

## The Imbecilic Executive

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[Dear Schmoozers: Below are the Intro and Part II of a project on the original executive's impotency during emergencies. Looking forward to the fun].

### Introduction

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

But wait, there's more: The Constitution's text hints at an energetic emergency executive. The President may command the state militias to "suppress insurrections and repel invasions."<sup>2</sup> The President is Commander in Chief of the army and navy,<sup>3</sup> both of which may be deployed to crush rebels and invaders. Finally the President must "preserve, protect, and defend the Constitution,"<sup>4</sup> a vow perhaps premised on the notion that the Constitution supplies the wherewithal to honor this pledge. Some scholars have argued that the President's supposed power to take whatever measures are necessary to save the Constitution subsumes the power to take measures necessary to save the nation itself. After all, there can be no Constitution of the United States, in a meaningful sense, without the United States.<sup>5</sup>

One might even suppose that the Presidency was crafted with emergencies in mind. Consider a somewhat obscure passage from THE FEDERALIST. Extolling the importance of "Energy in the Executive", Publius insisted that such energy "is essential to the protection of the community against foreign attacks; . . . to the protection of property . . . ; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."<sup>6</sup> As if to leave no doubt where he stood, Publius embraced what, for many, must be one of the most troubling examples of an energetic executive:

Every man the least conversant in Roman story, knows how  
often that republic was obliged to take refuge in the absolute

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<sup>1</sup> Vetogates are procedural hurdles that a bill must overcome in order to become a law. Opponents may use these vetogates to obstruct proposed bills. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66–68 (4th ed. 2007).

<sup>2</sup> U.S. CONST. art. II, § 2, cl. 1; U.S. CONST. art. I, § 8 cl. 15.

<sup>3</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>4</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>5</sup> For an argument along these lines, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257–58 (2003–2004).

<sup>6</sup> THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes . . . whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.<sup>7</sup>

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

Presidents and scholars favoring vigor in crises have read the Constitution as ceding extraordinary powers to the President. Theodore Roosevelt’s steward theory claimed the power to do anything not expressly forbidden by statute or the Constitution,<sup>8</sup> a reading that ensured ample executive discretion in crises. Abraham Lincoln suspended habeas corpus and freed Southern slaves, at times claiming a right to do anything necessary to save the Union.<sup>9</sup> Professor Michael Paulson ardently backs Lincoln’s Constitution of Necessity.<sup>10</sup> Similarly, John Yoo argues that “the executive power . . . contains a power to address national emergencies and crises.”<sup>11</sup> Finally, Eric Posner and Adrian Vermeule contend that emergency powers should rest with the President because he can best wield them.<sup>12</sup>

Whether chief executives have an array of emergency powers is a question older than the Constitution, for it was on the minds of many in England and America before the Constitution was even a glimmer in anyone’s eye. It is also question that will never go away. It recurs whenever we are at war, foreign or civil. Such issues arose during the Revolutionary War, the War of 1812, the Mexican-American War, and, of course, the Civil War. In the recent past, George W. Bush claimed a power to try non-citizens before military commissions.<sup>13</sup> More recently, when it seemed that Congress might not raise the statutory debt-ceiling, scholars claimed that the President could ignore that statute in order to avert an economic calamity.<sup>14</sup> Going forward, what is certain is that Chief Executives (and their

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<sup>7</sup> *Id.*

<sup>8</sup> See THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 357 (1920).

<sup>9</sup> See CONVERSATIONS WITH LINCOLN 308 (Charles M. Segal, ed., 2002).

<sup>10</sup> See generally Paulsen, *supra* note 5.

<sup>11</sup> JOHN YOO, CRISIS AND COMMAND 122 (2010).

<sup>12</sup> ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 15–16, 180 (2007). Posner and Vermeule make clear that theirs is not an originalist case for a strong crisis President. *Id.* at 56. But some might suppose that the cogent arguments Posner and Vermeule make for a robust Presidency would have been no less convincing in the 18th century and that such arguments lead to the creation of a strong crisis President. See Gary Lawson, *Extraordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 293 (2007) (arguing that Posner & Vermeule’s arguments cohere with the original Constitution).

<sup>13</sup> See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism Notice, 66 FED. REG. 57,833 (Nov. 16, 2001).

<sup>14</sup> See Eric Posner & Adrian Vermeule, *Obama Should Raise Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011) found at <http://www.nytimes.com/2011/07/22/opinion/22posner.html>. For a discussion of the crisis and a claim that the President faced a “trilemma,” see Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012).

acolytes) will claim extraordinary authority in extraordinary times, reading the supposed ambiguities of Article II as an invitation to act.

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

The Presidency's impotence in emergencies comes into focus when we consider its antecedents. Each of its predecessors—the Crown, the state governors, and the proto-national executives under the Continental Congress—lacked a generic emergency power. This was the background against which the Constitution was created.<sup>15</sup>

The Crown lacked authority to act *contra legem*, as is clear from many laws of Parliament. The English Bill of Rights specifically prohibited the Crown from suspending the law or issuing individualized dispensations permitting individuals to ignore the law.<sup>16</sup> In 1760, the Parliament reaffirmed this principle when it rebuked the executive for suspending a law in the midst of deadly riots.<sup>17</sup>

The state executives likewise could not act contrary to established law. Nor could they take property or impose martial law<sup>18</sup> on civilians. A few had express constitutional authority to lay temporary embargoes and a number could summon the assembly to secure whatever crisis legislation the latter deemed necessary. But by virtue of their constitutions alone the executives were almost powerless in emergencies. As one executive lamented during the Revolutionary War, the state constitution had left his office in a “state of imbecility.”<sup>19</sup>

When we look to the Continental Commander in Chief, we again discover an executive bereft of the power to take property, suspend habeas corpus, or try civilians. Neither the Continental Congress nor George Washington believed that the office of Commander in Chief came with such powers. Washington only exercised such powers when Congress granted them via temporary laws.

The Constitution never energized the executive in emergencies. To be sure, the President was to enjoy the four requisites of energy—unity, duration, adequate support, and competent powers—thus making it possible for him to act with “[d]ecision, activity,

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<sup>15</sup> For an argument that constitutional backdrops provide crucial context in understanding the Constitution, see Steven Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

<sup>16</sup> 1 W. & M., § 2, cl. 2 (1689).

<sup>17</sup> See *infra* notes and text.

<sup>18</sup> I use “martial law” to refer either to the use of military commissions to try civilians or to military rule over a civilian populace. The latter encompasses the power to punish without any trial, military or otherwise. I do not use the phrase to cover ordinary military law, i.e., the codes adopted to govern the American military.

<sup>19</sup> See Letter from Joseph Reed to George Washington *quoted in* MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 92 (1943).

secrecy, and dispatch.”<sup>20</sup> Yet insofar as the Constitution was concerned, the President was no less imbecilic than his immediate predecessors, the state governors and the Continental Commander in Chief.

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

Confirming this reading, the Constitution contains clues suggesting the Chief Executive lacks an emergency power. To begin with, he cannot raise taxes, issue debt, or appropriate funds. Those powers—authorities crucial to weathering crises—rest exclusively with Congress.<sup>21</sup> Moreover, the Commander in Chief could command no one until and unless Congress raised armies, launched a navy, and authorized the summoning of the state militias.<sup>22</sup> Finally, the Founders’ Constitution never authorized the President to suspend civil liberties in crises; he could not suspend the privilege of the writ, much less suspend the privilege of a jury trial by authorizing military trial of civilians. In sum, all powers necessary and proper to overcome emergencies—raising taxes and soldiers, issuing debt, making appropriations, summoning militias, and suspending civil liberties—rested with Congress.<sup>23</sup>

This is not to say that the Executive was entirely impotent in the face of crisis. The President could summon Congress;<sup>24</sup> propose and influence the shape of crisis legislation;<sup>25</sup> and appoint officers during a Senate recess.<sup>26</sup> These authorities make the Constitution’s Commander in Chief more powerful than his predecessor, even as the office remained without authority to appropriate funds, raise armies, seize property, or suspend civil liberties. In sum, while the President is more powerful than his predecessors, he was not made appreciably stronger when it came to acting unilaterally in crisis.

On many questions, it may well be that “[j]ust what our forefathers did envision . . . must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>27</sup> And it may be the case that on some constitutional issues, the

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<sup>20</sup> THE FEDERALIST NO. 70, *supra* note 6, at 355.

<sup>21</sup> U.S. CONST. art. I, § 8, cls. 1 & 2; *id.* § 9, cl. 7. Professors Buchanan and Dorf do not suppose that the President has constitutional power to do any of these things only that when the President faces statutes that issue contradictory commands he must choose which statutes to enforce. Thus their argument for why the President should issue debt unilaterally consists of the claim that doing so is necessary to execute Congress’s spending statutes. *See* Buchanan and Dorf, *supra* note ?.

<sup>22</sup> U.S. CONST. art. I, § 8, cls. 12, 13, & 15.

<sup>23</sup> In a companion piece, I develop the argument that Congress enjoys the power to repel invasions and suppress rebellions and the power to pass necessary and proper measures designed to further both of those ends. *See Decoding the Emergency Constitution* (on file with author). While I will advert to some of those arguments here, the focus of this Article is on the President’s emergency powers.

<sup>24</sup> U.S. CONST. art. II, § 3.

<sup>25</sup> U.S. CONST. art. II, § 3; U.S. CONST. art. I, § 7, cl. 2.

<sup>26</sup> U.S. CONST. art. II, § 2, cl. 2. The scope of this power has recently been questioned. *See generally* Noel Canning v. NLRB, No. 12-1153, found at [www.cadc.uscourts.gov/internet/opinions.nsf/.../12-1115-1417096.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/.../12-1115-1417096.pdf).

<sup>27</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

Founders “largely cancel each other.”<sup>28</sup> But on the question of executive power in emergencies—the very question that triggered Justice Robert Jackson’s assertions in *Youngstown*—there is no enigma or contradictory evidence. The founders crafted an executive authorized to act quickly, responsibly and energetically, but not one empowered to take whatever emergency measures he deemed requisite. And there was no division on this question.

The limited nature of the claim must be underscored. The Constitution as it is implemented today often bears only a faint resemblance to the original framework. The arguments made here hardly establish that the President does not have or should not have emergency powers. This paper only denies that the original Constitution ever vested such powers. If the President now may invade private right, suspend habeas corpus, or appropriate funds, it is because Presidents have acquired it over the course of our nation’s innumerable crises, large and small, real and imagined. To borrow from Felix Frankfurter, practices may have glossed the “executive power”, giving it a sheen it originally lacked.<sup>29</sup>

Part I lays out different conceptions of presidential authority in emergencies. Part II considers the emergency authority of precursors to the President—the English Crown, the state executives, and the Continental Commander in Chief—and argues that none had a constitutional power to act contrary to law, take property, suspend habeas corpus, or declare martial law. Part III considers constitutional text and structure and argues that the President likewise lacks an emergency power to act *contra legem*, invade private right, or suspend constitutional liberties. Part IV describes early practice under the Constitution up to the Civil War. Part V addresses the modern era where the President is widely thought to have some emergency powers, albeit with uncertain and contested bounds.

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### Part III. A Tradition of Imbecility

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

In some ways, the era’s executives stood poles apart. Americans came to see George III as a symbol of executive excess, partly because The Declaration of Independence had railed against his abuses. The Commander in Chief of the Continental Army was the most venerated man in America, even as he was the most powerless chief executive of his era.

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<sup>28</sup> *Id.* at 635. As evidence for this proposition, Jackson cited the debate between Hamilton and Madison on the propriety of the Neutrality Proclamation. *Id.* at 635 n.1. Yet neither actually addressed whether the President had generic crisis authority. Hamilton’s claim that the President could issue his Proclamation was grounded in the President’s duty to execute the law and his powers over foreign affairs. Madison’s contrary claim was grounded in the Declare War Clause. For a general discussion of the storm regarding the Neutrality Proclamation, see Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, in *PRESIDENTIAL POWER STORIES* 21 (Christopher Schroeder & Curtis Bradley eds., 2009).

<sup>29</sup> *Id.* at 610–11 (Frankfurter, J., concurring). For a discussion of historical gloss, see Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 411 (2012).

George Washington was a creature of the Continental Congress, serving at its pleasure and dutifully obeying its operational directives. The state executives, largely the products of jealousy towards all things executive, were arrayed in between the Georges. Unlike Washington, they had constitutionally-granted powers; they were not all mere creatures of statute. Unlike the Crown, they often served for short tenures, were term limited, and rarely had a veto.

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

By the same token, if the era's chief executives were relatively impotent in crisis—if they could not try civilians before military tribunals or suspend habeas corpus—that fact should influence how we read the Constitution, because it likewise supplies contextual clues about its meaning. Against a backdrop of executive weakness in emergencies, the architects of a new framework would do their best to make clear that they meant to depart from familiar, lest their purposes be mistaken or overlooked. In a regime of enumerated powers, radical departures from tradition require new text, especially when one hopes to infuse new powers into a familiar institution.

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

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

#### A. The English Monarchy in the Late 18<sup>th</sup> Century

By the 18th century, the English had discarded the Lockean prerogative. We know this because constitutional settlements, reflected in statutes, had hemmed in the Crown. Written about the same time of Locke's Second Treatise of Government, the 1689 English Bill of Rights<sup>30</sup> codified the view that Parliament's laws reigned supreme even over traditional conceptions of the Crown's executive power.

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<sup>30</sup> 1 W. & M., § 2, cl. 2 (1689).

The contours of the Bill are key. It denounced the “pretended” regal power of granting individualized dispensations from statutory strictures.<sup>31</sup> It condemned the “pretended” power of suspending Parliament’s laws. It declared that the Crown could not “levy[] money for or to the use of the Crown by pretence of prerogative,”<sup>32</sup> thereby decreeing that the Crown could not raise taxes. Finally it specified that the Crown could not raise or keep armies in the kingdom without Parliament’s consent in times of peace.<sup>33</sup>

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

Two textual clues strengthen the implication that the Bill of rights did not permit these executive measure during emergencies. First, the Bill made clear that its restrictions did not apply when Parliament had ceded discretion to the Crown, thereby suggesting that the relevant executive acts were legal *only* when Parliament gave its approval.<sup>34</sup> Second, by declaring that Crown could not raise or keep Armies in the kingdom, “in time of peace,” the Bill conceded that the Crown could do either during wars and rebellions.<sup>35</sup> This concession was necessary because it, alone among the Bill’s limitations, was inapplicable when the kingdom was at war.

But we need not rely solely upon inferences from the Bill of Rights. An episode from the 18th century makes clear that the Crown lacked authority to act *contra legem*. When the Crown blocked the export of corn in the mid-1800s, Parliament responded in a way that shed light on the Crown’s powers in domestic emergencies.<sup>36</sup> Think of it as the *Youngstown*<sup>37</sup> of 18th century England.<sup>38</sup>

In early 1766, a torrential downpour sharply reduced grain yields. While Parliament was in recess, grain prices skyrocketed, triggering riots. Mobs destroyed flour mills and seized foodstuffs;<sup>39</sup> some culprits were imprisoned and others hanged.<sup>40</sup> Believing that it could not wait until Parliament reconvened, the Crown resolved to act unilaterally, banning grain exports in order to preserve the supply for the domestic market, drive prices lower, and end the rioting. In an argument Abraham Lincoln would find congenial, George III said “great evils must require at times extraordinary measures to remove them.”<sup>41</sup> Unlike Lincoln’s measures, the Crown’s proclamation expressly provided

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

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

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

<sup>34</sup> *Id.*

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

<sup>36</sup> Unless otherwise noted, I’ve drawn heavily from Philip Lawson, *Parliament, The Constitution and Corn: The Embargo Crisis of 1766*, 5 PARLIAMENTARY HIST. 17 (1986).

<sup>37</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>38</sup> See Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321–38 (1952).

<sup>39</sup> MERRILL JENSEN, *THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION, 1763–1776*, at 218 (1968).

<sup>40</sup> HILTON L. ROOT, *THE FOUNTAIN OF PRIVILEGE: POLITICAL FOUNDATIONS OF MARKETS IN OLD REGIME FRANCE AND ENGLAND* 88–89 (1994).

<sup>41</sup> LAWSON, *supra* note 36, at 22.

that its export ban lapsed three days after Parliament returned. This was an implicit acknowledgement that any final decision rested with Parliament. To some of the Crown's advisors, the measure must have seemed necessary and legal. Others, including the Lord Chancellor, had their doubts.<sup>42</sup>

When Parliament reconvened, King George III's address referenced the export ban, without acknowledging its illegality and without asking for any bill to indemnify his ministers and officers against suits. Justifying the measure, George III said "[t]he urgency of the necessity called upon me . . . to exert my royal authority for the preservation of the public safety, against a growing calamity which could not admit of delay."<sup>43</sup> Because the ban would soon expire, the Crown referenced the possibility of new legislation. But by not admitting the illegality of the export ban, the Crown seemed to be reasserting a pre-Bill of Rights power to temporarily suspend laws.<sup>44</sup>

When the Lords convened, members criticized the Crown, with some insisting on a new bill that would reassert Parliamentary supremacy. In response, William Pitt quoted the portion of Locke's Second Treatise that argued that the Crown had a power to act *contra legem*. But he also seemed to back away from the implication, supposedly denouncing it. Lord Camden declared that the suspension established "at worst but forty days' tyranny."<sup>45</sup> Astonished, a member replied that once a dispensing power was established, "you cannot be sure of either liberty or law for forty minutes."

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

Agreeing with Lord Mansfield, Parliament passed an act of indemnity. Rather than sidestepping the export ban's legality, however, Parliament rebuked those who had advised it. The Act's preamble declared that the export bar "could not be justified by Law" but that because it was "for the service of the public" and "necessary," it should be "justified by Act of Parliament." It proceeded to indemnify against any act "advised, commanded, appointed, or done" relating to the embargo.<sup>46</sup> The Act thus conspicuously rejected the attempt to resurrect the Crown's power to suspend statutes, even though the suspension was concededly introduced for the public good. While *salus populi* might be the supreme *rex* in an abstract sense, it was not the supreme law in England. Only Parliament's laws had that status. Because the King-in-Parliament had permitted the export of grain at the time of the executive's ban, the Crown could not unilaterally forbid grain export.<sup>47</sup>

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<sup>42</sup> *Id.* at 22, 24. During wartime, the Crown had a common law right to impose an embargo. Not so during times of peace. See CHRISTOPHER VINCENZI, CROWN POWERS: SUBJECTS AND CITIZENS 152 (1998); see also LAWSON, *supra* note 36, at 29 (noting that Lord Mansfield asserted that the Crown could have imposed an embargo during war).

<sup>43</sup> *The King's Speech on Opening the Session* (Nov. 11, 1766), in XVI PARLIAMENTARY HISTORY OF ENGLAND 235 (1813).

<sup>44</sup> *Id.* at 235–36.

<sup>45</sup> *Id.* at 235.

<sup>46</sup> 6 Geo. III, ch. 7.

<sup>47</sup> Lawson, *supra* note 36, at 17, 33.

The Act's preamble carried an important constitutional lesson, for it reaffirmed what was implicit in the Bill of Rights. The executive could not, as a legal matter, create, modify, or suspend laws, in a domestic crisis, even when doing so was for the public good. As a member of Parliament, William Blackstone witnessed the debate and referenced it in later editions of his COMMENTARIES.<sup>48</sup> Those Founders who read the American printing would have known of the episode and Blackstone's more general conclusion that the Crown could not act contrary to law.

Did the Crown have an emergency power during wars and rebellions? In some respects the answer was clearly "yes". As noted, the Bill of Rights' bar on raising and keeping a domestic peacetime army implied that the Crown could deploy, at will, the army overseas and might raise and keep a standing army in England in time of war.<sup>49</sup> Moreover, the Crown could impose embargoes during wars.<sup>50</sup>

One aspect of the Crown's power during wars and rebellions was uncertain and contested, namely the power to impose martial law. R. E. Kostal describes various crises and cases throughout the late 18th and 19th centuries that touched upon the issue, with no uncontested or easy answer emerging.<sup>51</sup> Based on the Petition of Right<sup>52</sup> and a few cases,<sup>53</sup> some thought that the Crown could never use military commissions to try civilians;<sup>54</sup> perhaps it was left to Parliament to impose martial law.<sup>55</sup> Others seemed to admit that such commissions might be used when the ordinary courts were closed.<sup>56</sup> And still others claimed that whenever war, of whatever sort, was afoot the Crown could subject to martial law those suspected of aiding the enemy, even if the courts were open.<sup>57</sup> These disagreements about martial law would continue through the 19th century.

The Corn Crisis demonstrated not only that the Crown could not act *contra legem*, it also revealed that the Crown lacked a provisional emergency power in peacetime. The Crown had more authority in wartime, particularly with respect to military discipline, embargoes, and raising armies. Whether the Crown could impose martial law in wartime is more obscure because it was so contested.

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<sup>48</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*271 (describing the 1766 indemnity act as necessary because Crown's proclamation was "contrary to law").

<sup>49</sup> 1 W. & M., § 2, cl. 2 (1689).

<sup>50</sup> See 16 THE PARLIAMENTARY HISTORY OF ENGLAND 261 (T. C. Hansard et al., 1813) (member admitting that Crown had "undoubted power" to impose embargo during war). See also CHRISTOPHER VINCENZI, CROWN POWERS, SUBJECTS AND CITIZENS 114, 152 (1998) (declaring that Crown has general power to impose embargo during wartime).

<sup>51</sup> See R. W. KOSTAL, THE JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW (2005). I draw heavily from Kostal in this paragraph.

<sup>52</sup> 3 Charles I, c. 3 (1766).

<sup>53</sup> See KOSTAL, supra note 51, 198–199 (2005) (collecting cases about martial law). I draw heavily from Kostal in this paragraph.

<sup>54</sup> See FACTS AND DOCUMENTS RELATING TO THE ALLEGED REBELLION IN JAMAICA, JAMAICA REPORTS NO. 1, at 72 (London, 1866); FREDERIC HARRISON, MARTIAL LAW: SIX LETTERS TO THE DAILY NEWS, JAMAICA PAPERS NO. 5, at 13 (London, 1867).

<sup>55</sup> ROBERT B. SCOTT, THE MILITARY LAW OF ENGLAND 18–19 (1810)

<sup>56</sup> See Juridicus, SOLICITORS' JOURNAL 109 (Dec. 9, 1865); Authority of the Executive to Proclaim Martial Law, Daily News 3 (Jan. 3, 1866).

<sup>57</sup> See generally W. F. FINLASON, A TREATISE ON MARTIAL LAW (1866); W. F. FINLASON, COMMENTARIES ON MARTIAL LAW (1867).

## B. The State Executives

Reflecting a jealousy of executive power,<sup>58</sup> the state constitutions drew from the English Bill of Rights. Some expressly provided that no one but the legislature could suspend the law. For instance, the Maryland Constitution of 1776 declared “[t]hat no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.”<sup>59</sup> Like their English precursor, these provisions lacked emergency exceptions. Moreover, because the constitutions were themselves law, the state bar on suspensions meant that the executive could not suspend constitutional provisions, either separation of powers clauses or rights provisions.

Yet focusing on the anti-suspension clauses obscures the extent to which it was widely understood that state executives lacked crisis powers. Consider their travails during the War of Independence. State executives faced the daunting task of defeating an imperial power at its height. To succeed they not only had to defeat the enemy on the battlefield, they also had to secure military supplies, apprehend spies, and maintain civil government.<sup>60</sup> Though state constitutions often made their chief executives commander in chief and almost always granted them “executive power,”<sup>61</sup> those executives lacked any sort of emergency power. To the contrary, they were remarkably feeble in crises. The leading historian on the war governors, Margaret Burnham MacMillan, noted that the constitutions ceded executives “limited powers entirely inadequate for dealing with [] emergencies.”<sup>62</sup>

Consider Pennsylvania’s plural executive (“the Supreme Executive Council”) endowed with the “executive power.”<sup>63</sup> The Council’s President informed General Washington that it could no longer seize supplies because a statutory grant had expired.<sup>64</sup>

It may seem strange . . . that we have not legal power to impress a single horse or wagon, let the emergency be what it will, nor have we any legal power whatever over property in any instance of public distress . . . . In this state of imbecility . . . we regret our inability to answer the public expectation with the keenest sensibility.<sup>65</sup>

Another chief executive spoke for most when he lamented the lapse of emergency legislation, for he was now “left to the Constitution which may do in Peace but is by no means adapted to war.”<sup>66</sup>

These complaints were predictable, at least once one grasps that the state constitutions ceded few emergency powers to the executive. Moreover, executives often

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<sup>58</sup> Thomas Jefferson, *Notes on the State of Virginia*, in COLONIES TO NATION 369 (Jack P. Greene ed., 1967).

<sup>59</sup> MD. CONST. art. VII (1776). See also NC CONST. art. V (1776) (all powers of suspending the laws should be exercised only with legislature’s consent).

<sup>60</sup> JOSEPH E. KALLENBACH, *THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP* 27 (1966); MARGARET BURNHAM MACMILLAN, *THE WAR GOVERNORS IN THE AMERICAN REVOLUTION* 83 (1943).

<sup>61</sup> MACMILLAN, *supra* note 60, at 57, 63.

<sup>62</sup> *Id.* at 61.

<sup>63</sup> PA. CONST. § 3, 19 (1776)

<sup>64</sup> MACMILLAN, *supra* note 60, at 92.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 61.

will be tempted to claim that their powers are inadequate to the task at hand both to acquire greater powers and deflect blame if their response to some catastrophe seems inadequate.

Yet it would be a mistake to imagine that state executives were feckless in emergencies. First, several had constitutional authority to impose embargoes (bans on the export of goods and material).<sup>67</sup> Because the state constitutions were products of a war, one has to suppose the executive was given authority to lay embargoes during the ongoing war as a means of preventing the export of needed supplies (weapons, raw materials, and food); without such grants, there would have been no unilateral executive authority. Moreover, as the Crisis of 1766 demonstrated, this authority might be crucial during peace. Embargoes could be used as a means of lowering prices during times of high inflation, thereby staving off riots or rebellion.

The embargo provisions were hardly blank checks. Rather they did no more than grant authority to impose short-term embargoes when the legislature was in recess. The implication is that legislatures had exclusive power over long-term export bans and on short-term bans when in session. Needless to say, it is hard to read those state constitutions that granted their executives authority to impose interim export bans during a legislative recess as if they also implicitly ceded far more consequential power to their executives, such as the powers to seize war material, to raise armies and taxes, and sacrifice individual liberties for the sake of defeating the enemy or rebels.

Second, many chief executives could summon their legislature.<sup>68</sup> Some constitutions provided that this power could be used whenever the executive thought it “necessary.”<sup>69</sup> For others, the power could be exercised only in an “emergency.”<sup>70</sup> In those states that limited the power to crises only, constitutional structure strongly suggested that the executives lacked a generic emergency power. After all, an executive with a Lockean prerogative to do whatever was necessary during a crisis, including a power to act *contra legem*, had no need to summon the legislature in an emergency.

Third, the power to summon the legislature was an important means of acquiring delegated authority. So while state executives were generally feckless by virtue of their constitutions alone, no constitution ever required or mandated executive imbecility. Oftentimes the legislatures granted executive requests for delegated authority because they agreed that the crisis called for such delegations.

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<sup>67</sup> See MD. CONST. art. XXXIII (1776) (governor may impose thirty day embargoes during recess of general assembly to prevent departure of ships and export of commodities); S.C. CONST. art. XXXV (1778) (governor may impose thirty day embargoes during recess of legislature); DEL. CONST. art. 7 (1776) (president, with consent of council, may impose thirty day embargoes during recess of legislature); N.C. CONST. art. XIX (1776) (same authority for governor); PA. CONST. § 20 (1776) (executive council may impose thirty day embargoes during recess of House).

<sup>68</sup> See, e.g., PA. CONST. § 20 (1776); N.Y. CONST. art. XVIII (1777); VA. CONST. cl. 30 (1776). See MASS. CONST. Ch. II § 1 art. V (1780) and N.H. CONST. art. XLIII (1783) for examples of power to convene at a particular location.

<sup>69</sup> PA. CONST. § 20 (1776); VA. CONST. cl. 30 (1776) (same); VT. CONST. Ch. II § XVIII (1777) (same); S.C. CONST. art. XVII (1778) (same); S.C. CONST. art. VIII (1776) (same); MD. CONST. art. XXIX (1776) (same). See also DEL. CONST. art. 10 (1776) (President may convene at his discretion “with the advice of the privy council, or on the application of a majority of either house.”); MASS. CONST. Ch. II, § 1, art. V (1980) (Governor may summon legislature where “the welfare of the commonwealth shall require the same.”).

<sup>70</sup> GA. CONST. art. XX (1777). See also N.Y. CONST. art. XVIII (1776) (“extraordinary occasions”).

So the constitutions granted little crisis authority and were generally understood to leave the state executives in an imbecilic state, at least until statutes ameliorated that feebleness. Yet navigating the twists and turns of war sometimes requires extraordinary action. Little wonder that executives occasionally took measures that were constitutionally and statutorily unauthorized. Such unilateral action—often dealing with supplies—was seen as illegal, despite the necessity. When Washington pushed George Clinton of New York to supply flour, the Governor illegally seized some.<sup>71</sup> Another time, Clinton advised officers to seize nails, claiming that necessity justified the seizure.<sup>72</sup> Yet he admitted that necessity was not a legal defense, but a practical one: “[I]t is not in my Power as Gov’r [to impress] & I ought to be cautious how I walk.”<sup>73</sup>

When executives took such crisis measures they often sought *post hoc* legislative sanction.<sup>74</sup> After one executive illegally transferred cannons to Washington’s army,<sup>75</sup> he sought and received legislative sanction.<sup>76</sup> Similarly, the Virginia legislature “legalize[d] certain acts” of its governor, finding that they were “evidently productive of general good and warranted by necessity.”<sup>77</sup> Of course, indemnification would have been unnecessary if the executive had legal authority to take needed measures during crises. It was essential precisely because the executive occasionally took illegal, but necessary, actions.

Three lessons emerge from the state experience. First, although almost all executives enjoyed express grants of executive power and many served as commander in chief, none of them acted as if they had constitutional authority to take any and all emergency measures. In other words, even though state constitutions were created in the crucible of crisis, they were most certainly not constitutions of necessity insofar as the executives were concerned. Relatedly, executives never claimed authority to do anything not specifically prohibited by law, meaning that they did not view themselves as Rooseveltian stewards, able to do anything that that might further the commonweal. Finally, no chief executive asserted constitutional authority to take temporary emergency measures that preserved the status quo for the legislature, except where the Constitution expressly granted as much, as in the case of embargoes. In the midst of a civil war that threatened their “Lives”, “Fortunes” and “sacred Honor”,<sup>78</sup> executives felt rather handcuffed.

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

The final lesson relates to the perceived inadequacies of the system of weak crisis executives. Though executives complained about the constitutional architecture, we should be skeptical. In the midst of a crisis, those in power often will believe that all manner of

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<sup>71</sup> MACMILLAN, *supra* note 60, at 203–04.

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

<sup>73</sup> Letter from George Clinton to Hugh Hughes (Mar. 17, 1778), in 3 PUBLIC PAPERS OF GEORGE CLINTON 53 (Hugh Hastings ed., 1900).

<sup>74</sup> MACMILLAN, *supra* note 60, at 99.

<sup>75</sup> *Id.* at 202.

<sup>76</sup> *Id.*

<sup>77</sup> 10 WILLIAM WALLER HENING, HENING’S STATUTES AT LARGE 478 (1822).

<sup>78</sup> THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

obstacles will be overcome only if they are given more authority and a freer hand. But believing so does not necessarily make it true.

Whatever the case may be, we need not delve too deeply into their protests. The important question is how well did the system of weak crisis executives function. One is tempted to say quite well. Despite the frail executives, the Revolution was won and, for the most part, the state executives and legislatures acquitted themselves well enough. So while those who served as governors might have thought the system was imbecilic and inadequate, it is quite likely that many disagreed, having witnessed the general framework's success. Indeed, it seems likely that the perceived successes of the scheme of weak crisis executives might have influenced the structure of any new system erected in its wake.

### C. The Continental Commander in Chief

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

Congress appointed Washington in June of 1775. His commission made him "General and Commander-in-chief of the army of the United Colonies, and of all the forces raised or to be raised by them, and of all others who shall voluntarily offer their service and join the said army."<sup>79</sup> The Commission required soldiers and officers to obey Washington. It also gave him "full power and authority to act as you shall think for the good and welfare of the service."<sup>80</sup>

At first glance, the office may appear rather powerful. Yet a careful reading of the commission and an examination of Washington's actions reveals otherwise. To begin with, he lacked "full power and authority" to do anything he thought useful for the "good and welfare of" the *United Colonies* as a whole. Rather he could only act for the good and welfare of the "service", namely the army.

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

We know that Washington could do none of these things because Congress occasionally granted power to take supplies, arrest Tories, and impose martial law.<sup>81</sup> Such emergency resolves had features that confirmed that they were but temporary augmentations of the office. Almost always, the grants were temporary, made to expire

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<sup>79</sup> See Commission as Commander in Chief to George Washington (June 19, 1775), in EDWARD LENGEL, *THE GLORIOUS STRUGGLE: GEORGE WASHINGTON'S REVOLUTIONARY WAR LETTERS* 6 (2007).

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

<sup>81</sup>

during a coming session of the Continental Congress.<sup>82</sup> Occasionally, the grants were geographically limited to a radius around a camp or the scene of ongoing hostilities.<sup>83</sup> There was no reason to limit the crisis authority in duration and geographical scope if the Commander already enjoyed a generic crisis power to impress supplies, suspend habeas corpus, or impose martial law.

The genesis of some statutory grants also suggests that the office of Commander in Chief was bereft of crisis authority. Often, the Continental Congress granted emergency powers because the Commander in Chief requested as much.<sup>84</sup> Washington's desire for statutory authority was an implicit acknowledgment that his office did not encompass power to impress supplies, arrest civilians, or try them via courts martial. While commanders in chief could command the troops, they could not take any measure that might further the army's welfare, much less any thought necessary to defeat the enemy.

Finally consider Washington's careful respect for the terms of crisis legislation. The Commander always strictly complied with congressional law, never venturing beyond its terms. When a civilian was executed for his "heinous" crime, Washington rebuked the responsible army officer, saying that crime was not cognizable by the military courts and that Congress had not authorized capital punishment, even on soldiers.<sup>85</sup> Another time, Washington declared that martial law could no longer be applied against civilians because the law that had permitted it had expired the day before.<sup>86</sup> In a third instance, the General condemned the trial of a civilian who had been caught far from headquarters because it was statutorily unauthorized. "There is a resolve of Congress, empowering Courts Martial to take cognizance of inhabitants who have any communication of Trade or intelligence . . . with the enemy . . . ; but the operation of this law is limited to persons" captured with 30 miles of headquarters "which prevents its applications to the present case."<sup>87</sup> Washington hewed strictly to congressional delegations because they were the only sources under which he could seize property, hold civilians indefinitely, or try them before military courts.

In one respect, Washington enjoyed less authority than some state counterparts. As noted a few state executives could impose a temporary embargo during a legislative recess. Washington, however, lacked such authority, as is evidenced by his request that Congress impose one.<sup>88</sup> He perhaps understood that while the price of wartime material might decline in the wake of an export ban that fact alone hardly suggested that commanders in chiefs could impose the bar. After all, he lacked all sorts of powers that would have been militarily useful. The Commander in Chief likely understood that because he lacked authority, *ex officio*, to impress supplies, it made little sense to suppose that he would have the far less consequential authority to take measures that merely decreased the cost of military supplies in the short term, such as imposing embargoes.

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<sup>84</sup> See Letter to John Hancock (Dec. 20, 1776) in 7 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 382 (1996).

<sup>85</sup> Letter to Preudhomme de Borre (Aug. 3, 1777) in 10 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 101, at 495.

<sup>86</sup> Letter to William Smallwood (May 19, 1778) in 15 *id.* at 168.

<sup>87</sup> Letter to William Livingston (April 15, 1778) in 14 *id.* at 525.

<sup>88</sup> Letter to Nathaniel Woodhull (July 24, 1776) in 5 *id.* at 454.