework."<sup>130</sup> While placing unchecked powers in the hands of the executive branch could be dangerous to liberty with the unrestricted potential for abuse,<sup>131</sup> the Court has stated that "it would be difficult to point out any other hands in which this power would be more safe, and at the same time equally effectual."<sup>132</sup> This power "is conferred by the Constitution and laws of the United States, and must therefore be respected and enforced."<sup>133</sup>

### III. THE ENUMERATED EMERGENCY POWERS OF THE EXECUTIVE BRANCH

#### A. *Emergency Powers*

The Tenth Amendment of the United States Constitution sets forth that "all powers not delegated to the government of the United States are reserved to the several states or to the people."<sup>134</sup> The Articles of Confederation guaranteed to each state its "sovereignty, freedom and independence and every power, jurisdiction and right, which is not . . . expressly delegated to the United States is retained by the states."<sup>135</sup> These documents grant certain express, unalienable rights to the states to be free from interference by the federal government.<sup>136</sup>

While these historical documents may be read as a check against the executive branch during an emergency scenario, the President does have some indirect authority over the matter.<sup>137</sup> "As Commander-in-Chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual"<sup>138</sup> Moreover, the Constitution provides the "power [to] the executive branch of the government to preserve order and insure the public safety in times of emergency,

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<sup>128</sup> Wars Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555. The President initially vetoed the War Powers Act, but Congress ultimately overrode the veto. VETO OF THE WAR POWERS RESOLUTION, 1 PUB. PAPERS 311 (Oct. 24, 1973).

<sup>129</sup> Delahunty & Yoo, *supra* note 5, at 514.

<sup>130</sup> *Id.* at 495.

<sup>131</sup> *Luther v. Borden*, 48 U.S. 1, 44 (1848).

<sup>132</sup> *Hamdi*, 542 U.S. at 591 (2004) (Thomas, J., dissenting).

<sup>133</sup> *Id.* at 591.

<sup>134</sup> U.S. CONST. amend. X.

<sup>135</sup> ARTICLES OF CONFEDERATION OF 1781, art. II, para. 1.

<sup>136</sup> *Id.*

<sup>137</sup> *See Fleming v. Page*, 50 U.S. 603 (1850).

<sup>138</sup> *Id.* at 615.

when other branches of the government are unable to function, or their functioning would itself threaten the public safety.”<sup>139</sup>

For example, in the rare instance where a state refuses to send in military forces to address an emergency, such as a revolt by the populace or a terrifying health quarantine, the President must realize his authority to act in these situations. No governmental interest is more compelling than the security of the nation.<sup>140</sup> It is also expressed during these scenarios that “the President should *not* report to Congress or, indeed, to anyone else.”<sup>141</sup> According to Justice Story, “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.”<sup>142</sup>

Presidential authority may be expanded during such times of emergency. In *Youngstown*, Justice Frankfurter dictated that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents . . . may be treated as a gloss on executive power vested in the President.”<sup>143</sup> Justice Frankfurter’s concurrence established a three-pronged test for the legitimate expansion of executive powers.<sup>144</sup> First, the Executive’s practice must be systematic, unbroken, and long pursued.<sup>145</sup> Second, Congress must knowingly acquiesce to the practice.<sup>146</sup> Third, the Executive may not violate any unambiguous constitutional commands or statutes.<sup>147</sup>

“The President’s authority to deploy armed forces has been exercised in a broad range of circumstances [in] our history.”<sup>148</sup> Emergency situations sometimes arise in foreign, rather than domestic matters. “The United States frequently employs armed forces outside this country—over 200 times in our history—for the protection of American citizens or national security.”<sup>149</sup> On August 20, 1998, President Clinton ordered the armed forces to strike at terrorist-related facilities in Afghanistan and Sudan because “of the threat they present[ed] to our national security.”<sup>150</sup> President Clinton continued, “when our very national security is challenged . . . we must take

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<sup>139</sup> *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring).

<sup>140</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981).

<sup>141</sup> Charles Cooper, *What the Constitution Means By Executive Power*, 43 U. MIAMI L. REV. 165, 195 (1988).

<sup>142</sup> *The Apollon*, 22 U.S. 362, 366-67 (1824).

<sup>143</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

<sup>144</sup> *See generally id.* at 593-614.

<sup>145</sup> *Id.* at 610-11.

<sup>146</sup> *Id.* at 613.

<sup>147</sup> *Id.* at 637-38.

<sup>148</sup> 8 U.S. Op. Off. Legal Counsel 271, 275 (1981).

<sup>149</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990).

<sup>150</sup> President William Clinton, Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afg. and Sudan (Aug. 20, 1998) available at <http://www.presidency.ucsb.edu/ws/?pid=54798&st=&st1=#axzz1mJ8YnoyT>.



extraordinary steps to protect the safety of our citizens.”<sup>151</sup> Here, President Clinton viewed his emergency authority independent of Congress and acted to protect the nation against imminent terrorist threats.<sup>152</sup>

According to Justice Vinson in *Youngstown*:

[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power. The Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness. There is no cause to fear Executive tyranny so long as the laws of Congress are being faithfully executed. Certainly there is no basis for fear of dictatorship when the Executive acts, as he did in this case, only to save the situation until Congress could act.<sup>153</sup>

So long as the Executive did not create a basis for claims of “arbitrary action, unlimited powers or dictatorial usurpation of congressional power,”<sup>154</sup> the Court was willing to overlook the matter of any “executive tyranny” in handling emergency situations.<sup>155</sup>

Another issue arising recently deals with the government’s detention of individuals suspected of involvement in terrorism during wartime situations. The Court held in *Hamdi* that “the [g]overnment’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest. For example, in times of war or insurrection, when society’s interest is at its peak, the government may detain individuals whom the government believes to be dangerous.”<sup>156</sup> According to the Court, the Executive’s power to protect the nation in these circumstances should be unrestrained because,

it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.<sup>157</sup>

The *Hamdi* Court stepped beyond *Youngstown*, ruling that national emergencies dictate the existence of an executive authority, free from “constitutional shackles,”<sup>158</sup>

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<sup>151</sup> Letter from John C. Yoo, Deputy Assistant Attorney General to George W. Bush, President of the United States (Sept. 25, 2001) available at [http://www.justice.gov/olc/war\\_powers925.htm](http://www.justice.gov/olc/war_powers925.htm).

<sup>152</sup> See generally *id.*

<sup>153</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

<sup>154</sup> *Id.* at 710 (Vinson J., dissenting).

<sup>155</sup> *Id.*

<sup>156</sup> *Hamdi*, 542 U.S. at 591 (Thomas, J., dissenting).

<sup>157</sup> *Id.* at 580.

<sup>158</sup> *Id.*

which would not subsequently give rise to the “executive tyranny”<sup>159</sup> envisioned in *Youngstown*.

Similarly, in the legislative record, Congress has explicitly authorized military involvement in domestic affairs when civilian authorities are overwhelmed.<sup>160</sup> The Federal statute, entitled Use of Militia and Armed Forces to enforce Federal Authority,<sup>161</sup> states:

[w]henver the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.<sup>162</sup>

This statute permits the Executive to employ the military in an emergency situation, specifically in the instance of a domestic uprising or a health quarantine.<sup>163</sup> The doctrine of necessity has spoken for wartime emergency actions, as well as situations requiring the seizure of a private facility for clearing away dangerous conditions.<sup>164</sup> Seizing property may require due compensation under the “takings clause,”<sup>165</sup> but does not encroach on the rights of the legislature.<sup>166</sup>

Indeed, the judicial record is replete with controversy over the Executive emergency powers.<sup>167</sup> In *Ex parte Milligan*, the Court noted that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”<sup>168</sup> This statement is just the beginning of discourse against broadening Executive powers in emergency scenarios. The Court further reasons that “[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or

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<sup>159</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 704.

<sup>160</sup> Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 77 (2005).

<sup>161</sup> 10 U.S.C. § 332 (2012).

<sup>162</sup> *Id.*

<sup>163</sup> The President could act under 10 U.S.C. § 332 to enforce health matters in the event that civil officials were overwhelmed and were unable to enforce the law. KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 33201, FED. AND STATE QUARANTINE AND ISOLATION AUTHORITY (2007).

<sup>164</sup> McCormack, *supra* note 160, at 77.

<sup>165</sup> *Id.* at 144.

<sup>166</sup> *Id.*

<sup>167</sup> See HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-505 GOV, NAT’L EMERGENCY POWERS (2001).

<sup>168</sup> *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

despotism.”<sup>169</sup> According to the *Milligan* Court, the government, acting within the confines of the Constitution, has “all the powers granted to it, which are necessary to preserve its existence.”<sup>170</sup> When the executive branch failed to follow the necessary and proper procedures that were established by Congress, the President took “measures incompatible with the expressed or implied will of Congress.”<sup>171</sup>

This result was intended to address the prevailing opinion at the time that, according to Justice Jackson in *Youngstown*, “[the Framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation . . . they suspected that emergency powers would tend to kindle emergencies.”<sup>172</sup> Justice Jackson argued that the Framers did not envision a constitutional conception of emergency powers for the Executive and did not intend to broaden these same powers except with Congressional or judicial oversight.<sup>173</sup>

In more recent decisions, the Court has ventured off the historical path by refusing to impede the Executive in the exercise of its emergency powers. In *Hirabayashi*, the Court concluded that, “[w]here . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or to substitute its judgment for theirs.”<sup>174</sup> The Court dictated that it could not reasonably intrude on delicate matters where the Executive has discretion.<sup>175</sup> The Court also specifically referred to the Executive’s emergency powers in *Hirabayashi*, when it stated that “it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.”<sup>176</sup>

Similarly, in *Korematsu*, the Court held that “when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”<sup>177</sup> This is clearly applicable to a domestic emergency scenario. While a President must be permitted to act outside of the boundaries of congressional authority in an emergency scenario, the Court has dictated that a standing President cannot be permitted to act beyond the boundaries of reason.<sup>178</sup>

The expansive “rational basis” standard of *Hirabayashi* and *Korematsu* carries weight even as recent as 2011, when President Obama argued that he had the right to

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<sup>169</sup> *Id.*; see also Davies, *supra* note 55, at 97.

<sup>170</sup> *Ex parte Milligan*, 71 U.S. at 121.

<sup>171</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 638.

<sup>172</sup> *Id.* at 650.

<sup>173</sup> Telman, *supra* note 13, at 157-58.

<sup>174</sup> *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

<sup>175</sup> *Id.* at 93-94.

<sup>176</sup> *Id.* at 102.

<sup>177</sup> *Korematsu v. United States* 323 U.S., 220 (1944).

<sup>178</sup> *Id.* at 234.

engage in warfare through military operations in Libya.<sup>179</sup> The administration contended that U.S. forces in Libya engaged in “a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster.”<sup>180</sup> President Obama argued that his actions were justified absent a formal declaration of war against Libya, pursuant to U.N. Security Council Resolution of 1973, and that his actions were “in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”<sup>181</sup> The Court noted its dismay that the claimants were attempting to circumvent constitutional authority to “achieve what appear to be purely political ends, when it should be clear to them that this Court is powerless to depart from clearly established precedent of the Supreme Court and the District of Columbia Circuit.”<sup>182</sup> On this basis, the Court dismissed the matter.<sup>183</sup>

This case echoes the result in *Campbell v. Clinton*, when several members of Congress sued over President Clinton’s military campaign in Yugoslavia.<sup>184</sup> There, the Court found that Congress had a broad range of legislative remedies and could have noted their objection to the Yugoslavian mission in that manner, rather than appealing to the judiciary that was precluded from entering the fray due to the political question doctrine.<sup>185</sup>

#### B. *Posse Comitatus*

The President has the power under the doctrine of “posse comitatus,” or “power of the county,” to call on the populace to assist in maintaining order or to apprehend criminals.<sup>186</sup> In other words, the government can ask the community to engage in civil law enforcement.<sup>187</sup> This concept has been sanctioned by Congress for the express purpose of “maintaining order or law enforcement, so long as military personnel are not directly engaged in searches or arrests.”<sup>188</sup>

The Posse Comitatus Act was enacted in 1878, “[i]n response to the military presence in the [s]outhern [s]tates during the Reconstruction Era”<sup>189</sup> and in “the

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<sup>179</sup> See generally *Kucinich v. Obama*, 2011 WL 5005303 (D.D.C. Oct. 20, 2011).

<sup>180</sup> See Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate (Mar. 21, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

<sup>181</sup> *Id.*

<sup>182</sup> *Kucinich v. Obama*, 2011 WL 5005303, at \*11.

<sup>183</sup> *Id.*

<sup>184</sup> *Campbell v. Clinton*, 203 F.3d 19 (D.C. 2000).

<sup>185</sup> *Id.* at 28.

<sup>186</sup> McCormack, *supra* note 160, at 79.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Davies, *supra* note 55, at 79.

perceived abuses of involving the military in various civilian responsibilities.”<sup>190</sup> Congress intended the Act to prevent military personnel from executing laws or directly involving themselves in civilian law enforcement activities that were not under their auspices.<sup>191</sup>

The origin of the Posse Comitatus Act<sup>192</sup> arose from the traditional American dislike for a strong military role in society, the very crux of the American Revolution.<sup>193</sup> When the colonies submitted their “Declaration of Independence” to the King of Great Britain, they listed numerous complaints against the King’s excessive use of the military.<sup>194</sup> These grievances included the following: “He has erected a multitude of [n]ew [o]ffices, and sent hither swarms of [o]fficers to harass our people, and eat out their substance. He has kept among us, in times of peace, [s]tanding [a]rmies, without the consent of our legislatures. He has affected to render the [m]ilitary independent of and superior to the [c]ivil power.”<sup>195</sup> Our nation’s founding fathers were rightfully afraid that the [e]xecutive branch, in the exercise of its constitutional powers, would act to limit individual rights against the consent of the legislature.<sup>196</sup> After the close of the Civil War, the U.S. continued to occupy the former [c]onfederate [s]outhern states, but agreed to withdraw these troops during the 1876 election—thereby ending Reconstruction and setting the stage for the enacting of the Posse Comitatus Act.<sup>197</sup>

As Justice Murphy stated, “From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.”<sup>198</sup> The founders intended for a congressional check against the misuse of federal forces to enforce the law of the land.<sup>199</sup> This premise was established through the Posse Comitatus Act.<sup>200</sup>

More recently, the military has become increasingly involved in domestic affairs.<sup>201</sup> Critics have disclaim that the American populace has historically

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> The text reads as follows: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” Posse Comitatus Act of 1878, 18 U.S.C. § 1385 (2012).

<sup>193</sup> Davies, *supra* note 55, at 75.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.*

<sup>197</sup> McCormack, *supra* note 160, at 86.

<sup>198</sup> *Id.*

<sup>199</sup> *See* THE FEDERALIST NO. 29 (Alexander Hamilton).

<sup>200</sup> *See generally id.*

<sup>201</sup> Davies, *supra* note 55, at 77.

displayed a “strong aversion to military involvement in civil affairs,”<sup>202</sup> and that citizens “applaud the military’s entering into such popular battles like the fight against illegal drugs, but once the enemy becomes the average American under strict conditions of martial law, that applause would likely be quickly silenced.”<sup>203</sup> However, according to the Code of Federal Regulations, “The Constitution and Acts of Congress establish six exceptions, generally applicable within the entire territory of the United States, to which the Posse Comitatus Act prohibition does not apply.”<sup>204</sup> These exceptions, including the Force Acts, include insurrections within a state, with the permission of the governor, rebellions where enforcement of federal law is impractical, or an insurrection which impedes the state’s ability to protect citizens of their constitutional rights, and the state is unable or unwilling to protect those rights.<sup>205</sup> More specifically, one of these exceptions is an emergency authority by the executive branch to prevent loss of life or property during serious disturbances or calamities.<sup>206</sup>

One of the most well known examples of the use of the emergency exception to the Posse Comitatus statute is the 1957 incident over the “Little Rock Nine” at Central High School, in Little Rock, Arkansas.<sup>207</sup> A federal injunction was issued against the Governor of Arkansas, which prevented the Governor from using the National Guard to prevent integration of Arkansas public schools.<sup>208</sup> Under the Posse Comitatus Act, President Eisenhower federalized the Arkansas National guard troops.<sup>209</sup> This effectively overruled the authority of Governor Orval Faubus, and prevented him from using the State National Guard to prevent nine black students from desegregating Central High School, in Little Rock.<sup>210</sup>

At the time, the Attorney General advised President Eisenhower that “the [P]osse [C]omitatus [S]tatute was not intended to limit the President’s authority to deal with mob violence or similar threats to enforcement of federal law.” Nevertheless, the “Little Rock Nine” entered the school under the protection of 1,000 members of the 101st Airborne Division of the U.S. Army.<sup>211</sup> Thus, Presidents have the authority to act to protect the public welfare and to secure the civil rights and civil liberties of the American people; even by force, if necessary.

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 76-77.

<sup>204</sup> *Id.* at 81 (quoting 32 C.F.R. § 215.4(c)(2)(i)(a-d)).

<sup>205</sup> Davies, *supra* note 55, at 81.

<sup>206</sup> *Id.*

<sup>207</sup> See McCormack, *supra* note 160, at 80.

<sup>208</sup> *Id.* at 79 n.51.

<sup>209</sup> Craig Rains, *Little Rock Central High 40th Anniversary*, <http://www.centralhigh57.org> (last visited Feb. 1, 2012).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

The Posse Comitatus Statute was used by the executive branch to address conflicts that have arisen over the national security of the nation.<sup>212</sup> Threats against national security have become more apparent with incidents such as the bombing of the federal plaza in Oklahoma City, the February 26, 1993 World Trade Center garage bombing, and the attacks on the twin towers on September 11, 2001, among others. It has now become of paramount importance that the executive branch have the authority to act independently if necessary to respond to the threats posed to the nation's safety.<sup>213</sup> When President Clinton announced that he was increasing federal funding to fight a variety of terrorist attacks, many protested the President's actions for independently increasing the military's role in civil law enforcement.<sup>214</sup> Despite the public furor, federal programs have continued to prepare for immediate incident response and recovery involvement, with an annual exercise conducted by the Department of Homeland Security each year to prepare for such causality.<sup>215</sup>

### C. Martial Law

*[Is] it possible to lose the nation and yet preserve the Constitution?*<sup>216</sup>

A third possibility for the President during a national emergency, where the President must overrule the inherent powers of the state, includes an act of martial law, "the rule which is established when civil authority in the community is made subordinate to military, either in repelling invasions or when the ordinary administration of the laws fail to secure the proper objects of the government."<sup>217</sup>

The Supreme Court has limited the definition of martial law to "the law of military necessity in the *actual presence of war*. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary, but it must be obeyed."<sup>218</sup> Interestingly enough, the "term 'martial law' itself carries no precise meaning. The Constitution does not refer to 'martial law' at all and no 'Act of Congress' has defined the term further."<sup>219</sup> It is clear, however, that martial law extends beyond "war."<sup>220</sup> If a widespread terrorist attack occurred, which severely incapacitated the governor of a state or rendered him unwilling to control the populace, the President

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<sup>212</sup> See generally Col. Craig Trebilcock, *Resurrecting Posse Comitatus in the Post-9/11 World*, AUSA.ORG (May 2009), [http://www.ausa.org/publications/armymagazine/archive/2009/5/Documents/FC\\_Trebilcock\\_0509.pdf](http://www.ausa.org/publications/armymagazine/archive/2009/5/Documents/FC_Trebilcock_0509.pdf) (last visited May 15, 2012).

<sup>213</sup> See McCormack, *supra* note 160, at 69-70.

<sup>214</sup> See William J. Broad & Judith Miller, *Pentagon Seeks Command for Emergencies in the U.S.*, N.Y. TIMES, Jan. 28, 1999, at A21.

<sup>215</sup> See, e.g., DEP'T OF HOMELAND SECURITY: NATIONAL EXERCISE PROGRAM, [http://www.dhs.gov/files/training/gc\\_1179350946764.shtm](http://www.dhs.gov/files/training/gc_1179350946764.shtm) (last visited Mar. 21, 2012).

<sup>216</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 662 (Clark, J., concurring).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (quoting *United States v. Diekelman*, 92 U.S. 520, 526 (1876)) (emphasis added).

<sup>219</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>220</sup> See generally *id.*

would be qualified to declare “war on terrorism” and use martial law to control the government of that state.<sup>221</sup>

The *Milligan* Court<sup>222</sup> laid out express requirements for a declaration of martial law. The requirements are either, a condition of necessity, domestic war of some form, when the courts are closed,<sup>223</sup> or actual war.<sup>224</sup> However, one final caveat that the *Milligan* Court established, was that “any exercise of emergency power by the President must be viewed in conjunction with congressional will.”<sup>225</sup> While obtaining “congressional will”<sup>226</sup> is not always feasible, this facet of *Milligan* exists because “just as emergencies do not create power and unenumerated powers do not mean undefined powers, the President's power to impose martial law must not be limitless.”<sup>227</sup>

Fearing an unlimited abuse of Presidential powers, the *Milligan* Court endeavored to check warrantless Presidential action in a time of conflict. Other than a condition of necessity, there are only very narrow circumstances where martial law may be established.<sup>228</sup> An emergency must exist in to declare martial law.<sup>229</sup> One view of what constitutes an emergency was illustrated in Texas during the Great Depression. There the governor of Texas attempted to declare martial law<sup>230</sup> in the absence of an emergency, attempting to limit oil well production.<sup>231</sup> The Supreme Court determined that “[i]t is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.”<sup>232</sup> Furthermore, “[i]f a national emergency is so severe that the civilian courts are not able to meet and enjoin the declaration of martial law, then probably the emergency justifies the declaration.”<sup>233</sup>

While it is true that Congress has the authority to “call[] forth the [m]ilitia to execute the [l]aws of the [u]nion,”<sup>234</sup> it is the duty of the Executive to “take [c]are that the [l]aws be faithfully executed”<sup>235</sup> Thus, in an instance where the local militia

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<sup>221</sup> *Id.*

<sup>222</sup> *Ex parte Milligan*, 71 U.S. at 127.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Davies, *supra* note 55, at 100.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 109.

<sup>228</sup> *Ex parte Milligan*, 71 U.S. at 121.

<sup>229</sup> *Id.*

<sup>230</sup> McCormack, *supra* note 160, at 137-38.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 88.

<sup>233</sup> *Id.*

<sup>234</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>235</sup> U.S. CONST. art. II, § 3.



cannot maintain order, the President *must* declare martial law.<sup>236</sup> This effectively overrules any congressional authority, and establishes police powers solely within the executive branch.<sup>237</sup>

Martial law is not only applicable to the civilian populace, but can also be used to dictate the actions of the government towards those same civilians. According to a Department of Defense (DOD) directive, “[t]he primary responsibility for protecting life and property and maintaining law and order in the civilian community is vested in the [s]tate and local government.”<sup>238</sup> When conflict arises, the DOD has the power to overrule other responsibilities of alternative federal agencies to ensure the safety of lives.<sup>239</sup>

In a specific domestic disaster relief, the Federal Emergency Management Agency (FEMA) is the lead federal agency.<sup>240</sup> “While FEMA’s primary responsibilities lie in the area of disaster or consequence management . . . they are neither trained nor manned to handle scenarios involving insurrection.”<sup>241</sup> Therefore, in such a scenario, under a declaration of martial law, the President can remove “FEMA from its primary role in consequence management” and mandate that “the Department of Defense take over the process under a proclamation of martial law.”<sup>242</sup>

Where a declaration of martial law is a necessity, the realization is that congressional powers are abstained, and the President has the responsibility to act appropriately. A hypothetical example of the President’s declaration of martial law can be seen in the movie “The Siege,”—a movie depicting a realistic version of martial law. In the movie, after numerous terrorist attacks in New York, the President declared martial law.<sup>243</sup> By doing so, the President effectively permitted the army to go from house to house, searching for Middle-Eastern men.<sup>244</sup> When the army discovered “suspects,” it would gather these individuals and put them in detention camps, torturing and killing any suspect who objected.<sup>245</sup> While “the Siege” was probably not an accurate representation of what would actually transpire if the President declared martial law, the movie reflects some of the fears and the arguments against declaring martial law in any given scenario.

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<sup>236</sup> U.S. CONST. art. II, § 3.

<sup>237</sup> *Id.*

<sup>238</sup> Davies, *supra* note 55, at 72.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See Judith I. Brennan, *Islamic Council Protests Timing of ‘The Siege’*, L.A. TIMES, Aug. 25, 1998, available at <http://articles.latimes.com/1998/aug/25/entertainment/ca-16165>.

<sup>244</sup> See Roger Ebert, *The Siege*, CHICAGO SUN-TIMES, Nov. 6, 1998, available at <http://rogerbert.suntimes.com/apps/pbcs.dll/article?AID=/19981106/REVIEWS/811060302/1023>.

<sup>245</sup> *Id.*

On April 29, 1992, a real life instance of “the Siege” occurred,<sup>246</sup> but the attacks were caused by American citizens rather than foreign terrorists.<sup>247</sup> Following the acquittal of several police officers accused of beating Rodney King, mob rule broke out in Los Angeles and protesters began committing multiple acts of arson and violence, including the severe beating of truck driver Reginald Denny.<sup>248</sup> Later that day, the Governor of California mobilized the California National Guard (CANG) and imposed a dawn-to-dusk curfew within Los Angeles and the surrounding counties. Over the next two days, at least two thousand CANG officers were deployed around the Los Angeles area.<sup>249</sup>

On May 1 and 2, 1992, the President deployed four thousand federal troops to the area from Camp Pendleton and Fort Ord, California, federalized the CANG, and replaced several CANG divisions with United States Marines.<sup>250</sup> The failure of the CANG to effectively maintain order was largely due to an ineffective aid agreement with the Los Angeles Police Department, an insufficient budget for troops, and most importantly, a larger than anticipated mob size.<sup>251</sup> Eventually, almost ten thousand CANG soldiers were deployed!<sup>252</sup> Several days later the riots faded, and throughout the course of the following weeks, the President ended the federalization of the CANG troops and disbanded the CANG.<sup>253</sup>

At the time of the 1992 Los Angeles riots, civilian law enforcement agencies were unable to cope with the widespread rioting and were forced to rely upon National Guard and federal troops to help restore order.<sup>254</sup> However, this large-scale incident has shown that necessity is a requirement for a declaration of martial law. What constitutes necessity is a question of fact.<sup>255</sup> Scholars have noted that “martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed.”<sup>256</sup> While the Supreme Court has recognized that in various instances martial law may be necessary,<sup>257</sup> there is only one requirement for a *continued* act of

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<sup>246</sup> Christopher M. Schnaubelt, *The 1992 Los Angeles Riots; Lessons in Command and Control from the Los Angeles Riots*, available at <http://www.militarymuseum.org/LARiots1.html>.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Christopher M. Schnaubelt, *The 1992 Los Angeles Riots; Lessons in Command and Control from the Los Angeles Riots*, THE CALIFORNIA STATE MILITARY MUSEUM, available at <http://www.militarymuseum.org/LARiots1.html>.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Davies, *supra* note 55, at 87 (quoting Frederick Bernays Wiener, A PRACTICAL MANUAL OF MARTIAL LAW § 16 (1940)).

<sup>256</sup> *Id.*

<sup>257</sup> McCormack, *supra* note 160, at 137- 38.

martial law, i.e., sustaining martial law even after the imminent threat may have abated.<sup>258</sup> That condition is a continued state of necessity.

On December 7, 1941, following the surprise attack by the Japanese on Pearl Harbor, Hawaii, the Governor of Hawaii suspended habeas corpus and placed the Territory of Hawaii under martial law.<sup>259</sup> Upon this declaration, the Commanding General declared himself to be the military governor of Hawaii, and promptly shut down the courts in the state.<sup>260</sup> He then established military courts for the sole purpose of trying civilians under martial law.<sup>261</sup> The sentences imposed by military courts are not reviewable on appeal because military tribunals are not part of the judicial system.<sup>262</sup> Several months after the attack, the declaration of martial law was slowly withdrawn.<sup>263</sup> Eventually, civil courts were authorized to exercise their normal functions.<sup>264</sup>

Two individuals were brought before the military courts after the status quo had resumed in Hawaii.<sup>265</sup> They were sentenced by a military tribunal, subject to the laws of war instead of regular trial court.<sup>266</sup> These individuals appealed, and the Supreme Court granted certiorari in *Duncan v. Kahanamoku*.<sup>267</sup> In its opinion, the Court held that “the phrase ‘martial law’ . . . while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.”<sup>268</sup>

In *Duncan*, the Court ruled that when courts *were* available (even when not utilized) for the trial of civilian matters, military tribunals, vis-à-vis martial law, could not “supplant” the legal authority of these courts. The Court adopted the view that “martial law provides a type of self-defensive use of force commensurate with necessity,” and allows the military “to override some of the normal operations of the civil authorities, to provide for law enforcement and maintenance of order, without supplanting the civil judicial function.”<sup>269</sup> In sum, when the traditional courts are in operation and available to the parties, the use of military tribunals surpasses the executive branch’s authority in a martial law scheme.<sup>270</sup>

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<sup>258</sup> Davies, *supra* note 55, at 87.

<sup>259</sup> *Duncan*, 327 U.S. at 307.

<sup>260</sup> *Id.* at 308.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 324.

<sup>263</sup> *Id.* at 327.

<sup>264</sup> *Id.*

<sup>265</sup> *Duncan*, 327 U.S. at 309.

<sup>266</sup> *Id.* at 309-11.

<sup>267</sup> *Id.* at 607-08.

<sup>268</sup> *Id.* at 324.

<sup>269</sup> McCormack, *supra* note 160, at 84.

<sup>270</sup> *Ex parte Milligan*, 71 U.S. at 9.

Therefore, necessity must exist in order for the President to declare martial law.<sup>271</sup> There must be a situation where all alternative options have been exhausted, and the consensus must be that the situation demands a declaration of martial law.<sup>272</sup> Once a declaration of martial law has been made, the military receives the power to “do all acts which are reasonably necessary for the purpose of restoring and maintaining public order.”<sup>273</sup> This includes “restricting individuals’ movement, imposing punishment through military trials, and suspending other fundamental rights.”<sup>274</sup>

#### *D. Immediate Response*

*This is no time for timorous action.*<sup>275</sup>

Finally, of all of the possible applications of Presidential authority previously listed, the concept of “immediate response” is the most significant yet the least regulated. An immediate response scenario applies to extreme situations where the President must take immediate action in response to a disaster or terrorist attack.<sup>276</sup> After a severe disaster takes place, rioting, insurrection, or other serious disturbances are likely. As these incidents “would hamper efforts to counteract the effects of the disaster,”<sup>277</sup> immediate action is crucial to “prevent human suffering, save lives, or mitigate great property damage, even without prior authorization”<sup>278</sup> to counteract the effects of the disaster. This principle exists only within an exigent emergency scenario that “overwhelms the capabilities of local authorities.”<sup>279</sup>

Immediate response was implemented when Timothy McVeigh bombed the Alfred P. Murrah federal building on April 19, 1995.<sup>280</sup> The Oklahoma City bombing was the largest domestic terrorist attack in the history of the United States, killing

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<sup>271</sup> *Ex parte Milligan*, 71 U.S. at 9. According to the Supreme Court in *United States v. Russell*, “[i]t is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.” *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (quoting *Mitchell v. Harmony*, 54 U.S. 115, 134 (1852)); *see also* *United States v. Russell*, 80 U.S. 623, 628 (1871), *abrogated in part and on different grounds by* *Doe v. United States*, 95 Fed. Cl. 546, 559-560 (Fed. Cl. 2010).

<sup>272</sup> *See generally* McCormack, *supra* note 160, at 83-90.

<sup>273</sup> Davies, *supra* note 55, at 87 (quoting 53 AM. JUR. 2ND *Military and Civil Defense* § 441 (1996)).

<sup>274</sup> *Id.*

<sup>275</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 709.

<sup>276</sup> Davies, *supra* note 55, at 83-84.

<sup>277</sup> *Id.* at 74.

<sup>278</sup> *Id.* at 83.

<sup>279</sup> *Id.*

<sup>280</sup> *Lessons Learned, and Not Learned, 11 Years Later: Survivors Fear Impact of 1995 Oklahoma City Bombing Being Forgotten*, ASSOCIATED PRESS, Apr. 16, 2006, available at <http://www.msnbc.msn.com/id/12343917/#.Tzl-xG0dtwU>.

168 individuals and seriously wounding 800 more.<sup>281</sup> The bombing marked the largest act of terrorism within U.S. borders prior to September 11, 2001.<sup>282</sup> Due to the large scale of fatalities and injured, this attack on the federal building decimated the ability of the local authorities to immediately respond to the attack.<sup>283</sup> However, the military was able to assist local authorities by providing “medevac aircraft, ambulances, bomb detection dog teams, and various military personnel.”<sup>284</sup> Military “commanders at Fort Sill and Tinker Air Force Base provided this support under the theory of the . . . immediate response authority.”<sup>285</sup>

Another instance of immediate response necessity occurred when the largest ever terrorist attack on the United States transpired on September 11, 2001.<sup>286</sup> Nineteen hijackers, under the aegis of a terrorist group known as Al-Qaeda, led by Osama Bin-Laden, took control of four airplanes.<sup>287</sup> Two planes were each flown, eighteen minutes apart, into the economic symbol of the U.S., the World Trade Center twin towers.<sup>288</sup> Two hours later, both towers collapsed.<sup>289</sup> A third plane was flown into the Department of Defense Headquarters, the Pentagon.<sup>290</sup> A fourth plane was crashed outside Pennsylvania, evidently intended for the White House or the U.S. Capitol.<sup>291</sup>

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<sup>281</sup> Commander Jim Winthorp, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997-JUL ARMY LAW. 3, 3 (1997).

<sup>282</sup> Brian Dakss, *Oklahoma City Bombing vs. Sept. 11*, Apr. 20, 2009, CBS NEWS, available at <http://www.cbsnews.com/stories/2003/04/20/news/opinion/courtwatch/main550231.shtml>.

<sup>283</sup> THE OKLAHOMA DEPARTMENT OF CIVIL EMERGENCY MANAGEMENT, AFTER ACTION REPORT: ALFRED P. MURRAH FEDERAL BUILDING BOMBING 19 APRIL 1995 IN OKLAHOMA CITY, OKLAHOMA 4-12, available at <http://www.ok.gov/OEM/documents/Bombing%20After%20Action%20Report.pdf>.

<sup>284</sup> Davies, *supra* note 55, at 83.

<sup>285</sup> *Id.*

<sup>286</sup> David Nakamura & Colum Lynch, *America Marks 10th Anniversary of Sept. 11 Terror Attacks*, WASH. POST, Sept. 11, 2011, available at [http://www.washingtonpost.com/politics/america-marks-10th-anniversary-of-sept-11-terror-attacks/2011/09/11/gIQA9QssJK\\_story.html](http://www.washingtonpost.com/politics/america-marks-10th-anniversary-of-sept-11-terror-attacks/2011/09/11/gIQA9QssJK_story.html).

<sup>287</sup> Obituary, *Osama bin Laden, 54; Al Qaeda Leader and Mastermind of Sept. 11 Attacks*, BOSTON GLOBE, May 2, 2011, available at [http://www.boston.com/news/nation/washington/articles/2011/05/02/osama\\_bin\\_laden\\_54\\_al\\_qaeda\\_leader\\_and\\_mastermind\\_of\\_sept\\_11\\_attacks/](http://www.boston.com/news/nation/washington/articles/2011/05/02/osama_bin_laden_54_al_qaeda_leader_and_mastermind_of_sept_11_attacks/).

<sup>288</sup> Serge Schmemmann, *Hijacked Jets Destroy Twin Towers and Hit Pentagon*, N.Y. TIMES, Sept. 12, 2001, available at <http://www.nytimes.com/2001/09/12/nyregion/12PLAN.html?ex=1201323600&en=e86fe2520af3926d&ei=5070?pagewanted=1>.

<sup>289</sup> *A Decade Since 9-11: Ground Zero*, DENVER POST, Sept. 8, 2011, available at <http://photos.denverpost.com/mediacenter/2011/09/a-decade-since-9-11-ground-zero/>.

<sup>290</sup> Schmemmann, *supra* note 288.

<sup>291</sup> *Flight 93 Passengers, Crew Honored at Capitol: Plaque Pays Tribute to 40 Killed in Heroic Struggle Against 9/11 Hijackers*, ASSOCIATED PRESS, Nov. 9, 2009, available at [http://www.msnbc.msn.com/id/32763624/ns/us\\_news-9\\_11\\_eight\\_years\\_later/t/flight-passengers-crew-honored-capitol/#](http://www.msnbc.msn.com/id/32763624/ns/us_news-9_11_eight_years_later/t/flight-passengers-crew-honored-capitol/#).

There were no survivors in any of the planes.<sup>292</sup> The death toll for all four incidents reached almost three thousand victims.<sup>293</sup> This series of tragic events became known worldwide as “9/11.” In response to the events on 9/11, then-President Bush said, “I’ve ordered that the full resources of the federal government to help the victims and their families and to conduct a full-scale investigation to hunt down and to find those folks who committed this act.”<sup>294</sup>

The immediate response to the 9/11 attacks on the political, economic, and military might of the United States was necessary, both by law and by symbolic determination. Without the ability to implement an immediate response, the ability to “survive” such a devastating attack, both physically and mentally, would have been impossible. Applying his executive immediate response power in the supreme case of necessity, the President demonstrated to the world that the United States could not and would not shirk from the protection of its civilians, and would not be overwhelmed by such an enormous tragedy even in the face of a major terrorist attack.<sup>295</sup>

Finally, the necessity for an executive immediate response power exists within the category of natural disasters. The SARS H1N1 avian flu pandemic, the 1989 Loma Prieta major earthquake in San Francisco, or the devastating events of Hurricane Katrina on Louisiana are all instances of when the principle of immediate response would be necessary.<sup>296</sup> The National Response Plan (NRP), intended to address a wide variety of emergency scenarios, was enacted in December of 2004, by President Bush under Homeland Security Presidential Directive 5 in response to the events of September 11, 2001.<sup>297</sup>

The scenarios addressed by the NRP include; a biological, nuclear, or radiological accident or terrorist attack; a natural disaster such as a tsunami, hurricane, fire, or earthquake; a malicious cyber attack; a food and agriculture disaster involving the nation’s food and/or agriculture supply; an incident involving oil and/or hazardous materials and pollution; a biological health quarantine; or, a

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<sup>292</sup> John Stackhouse, *A Day of Infamy*, GLOBE AND MAIL, Aug. 26, 2011, available at <http://www.theglobeandmail.com/news/world/americas/september-11/archives-a-day-of-infamy/article2113124/>.

<sup>293</sup> *Osama bin Laden*, *supra* note 287.

<sup>294</sup> *Bush: “Freedom Will Be Defended”*, ASSOCIATED PRESS, Sept. 11, 2001, available at <http://articles.latimes.com/2001/sep/11/news/ss-44622>.

<sup>295</sup> *Id.*

<sup>296</sup> *See generally In Context: SARS, Bird Flu and Influenza A (H1N1)*, GMA NEWS ONLINE, June. 23, 2009, <http://www.gmanetwork.com/news/story/165614/news/in-context-sars-bird-flu-and-influenza-a-h1n1> (last visited Mar. 21, 2012); *see generally Loma Prieta Earthquake Professional Papers*, U.S. GEOLOGICAL SURVEY, <http://earthquake.usgs.gov/regional/nca/1989/papers.php> (last visited Feb. 18, 2012); *see generally Hurricane Katrina*, NATIONAL CLIMATE AND DATA CENTER (Dec. 29, 2005), <http://www.ncdc.noaa.gov/special-reports/katrina.html> (last visited Mar. 21, 2012).

<sup>297</sup> DEP’T. OF HOMELAND SEC., NATIONAL RESPONSE PLAN (2004), available at [http://www.ir.com/Information\\_Sharing/global/resources/fusioncenter/NRPbaseplan.pdf](http://www.ir.com/Information_Sharing/global/resources/fusioncenter/NRPbaseplan.pdf). The Plan was enacted in December of 2004, by President Bush under Homeland Security Presidential Directive 5 in response to the events of September 11, 2001. *Id.*

terrorist attack not involving any of the above circumstances.<sup>298</sup> The NRP likely would have covered the terrorist attacks of 9/11, intended to wreak havoc on the economic, military, and political might of the United States.<sup>299</sup>

The NRP was developed to establish a unified federal resource which would assist in the preparedness for, response to, and recovery from terrorism, major disasters, and other major emergencies.<sup>300</sup> The NRP incorporates input gathered from numerous public safety organizations, and directed all major aspects of emergency planning into one cohesive unified discipline.<sup>301</sup> It is intended to assist in the “important homeland security mission of preventing terrorist attacks within the United States; [to reduce] the nation’s vulnerability to all natural and manmade hazards; and [to minimize] the damage” and assist with the recovery from any type of disaster that had occurred.<sup>302</sup>

The NRP was also created to support the executive policies and decision making entities during the response to a specific threat or incident.<sup>303</sup> It expressly encourages “cooperation, collaboration, and information-sharing across jurisdictions, as well as between the government and the private sector at all levels.”<sup>304</sup> It modifies existing agency emergency response plans at the federal, state and local levels, and formulates “regional capabilities to ensure sustained operational readiness.”<sup>305</sup> The concept for the NRP arose out of the National Incident Management System, which created an initial national framework and implementation protocol and guidelines to be applied in the event of a terrorist attack, major disaster, or public health emergency.<sup>306</sup>

The NRP has been successfully implemented during the events surrounding Hurricane Katrina.<sup>307</sup> The hurricane made landfall in Louisiana on August 30, 2005.<sup>308</sup> Katrina was a Category 5 hurricane on the Saffir-Simpson Hurricane Scale and one of the most costly and deadly hurricanes ever to hit the U.S.<sup>309</sup> The day after Katrina touched down, then-Secretary of Homeland Security, Michael Chertoff, seeing that state executives were unable to handle the extent of the situation, invoked the NRP to permit FEMA to take control of the developing situation in the gulf

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<sup>298</sup> *Id.* at xii-xiii, 64, 68.

<sup>299</sup> *Id.* at xii-xiii.

<sup>300</sup> *Id.* at xii.

<sup>301</sup> *Id.* at 3.

<sup>302</sup> *Id.* at iii.

<sup>303</sup> *Id.* at i.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at iii.

<sup>306</sup> *Id.* at 1.

<sup>307</sup> RICHARD D. KNABB ET AL., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 3 (2005), available at [http://www.nhc.noaa.gov/pdf/TCR-AL122005\\_Katrina.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf).

<sup>308</sup> *Id.* at 1.

<sup>309</sup> *Id.*

coast.<sup>310</sup> The resulting damage to the coasts of Alabama, Louisiana, Mississippi, Florida, and Georgia from the hurricane was estimated at over \$108 billion, with over 1,800 deaths throughout five states.<sup>311</sup>

The effectiveness of the immediate response power may be called into question given the numerous and widespread allegations of civil rights violations and failures by FEMA to adequately control the events that took place in the aftermath of Katrina.<sup>312</sup> The ACLU issued a comprehensive report concerning continuing incidents of racial injustice and human rights abuses, including discrimination and abuse on the streets, inhumane and dangerous conditions in the prisons, an ongoing housing crisis involving FEMA trailer parks and affordable housing in safe parts of the state, and severely limited mental health services for the public.<sup>313</sup> In light of this information, it is still important to note that without the immediate response powers available to the President and FEMA, it is likely that the federal response would have been greatly delayed and many more lives would have been lost, and the damage would have been substantially more catastrophic.

Despite the allegations of civil liberty violations during Hurricane Katrina, more recently, the Executive has successfully interceded during several natural disasters including the deadly tornados in Joplin, Missouri, which destroyed seventy-five percent of the city of Joplin and caused 160 deaths with nearly \$3 billion in damages.<sup>314</sup> The Department of Homeland Security has also played a lead role in federal response efforts following the BP oil spill in the Gulf of Mexico, efforts which continue to this day.<sup>315</sup>

In sum, the concept of immediate response is an inherent power granted to the executive branch, and now subsumed by congressional authority to executive powers.<sup>316</sup> Without these executive “immediate response” powers, the principles of martial law, or even *posse committatus*, would not be immediately available to the executive branch.<sup>317</sup> According to the U.S. Department of Justice, the broad pattern of presidential initiative continues to exist even in the absence of prior

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<sup>310</sup> Sandy Smith, *National Response Plan is Activated*, EHS TODAY, Sept. 5, 2005, available at [http://ehstoday.com/news/ehs\\_imp\\_12650/](http://ehstoday.com/news/ehs_imp_12650/).

<sup>311</sup> KNABB ET AL., *supra* note 307, at 11, 13.

<sup>312</sup> *Broken Promises: Two Years After Katrina*, ACLU, <http://www.aclu.org/node/20847> (last visited Mar. 21, 2012).

<sup>313</sup> *Broken Promises: Two Years After Katrina - Executive Summary*, ACLU (2007), available at <http://www.aclu.org/prisoners-rights/broken-promises-two-years-after-katrina-executive-summary>.

<sup>314</sup> *Numerous Weekend Tornados From Southern Kansas, Missouri to Minnesota, Wisconsin: Joplin Tornado Claims 89 Lives; Leaves Parts of Southwest Missouri in Shambles*, NATIONAL WEATHER SERVICE (2011), [http://www.crh.noaa.gov/news/display\\_cmsstory.php?wfo=crh&storyid=68623&source=0](http://www.crh.noaa.gov/news/display_cmsstory.php?wfo=crh&storyid=68623&source=0) (last visited Mar. 21, 2012); *Joplin Storm Insurance Payments Top \$1 Billion*, ASSOCIATED PRESS, Sept. 14, 2011, available at <http://www.semi-sourian.com/story/1762466.html>.

<sup>315</sup> *Homeland Security Progress*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/homeland-security/> (last visited Jan. 31, 2012).

<sup>316</sup> Davies, *supra* note 55, at 83.

<sup>317</sup> *Id.*



congressional approval primarily in exigent situations calling for immediate action: “constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.”<sup>318</sup> It is necessary for the executive branch to have the express authority to immediately declare a national disaster or apply federal resources towards an incident without having to go through the traditional red tape of federal bureaucracy, much of which contributed towards the tragic conditions that arose after Hurricane Katrina.

#### IV. IMPLICATIONS OF EXPANDED EXECUTIVE POWERS ON PUBLIC HEALTH EMERGENCIES

“*Silent Enim Leges Inter Arma.*” (*Law stands mute in the midst of arms.*)  
Marcus Tullius Cicero

As demonstrated above, the executive powers are subject to certain checks and balances. However, an active executive may credibly stretch these powers given exigent circumstances, most particularly those requiring immediate response to a crisis.<sup>319</sup> There are none more necessary or imminent than in a public health emergency scenario, where the smallest delay can cause extensive loss of life.

In some circumstances, the executive can tread more cautiously and take the time to carefully document and justify his actions. But in a health emergency scenario, the fastest and most direct action is often the most effective. In such a case, the public, despite knowing that the President’s actions infringe upon the liberties of the few for the good of the many, may nonetheless yield without much conflict. One of the foremost experts on public health ethics of our times, Catholic University law professor, George P. Smith II,<sup>320</sup> summed up the issue of the willingness for restriction of civil liberties:

[w]hat remains is for the vox populi to be educated as to their responsibilities of citizenship which demand—in times of national and public health emergencies—that the common good be protected and secured, and further, that this responsibility justifies the curtailment of basic liberties and rights during the time of the emergency. The failure to recognize or accept this responsibility courts the collapse of society itself.<sup>321</sup>

Professor Smith notes that when a health epidemic breaks out, the public is best suited by allowing the executive to do what it does best, even with the prospect of having to comply with isolation or quarantine measures, as failure to do so is to

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<sup>318</sup> Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A OP. O.L.C. 185, 187 (1980).

<sup>319</sup> Davies, *supra* note 55, at 83.

<sup>320</sup> Indeed, Professor Smith’s curriculum vitae shows that he has published over 180 entries, including 14 books, 21 monographs, and 152 law review articles, book chapters, and essays, and has been widely recognized for his scholarly and literary contributions. *George P. Smith, II, Professor*, COLUMBUS SCHOOL OF LAW, <http://www.law.edu/fac-staff/SmithG/> (accessed on Feb. 1, 2012).

<sup>321</sup> George P. Smith, II, *Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage*, 18 ANN. HEALTH L. 1, 34 (2009).

facilitate many more injuries or deaths, i.e., to “court the collapse of society itself.”<sup>322</sup> To gain a better understanding of the circumstances within which the executive may be required to take immediate action, this Article addresses the judicial and legislative history of the health pandemics that once faced or continue to face our nation.

#### A. Emergence of Related Cases

To begin with, Article 1, Section 10, of the U.S. Constitution provides that states may promulgate and enforce inspection laws.<sup>323</sup> This provision has long been thought to give states the power to quarantine articles of commerce suspected of spreading inspection.<sup>324</sup> Quarantine is one of the oldest means of regulating for the public health.<sup>325</sup> As early as 1796, the federal government “enacted the first federal quarantine law in response to a yellow fever epidemic.”<sup>326</sup> That law gave the President the power to assist states in enforcing their own quarantine laws.<sup>327</sup> In 1799, the Act “was repealed and replaced with one establishing the first federal inspection system for maritime quarantines.”<sup>328</sup> By 1824, the Supreme Court in *Gibbons v. Ogden* recognized the police powers of the state to compel isolation and quarantine “to provide for the health of its citizens.”<sup>329</sup>

Thereafter, throughout the nineteenth century, the states and federal government undertook an increasingly prominent role in implementing maritime quarantines for the safety of the nation. Beginning with *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health*, the Court held that the states have the power to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants.<sup>330</sup> And that “until Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution.”<sup>331</sup> More specifically, the *Compagnie* Court recognized that state quarantine powers could be displaced by “affirmative action” from Congress and substituted by congress thereby correcting any “injustifiable and oppressive exercise of power by state legislation.”<sup>332</sup>

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<sup>322</sup> *Id.* at 1, 34.

<sup>323</sup> U.S. CONST. art. I, §10.

<sup>324</sup> Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 57 (1985).

<sup>325</sup> *Id.* at 56.

<sup>326</sup> An Act Relative to Quarantine, May 27, 1796, ch. 31, 1 STAT. 474 (repealed 1799); Parmet, *supra* note 324, at 57.

<sup>327</sup> An Act Relative to Quarantine, May 27, 1796, ch. 31, 1 STAT. 474 (repealed 1799).

<sup>328</sup> An Act Respecting Quarantine and Health Laws, Feb. 25, 1799, ch. 12, 1 STAT. 619 (current version at 42 U.S.C. 97 (2011)); Parmet, *supra* note 324, at 57.

<sup>329</sup> *Gibbons v. Ogden*, 22 U.S. 1, 79 (1824); Parmet, *supra* note 324, at 57.

<sup>330</sup> *Compagnie Francaise De Navigation A Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380 (1902).

<sup>331</sup> *Id.* at 387.

<sup>332</sup> *Id.* at 390.

Only a few years later, the Court in *Jacobson v. Massachusetts*,<sup>333</sup> deemed the state powers to impose quarantine as “the police power,”<sup>334</sup> and recognized that constitutional liberties do not import the absolute right to be free from restraint.<sup>335</sup> Indeed, in situations of necessity, the common good, including the “safety, health, peace, good order, and morals of the community,” must overrule the individual enjoyment of liberty. This is “liberty regulated by law.”<sup>336</sup> The *Jacobson* Court implicitly recognized that state or executive powers may be arbitrarily or capriciously imposed, and hastened to check the speed at which these actions occurred:

in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.<sup>337</sup>

Historically, the Court has “distinctly recognized the authority of a [s]tate to enact quarantine laws and ‘health laws of every description;’ indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other [s]tates.”<sup>338</sup> The state may broadly apply such police powers only insofar as the law does not contravene the constitutional rights or federal authority over such matters.<sup>339</sup> As such, in the broader case of a public health emergency, it is “the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few.”<sup>340</sup>

While necessity may reasonably require a community to protect itself against an epidemic threatening the safety of all, the Court disclaimed that it would not hesitate to step in and adjudicate against “a plain, palpable invasion of rights secured by the fundamental law” which has no real or substantial relation to the “public health, the public morals or the public safety.”<sup>341</sup> Conversely, the Court noted that it would not “invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law.”<sup>342</sup> Along with *Compagnie*, *Jacobson* helped pave the way for later federal national emergency legislation and intervention.

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<sup>333</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>334</sup> *Id.* at 25.

<sup>335</sup> *Id.* at 26.

<sup>336</sup> *Id.* at 27.

<sup>337</sup> *Id.* at 33-34.

<sup>338</sup> *Id.* at 25 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Railroad Company v. Husen*, 95 U.S. 465, 470 (1877); *Beer Company v. Massachusetts*, 97 U.S. 25 (1878); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 661 (1885); *Lawton v. Steele*, 152 U.S. 133 (1884)).

<sup>339</sup> *Jacobson*, 197 U.S. at 25.

<sup>340</sup> *Id.* at 29.

<sup>341</sup> *Id.* at 31.

<sup>342</sup> *Id.* at 38.

*B. Public Health Legislation*

Several pieces of legislation have been enacted for the purpose of dealing with a health pandemic. In 1976, Congress passed the National Emergencies Act to formally limit the emergency powers of the president during a state of emergency.<sup>343</sup> The Executive is authorized to declare a national emergency but must specify the statutory authorities to be used under such declaration, report them to Congress, and publish this information in the Federal Register.<sup>344</sup> Congress can terminate the emergency, and it also may be revoked by proclamation of the President.<sup>345</sup> The U.S. has been under a state of national emergency since 9/11.<sup>346</sup>

Under the Stafford Act of 1988,<sup>347</sup> Congress has also previously sanctioned the President to commit federal troops to assist state governments during emergencies, as long as the work is “essential for the preservation of life and property.”<sup>348</sup> The Stafford Act conditions the President’s power upon the existence of a natural disaster and the permission from the governor of the state requesting aid.<sup>349</sup> In the case of a “major disaster” or “emergency” the Stafford Act allows the President to coordinate administration of disaster relief through FEMA or other government agencies.<sup>350</sup> The state must implement its emergency plan before the President may invoke these emergency powers.<sup>351</sup> However, in the case where the emergency involves “federal primary responsibility” such as one occurring on a federal property, the President may overrule state action.<sup>352</sup>

The Public Health Service Act,<sup>353</sup> enacted in 1994, grants the executive unilateral authorization to declare a national emergency and allows broad discretion during a public health emergency such as making grants, entering into contracts, investigating the cause, treatment and prevention of a disease or disorder causing the emergency, and authorizing emergency use of unapproved products or approved products for

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<sup>343</sup> National Emergencies Act, 50 U.S.C. §§ 1601-1651 (2012).

<sup>344</sup> 50 U.S.C. § 1621 (2012).

<sup>345</sup> *Id.* § 1622(A)(2).

<sup>346</sup> Washington’s Blog, *Yes, America is Still in an Official State of Emergency*, GLOBAL RESEARCH.CA: CENTRE FOR RESEARCH ON GLOBALIZATION (Feb. 11, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=17545> (last visited Mar. 21, 2012); Public Health Law Program Centers for Disease Control and Prevention, *Selected Federal Legal Authorities Pertinent to Public Health Emergencies* (2009), <http://www2.cdc.gov/phlp/docs/Selected%20Fed%20Legal%20Authorities%20re%20PH%20Emergencies%20102709%20v2.pdf>.

<sup>347</sup> *Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988*, 42 U.S.C. §§ 5121-5207 (2012). <sup>348</sup> 42 U.S.C. § 5170b(c) (2012); Davies, *supra* note 55, at 82.

<sup>348</sup> 42 U.S.C. § 5170b(c) (2012); Davies, *supra* note 55, at 82.

<sup>349</sup> 42 U.S.C. § 5170b(c) (2012).

<sup>350</sup> Public Health Law Program Centers for Disease Control and Prevention, *supra* note 346, at 2.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> Public Health Service Act, 42 U.S.C. §§ 201 et. seq. (2011).

unauthorized uses.<sup>354</sup> Quarantine may also be used as “necessary” to prevent the introduction, transmission, or spread of communicable diseases.<sup>355</sup> President Obama used this Act to declare a Public Health Emergency for the H1N1 pandemic during 2009.<sup>356</sup>

In 2001, the Model State Emergency Health Powers Act (“MSEHPA”) was drafted to address new health threats, such as SARS and influenza.<sup>357</sup> This important piece of model legislation was intended to standardize and modernize state public health legislation which would thereby enable state actors to take immediate action in the event of a disaster.<sup>358</sup> The MSEHPA established provisions for reporting diseases and other health conditions.<sup>359</sup> It broadly defined the circumstances under which a public health emergency may be declared or whether compulsory actions may be undertaken, and permitted the same “when the situation calls for prompt and timely action.”<sup>360</sup> The MSEHPA also defined and established mechanisms for enforcement of the states’ compulsory powers through quarantine or isolation.<sup>361</sup> A majority of states have enacted legislation based on the MSEHPA.<sup>362</sup>

On November 1, 2005, the National Strategy for Pandemic Influenza was released by then-President Bush to prepare the nation’s response during an influenza pandemic.<sup>363</sup> The Strategy set forth distribution protocols for the limited availability of vaccine and antiviral medication during the outbreak.<sup>364</sup> President Bush also signed the National Security and Homeland Security Presidential Directive, which created an “Enduring Constitutional Government” in the case the federal government

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<sup>354</sup> 42 U.S.C. § 247d-6b(a)(1), (b)(1), (c)(2)(A), (c)(4)(A), (c)(5), (c)(7)(c) (2012).

<sup>355</sup> *Federal Public Health Emergency Law*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/federal-public-health-emergency-law.aspx> (last visited Feb. 19, 2012).

<sup>356</sup> *Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic*, WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0> (last visited Feb. 19, 2012).

<sup>357</sup> Model State of Emergency Health Powers Act (2001), available at <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.

<sup>358</sup> Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL’Y 379, 382 (2003).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 395.

<sup>361</sup> *Id.* at 406-12.

<sup>362</sup> *Id.* at 384-85.

<sup>363</sup> *The Turning Point Model State Public Health Act State Legislative Table*, THE CENTER FOR LAW & THE PUBLIC’S HEALTH AT GEORGETOWN & JOHNS HOPKINS UNIVERSITIES (2007), available at <http://www.publichealthlaw.net/Resources/ResourcesPDFs/MSPHA%20LegisTrack.pdf>.

<sup>364</sup> *National Strategy for Pandemic Flu*, THE DEP’T OF HOMELAND SECURITY (Jan. 23, 2009), [http://www.dhs.gov/files/programs/editorial\\_0760.shtm](http://www.dhs.gov/files/programs/editorial_0760.shtm) (last visited Mar. 21, 2012).

was drastically affected.<sup>365</sup> This legislature established a “cooperative effort” as a matter of comity among the three branches of federal government, coordinated by the President.<sup>366</sup>

Emergency legislation has also been passed to control communicable diseases,<sup>367</sup> such as preventing the interstate spread of diseases;<sup>368</sup> preventing the introduction, spread or transmission of foreign diseases;<sup>369</sup> establishing the list of quarantinable communicable diseases and penalties for violating quarantine regulations;<sup>370</sup> precluding aliens with communicable public health diseases from entry into the U.S.;<sup>371</sup> authorizing the cessation, cancelation or grounding of flights or restricting airport airspace due to emergency conditions on the ground;<sup>372</sup> regulating or limiting the interstate, intrastate or foreign transportation of, or providing for the inspection, cleaning or destruction of, animals, food, and other property found to be contaminated or infected;<sup>373</sup> and, limiting the liability of those administering emergency countermeasures or those volunteers participating in emergency aid.<sup>374</sup>

### C. Current Application to Emergencies

There are five foundational functions of public health that must be generally observed by the active Executive (or even state or local government) during a public health crisis.<sup>375</sup> The most important is preparedness through public health emergency planning and exercises.<sup>376</sup> The meticulously planned response to a disaster will

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<sup>365</sup> *Homeland Security Presidential Directive 20: National Continuity Policy*, THE DEP'T OF HOMELAND SECURITY (Sept. 9, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070509-12.html> (last visited Mar. 21, 2012).

<sup>366</sup> *Id.*

<sup>367</sup> *See generally* Public Health Law Program Centers for Disease Control and Prevention, *supra* note 346 (discussing various legal authorities related to public health emergencies).

<sup>368</sup> 42 CFR 70.1 (2012).

<sup>369</sup> 42 CFR 71 (2012).

<sup>370</sup> These diseases include Cholera, Diphtheria, infectious Tuberculosis, Plague, Smallpox, Yellow Fever, Viral Hemorrhagic Fevers, Severe Acute Respiratory Syndrome (SARS), and Influenza. *See* Exec. Order No. 13,295; Exec. Order No. 13,375; *see also* 42 U.S.C. § 271 (2011).

<sup>371</sup> 8 U.S.C. § 1182 (2011); 8 U.S.C. § 1222 (2011); 42 U.S.C. § 252 (2011); 42 CFR Part 34.1 (2012).

<sup>372</sup> 49 U.S.C. § 114 (2012); 49 U.S.C. § 44905(b) (2012); 49 U.S.C. § 40101 (d) (2012); 49 U.S.C. § 40103 (b) (2012); 49 U.S.C. § 44701 (2012); 49 U.S.C. § 46105 (c) (2012).

<sup>373</sup> 21 C.F.R. Part 1240 (2012); 42 C.F.R. Part 71.1 (2012); 42 U.S.C. § 264 (2012).

<sup>374</sup> 42 U.S.C. § 247d-6d (2012); 42 U.S.C. § 247d-6e (2012) (providing tortious immunity from claims of loss caused from the administration of countermeasures against current or future public health emergencies).

<sup>375</sup> Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, HEALTH LAW AND ETHICS (Aug. 7, 2002), available at <http://academic.udayton.edu/health/syllabi/bioterrorism/7ModelState/msehpa.pdf>.

<sup>376</sup> *Id.*

safeguard the common good and restore the lost equilibrium.<sup>377</sup> Secondly, surveillance requires the establishment of reasonable measures to not only detect, but track emergencies that may arise or that have occurred.<sup>378</sup> This will aid in the prevention or reduction of the traumatic effects of an emergency by immediately addressing and directing public safety concerns.<sup>379</sup> Third, is the management of healthcare property by securing the availability of vaccines, pharmaceuticals and hospitals to ensure that these measures do not become overwhelmed during the crisis.<sup>380</sup> Fourth, protection of persons by compelling, when clearly necessary, vaccinations, testing, treatment, isolation, and quarantine will help reduce the spread of contagion.<sup>381</sup> Finally, communication with the public is paramount. Ensuring that unambiguous and authoritative information reaches the public at large in a timely manner will go a long way towards maintaining calm and public safety.<sup>382</sup>

The appropriate division of these responsibilities during an emergency health disaster is crucial to the successful response of local and state authorities.<sup>383</sup> Take for instance the public health emergency scenario of a breakout of a virulent, contagious disease. A decision is raised whether the Executive will need to order the medical examination, vaccination, treatment or, worse case scenario, limited or widespread quarantine of the populace.<sup>384</sup> In these instances where the Executive action may be tantamount to mandatory compulsion against civil liberties, an effective leader will be able to preserve the public health and welfare better, faster, and more adequately than an ineffective leader. "Free people respond to leadership much more vigorously than a people held in place by power, fear and terror of their own government."<sup>385</sup>

As was agreed by a group of attorneys, academics, and government officials, "[c]lear, open, and lawful response by government officials is necessary for public support and preservation of our national values. Rapid determination of the appropriate balance between coercive government action and individual civil rights is critical"<sup>386</sup> According to Professor Smith, "public health ethics requires inherently at-risk individuals to suffer elements of harm—through isolation, quarantine, or compulsory vaccination—in order to advance the public good and secure the public-at-large from exposure to the spread of an infectious disease."<sup>387</sup> Smith goes on to state that:

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<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Smith, supra* note 321, at 16.

<sup>383</sup> *See Gostin et al., supra* note 375.

<sup>384</sup> *See Reich, supra* note 358, at 380-83.

<sup>385</sup> *Id.* at 381.

<sup>386</sup> *Id.*

<sup>387</sup> *Smith, supra* note 321, at 3.

[b]ecause of the chaos a pandemic is likely to bring, a strategy that focuses on benefiting society at large is a useful one, however, it must also be “guided by a spirit of humanism” and not eliminate autonomy altogether in the process. . . . During a dire situation like a pandemic, with thousands of citizens becoming stricken with a deadly influenza virus, rationing health care and medical resources will not only be necessary, but it will be just if applied correctly.<sup>388</sup>

Timorous action can result in the spread of infectious disease and related deaths.<sup>389</sup> For instance, if an influenza pandemic occurred, sixty-two million people would succumb and die nationally, and 89,000 to 207,000 people of the U.S. population would die.<sup>390</sup> To prevent losses of this magnitude, the Executive may be required to approve the infringement of individual liberties in order to immediately safeguard the lives of the many.<sup>391</sup> This is a challenge that no one person should have to face.

#### V. CONCLUSION – THE PRINCIPLE OF NECESSITY AS A GLOSS ON EXECUTIVE POWERS

*It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.*<sup>392</sup>

The authority for the President to act immediately in response to an emergency arises out of the principle of necessity.<sup>393</sup> “[A] military commander should be able to use available resources to alleviate human suffering, without first requiring a bureaucratic permission slip.”<sup>394</sup> As stated previously, necessity is a prerequisite for presidential action.<sup>395</sup> According to Thomas Jefferson, the laws of necessity or even those of self-preservation, which necessitate the immediate action to preserve the safety of our country when in danger, are of the highest obligation.

*To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. . . . The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk. . . . The line of discrimination between cases may be difficult; but the good officer is*

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<sup>388</sup> *Id.* at 15.

<sup>389</sup> *See generally* Youngstown Sheet & Tube Co., 343 U.S. at 709 (Vinson, C.J., dissenting) (noting that timorous action at a time of war in response to a stoppage in steel production would be detrimental to the war effort).

<sup>390</sup> *Smith, supra* note 321, at 16.

<sup>391</sup> *Id.* at 3.

<sup>392</sup> *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

<sup>393</sup> *See Davies, supra* note 55, at 83.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*



bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.<sup>396</sup>

Jefferson recognized the concept of necessity as a by-product of self-preservation.<sup>397</sup> Without necessity, there is a heightened potential for the abuse of presidential authority.<sup>398</sup> Chief Justice Stone in *Kahanamoku* directed that “[the] executive has broad discretion in determining when the public emergency is such as to give rise to the necessity.”<sup>399</sup> The determination that an emergency exists is a decision exclusively resting with the President.<sup>400</sup>

The Court expressed its rational fear that civil liberties may be laid by the roadside in the expression of presidential authority in times of emergencies.<sup>401</sup> “[A]n executive, acting pursuant to statutory and constitutional authority may, consistent with the Due Process Clause, unilaterally decide to detain an individual if the executive deems this necessary for the public safety even if he is mistaken.”<sup>402</sup> A historical record has shown, so long as the Executive proceeds under a good faith basis, his reasonable actions in limiting the rights of this individual will be constitutionally upheld.<sup>403</sup>

Despite its reservations, the Court has dismissed any possibility of “executive tyranny”<sup>404</sup> in the existence of a showing of necessity. “Any ambiguities in the allocation of a power that is executive in nature . . . must be resolved in favor of the executive branch.”<sup>405</sup> Any individual who acts on the principle of necessity in an emergency scenario is presumed to act in the interest of the populace rather than in furtherance of his own ambitions.<sup>406</sup> “A rigorous adherent to the demands of individual rights, however, will strike the balance with greater weight to the language of rights than to the language of power.”<sup>407</sup> The Founders intended to create a government that was “cloathed [sic] with all the powers requisite to [the]

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<sup>396</sup> *Id.* at 112 (emphasis added).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Duncan*, 327 U.S. at 336 (Stone, C.J., concurring).

<sup>400</sup> *Id.*

<sup>401</sup> *Hamdi*, 542 U.S. at 591; *Davies*, *supra* note 55, at 111.

<sup>402</sup> *Hamdi*, 343 U.S. at 590.

<sup>403</sup> *See generally* *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-38 (Jackson, J. concurring). Executive action to nationalize certain steel mills ahead of a steel strike to support wartime munitions was struck down because the authority was vested in the legislature. *See id.* The Court found that, to support the Executive action, the authority must have originated within the constitution, congress must have delegated authority to the executive, or the constitution must be silent on the issue. *Id.*

<sup>404</sup> *Id.* at 582.

<sup>405</sup> *See Delahunty & Yoo*, *supra* note 5, at 494.

<sup>406</sup> *Davies*, *supra* note 55, at 112.

<sup>407</sup> *See McCormack*, *supra* note 160, at 139.

complete execution of its trust.”<sup>408</sup> This trust is necessary for the security of the nation.<sup>409</sup>

During the 1980s, the AIDS crisis became full blown.<sup>410</sup> Amidst heightened fears, the prospect of quarantine returned to the national perspective.<sup>411</sup> Relatively unknown at the time, AIDS was “unlike any disease recently faced by man.”<sup>412</sup> Although AIDS is incurable and, at the time invariably fatal, victims could be asymptomatic carriers for all of their lives.<sup>413</sup> Indeed infected individuals posed no hazard to those with whom they did not have sexual relations, share blood, or other bodily fluid, or IV needles.<sup>414</sup> In such a unique public health epidemic, where the exact nature of the crisis is unknown or the results indeterminable, the Executive must inevitably weigh the interest in protecting the public health against the fundamental deprivation of civil liberties.<sup>415</sup>

Chief Justice Rehnquist succinctly portrayed the struggle to uphold civil rights alongside the Executive authority in his book “All the Laws But One.”<sup>416</sup> According to Chief Justice Rehnquist, “[i]t is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent . . . but they will speak with a somewhat different voice.”<sup>417</sup> History dictates that under Executive discretion, “the necessity for action in a manifest emergency will permit exercise of granted powers in unusual ways that may threaten individual liberties.”<sup>418</sup>

As this Article contends, it is clear that the President is inherently granted with the powers to unilaterally act to protect and control the national security and interests of the United States.<sup>419</sup> Some powers may not be explicitly spelled out, and instead, may be implicit.<sup>420</sup> This is so because “[o]f all the cares or concerns of government,

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<sup>408</sup> THE FEDERALIST NO. 23, at 137 (Alexander Hamilton) (Henry Cabot Lodge, ed., 1902).

<sup>409</sup> See Delahunty & Yoo, *supra* note 5, at 488.

<sup>410</sup> *How AIDS Got into the US*, HEALTH24 (Oct. 30, 2007), [http://www.health24.com/news/HIV\\_AIDS/1-920,42726.asp](http://www.health24.com/news/HIV_AIDS/1-920,42726.asp) (last visited Apr. 4, 2012).

<sup>411</sup> See Parmet, *supra* note 325, at 471-75.

<sup>412</sup> *Id.* at 472.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> See McCormack, *supra* note 160, at 139.

<sup>416</sup> WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 225 (1998).

<sup>417</sup> *Id.*

<sup>418</sup> See McCormack, *supra* note 160, at 139.

<sup>419</sup> See Delahunty & Yoo, *supra* note 5, at 489, 494.

<sup>420</sup> See, e.g., *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). In *Curtiss-Wright*, the Court recognized that while the Constitution does not provide for the executive’s exclusive ability to conduct foreign policy, such power is implicit and defined as the executive’s “plenary powers.” *Id.* Additionally, the Court held that the executive branch is fundamentally capable, by its own nature, to conduct foreign affairs in manners that Congress cannot. *Id.*; *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981) (recognizing that

the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.<sup>421</sup> When necessary to preserve and protect the safety and integrity of the United States and its responsibilities and obligations as a sovereign nation, the President's powers are the broadest.<sup>422</sup>

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inferences may be made from existing legislation determining the breadth of executive authority).

<sup>421</sup> See Delahunty & Yoo, *supra* note 5, at 493.

<sup>422</sup> See generally Delahunty & Yoo, *supra* note 5.