Work-in-Progress

Martial Law, Dictators, and Congress

Saikrishna Bangalore Prakash* 

N.B.: I am afraid that this draft is much more rough than I hoped. Nonetheless, it gives you a good sense of where I wish to take the argument. For those interested, I have a companion piece arguing that the President is “imbecilic” during emergencies and must entirely rely upon legislation as a source of crisis authority. I’d be happy to discuss how the two claims fit together should discussants be interested.

Thanks in advance for your willingness to slog through an extremely early draft.

* David Lurton Massee, Jr., Professor of Law, University of Virginia. Thanks to the reference librarians at the University of Virginia for excellent research support and to the Virginia Law School for summer research support.
INTRODUCTION

Martial Law, Dictators, and Congress

Whether the Constitution is a suicide pact is a question mooted from time to time, especially during crises. The line of inquiry is befuddling. A suicide pact is an agreement that two or more people will take their lives, more or less simultaneously. Whatever else the Constitution is, it is not a pact designed to end in the death of some or all, much less the destruction of the government it constitutes.

Knowing this, most who discuss whether the Constitution is a suicide pact are addressing a rhetorical question. They already know the answer. Or at least they know the answer they wish to discover within the Constitution. The answer, inevitably, is that the Constitution is not.1

How could it be otherwise? While all governments eventually fail, few constitutional framers contemplate the death of their handiwork. Though the Framers endeavored to lay the “perpetual” Articles of Confederation to rest, they were not laboring to create a Constitution that would meet the same fate in an emergency. Instead they built a “more perfect” Union2 meant to “endure for the ages”, as John Marshall said in McCulloch v. Maryland. We can say, with a high degree of certainty, that the Constitution was not designed to fail in crises.

So if the Constitution is not a suicide pact and if it was meant to endure, the natural follow-up question is in what way does it establish that it will not collapse in times of crises? Specifically, which features were meant to help it endure for the ages by helping it to outlast emergencies?

---

1 Often the principal point of saying that the Constitution is not a suicide pact is to put an opponent on the defensive. The charge is that if you adopt a narrow reading of federal power, you read the Constitution as if it were a suicide pact because that reading will lead to its eventual destruction. Because the Constitution is clearly not a suicide pact, a narrow reading of federal power must be utterly mistaken, or so the argument goes.

2 U.S. Const.
For some the answer is obvious. The Constitution anoints its own protector: The President who is to preserve, protect, and defend the Constitution is to spring into action in an emergency and do what is needed to save the day. This answer appeals because the executive is the active force of government. He is a doer rather than a deliberator or a ditherer.

Scholars who favor this answer can draw upon a few quotes from The Federalist Papers about the need for an energetic executive. And they can cite the President’s constitutional oath and the grant of Executive Power. Considered together, these give a patina of respectability to claims of executive emergency authority. Many also draw upon the Civil War and the vigorous actions of the Great Emancipator. Lincoln appropriated funds, enlarged the army, suspended habeas corpus, freed (some) slaves, and imposed martial law, all in the name of saving the Union and its Constitution. A common intuition is that while Lincoln may have gone too far in some respects, he had constitutional authority for many of his actions.

The notion that the executive is meant to be the Constitution’s failsafe is mistaken. Lincoln’s success during the Civil War has distorted our sense of the Constitution, blinding us to an older order, one where legislatures were supreme in the sense that they were the font of emergency authority and could delegate it (or not) as the occasion warranted. Under this regime, which lasted from the Revolutionary War until the Civil War, executives might act unilaterally (and hence illegally) were it was impossible to secure advanced legislative sanction. When legislatures concluded that the actions were appropriate, and hence excusable, they could pass an act of indemnification and refrain from impeachment.

The preferred course was for legislatures to enact whatever emergency measures were necessary, either at the executive’s behest or otherwise. Assemblies might enact laws in advance of any emergency that ceded the executive additional authority when an emergency struck. Or the assembly might wait until a crisis and only then adopt legislation tailored for the prevailing exigency.

When legislatures delegated, they might, when cautious, merely delegate greater authority over the military, eliminating statutory restraints on the executive’s command over it. To meet more severe crises, they might effectively cede the purse to the executive or authorize the taking of private property. In truly desperate times, they might authorize indefinite
detention, extrajudicial punishment, and a general suspension of many civil liberties. That is to say legislatures might create a dictator.

Obviously, the parameters of emergency legislation varied with the perceived threat. Broad delegations often were temporary, geographically limited, and hemmed in by the need to consult with a council of some sort. The idea was that the need for emergency measures might be confined to a particular area and might only be necessary for a limited time. The conciliar check facilitated broad delegations by imposing an ex ante check on final executive action.

This regime may frighten some as it suggests that the executive can be made omnipotent and that civil liberties may be suppressed in the short run. But in an era where the fear was that revolutionaries would be strung up as traitors to the Crown, this regime was far preferable, at least as compared to the alternative of losing the war. Most state constitutions at the founding were read to permit massive delegations and suspension of civil liberties during wartime. Indeed sweeping emergency legislation was enacted repeatedly across a number of states and was largely seen as legal.

The relatively weak continental government had much the same authority. The Continental Congress was a plural, often absent executive. Yet it wisely ceded the Commander in Chief broad powers in a localized area, powers so great that many saw the Commander as a dictator. Via statute, Congress granted Washington the power to detain without trial and the more troubling authority to try civilians before military tribunals.

If the regime of temporary dictatorship seems familiar, it should. The Founders, wedded to republicanism, drew upon the Roman Republic tradition of dictatorship. Dictators in the shape of Caesar or Sulla were to be feared and loathed. But dictators emulating Cincinnatus—those who vigorous exercised power and then relinquished it once the storm had passed—were to be celebrated. State legislatures consciously drew on the Roman example of temporary dictatorship, knowing full well that there was a chance that someone thought to be a Cincinnatus might turn out to be a Caesar instead. George Washington could be aptly compared to Cincinnatus not merely because he relinquished military command but because he readily ceded back the dictatorial powers Congress had granted.

The Constitution implicitly incorporates this emergency regime of legislative preeminence. A cursory reading of the Constitution would leave one almost wholly unaware of its latent ability to handle emergencies.
There are a few clauses that speak to emergencies, like the Habeas Corpus Clause. Yet as Justice Robert Jackson wrote in Youngstown, the Constitution lacks anything resembling Article 48 of the Weimar Republic; it has no provision expressly authorizing emergency measures or the Constitution’s partial or whole suspension. Nonetheless the Constitution, written against the recent memory of the American Revolution, has certain emergency principles embedded in it that, if not as express as Article 86, are no less potent in empowering the government and no less dangerous in perhaps leading to a permanent collapse of the Constitution.

The argument for this proposition is simple. The Constitution was written against the backdrop of governments that triumphed during the War of Independence via vast delegations of power to the executive and the temporary suppression of civil liberties. Moreover, the Constitution evidently creates a stronger government than the one that existed under the Articles, a government that authorized the creation of a temporary dictator. Given that the Constitution contains no express prohibition on ceding of massive power in times of crisis nor any provision barring the suspension of civil liberties, it is best read as authorizing the Congress to do in times of crisis that which its state and continental predecessors did, namely delegate massive authority and suspend various civil liberties.

Part I introduces the theory that the Constitution authorizes Congress to take all measures necessary to save the republic, including the creation of a dictatorship and the suspension of all civil liberties. Part II discusses founding era practices that suggest that the legislature’s dominant position. Part III reconsiders the Constitution and its early implementation via a consideration of statutes and commentary.

I. Two Views of the Constitution

As noted, the Constitution seems to say little about emergencies. There is no provision specifically authorizing a dictatorship, temporary or otherwise. Moreover, there is no emergency or crisis provision that allows the federal government to neatly (and legally) dissolve implicit and express constitutional constraints on the federal government. Instead, there is a smattering of emergency clauses, none of which seem to comprehensively address emergencies. Congress can declare war, decide when the state militias may be used to thwart invasions and crush insurrections, and suspend habeas corpus. The President can summon Congress on

---

3 Article 46 granted emergency prerogative to the
extraordinary occasions and might have shadowy emergency powers as Commander in Chief.

On one view, the Constitution is relatively inflexible in the sense that it does not authorize wholesale departures from ordinary constitutional restrictions. Call this the “Rigid Constitution.” While Congress can authorize executive detention via a suspension of habeas corpus, under the Rigid Constitution it cannot, no matter the extent of the crisis, ever permit civilians to be tried before military tribunals or abridge the freedom of speech or the press. After all, no provision expressly authorizes Congress to suspend these rights, in times of crisis or otherwise. Indeed, there is not even a clause (like the Suspension Clause) implying that Congress may suspend those rights. Similarly, one might further imagine that no matter how dire the circumstances, Congress can never delegate some or all of the legislative and judicial powers to the executive (or anyone else) because the Rigid Constitution authorizes no such departures from the Constitution’s basic allocation of powers. In sum, the Rigid Constitution is rigid with respect to rights and powers.

On another view, the Constitution’s constraints, both individual rights and structural, are meant for times of peace and tranquility. These are the rules that are to restrain the federal government in ordinary times. But in extraordinary times, where the fate of the Constitution and the nation hangs in the balance, many of these checks operate less stringently, and, if need be, can be eliminated. On this flexible approach, the Constitution creates mandatory rules applicable in the ordinary course, but not ones that must apply in existential crises. Borrowing from Eric Posner and Adrian Vermeule, we can call this vision the Accommodative Constitution.

The Rigid Constitution appeals to civil libertarians. They may fear that the Accommodative theory emasculates the Constitution in the guise of saving it. In particular, they may fear the supposedly one-way ratchet effect of crises, the claim that emergencies lead to permanent curtailments of civil liberty.4 The Accommodative Constitution is alluring to those more concerned about the possible collapse of the republic, for it privileges the continuity of the government above all else. Crudely put, the opponents of the Rigid Constitution may believe that it shortsightedly safeguards certain principles at the expense of long-term constitutional viability.
In this part, I do not hope to prove that one or the other is the best reading of the Constitution. For now I wish only to establish two propositions. First, I want to demonstrate that the Accommodative reading of the Constitution is at least a plausible one. Second, I want to suggest that if the Accommodative view is plausible, the branch able to temporarily relax constitutional constraints is Congress and not the executive.

A. The Plausibility of the Accommodative Constitution

The rigid reading of the Constitution, the idea that the Constitution establishes many constraints that can never be lessened or cast aside, is powerful. To begin with, the Constitution generally does not read as if it establishes a series of default rules that do not apply in emergency. Many of the civil liberties the Constitution protects—jury trial, free speech, and even the takings clause—contain nothing implying that their rights may be taken away, via legislation or otherwise, in times of emergency. “Congress shall make no law” sounds like a ringing, absolute prohibition on Congress making any law abridging the freedom of speech, freedom of the press, or free exercise of religion. The jury trial right of Article III mentions that “all” criminal trial “shall be by Jury” and the Sixth Amendment further provides that “all” shall have right “to a speedy and public trial” held in the State where the crime was committed. Again, there seems no equivocation. One might say similar things about the Double Jeopardy, the Self-Incrimination, and Cruel and Unusual Punishment Clauses—each establishes an unqualified check on governmental power.

Bolstering the view that the Constitution is largely rigid are those few clauses that are clearly accommodative. The Search and Seizure Clause is supple because it suggests that reasonableness is its touchstone. A search that is wholly unreasonable in one context (peacetime) may be quite reasonable in other contexts (war, rebellion). Similarly, the Courts have read the Due Process Clause to require varying levels of procedure based upon the proposed deprivation and the interests of the government and the person facing the loss of life, liberty, and property. During crises, governmental interests are more pressing thereby permitting it to use more rudimentary procedures for the deprivation of life, liberty, and property.

Finally, the Habeas Clause’s very existence might suggest that when the Constitution means to permit the suspension of civil liberties, it expressly provides as much. There being but one such clause, a possible
expressio unius implication is that the Constitution does not generally permit the suspension of civil liberties, by Congress or otherwise.

Relatedly because the Habeas Clause only expressly permits indefinite detention during invasions and rebellions, the Clause arguably has negative implications for actual punishment. One possible implication is that while the government can detain individuals in narrow circumstances it lacks the greater power to punish people outside the criminal processes required by Article III and the 5th, 6th, and 7th Amendments. After all, why mention that indefinite detentions are permissible under only limited circumstances if an even worse fate (irregular trial and punishment) can befall individuals? Because there is no criminal trial suspension clause constraining the ability to suspend the Constitution’s criminal trial rights for civilians, if there is a generic federal power to suspend the criminal provisions of the bill of rights that power conceivably could be exercised even when there has been no invasion or rebellion.

Though reading the Constitution as if it were rigid has a certain appeal, it is hardly the only way of reading it. Consider the very different textual appeal of the Accommodative theory, one that imagines that some ordinary constitutional restraints do not apply in true emergencies.

The Constitution contains clues supporting the notion that it is implicitly Accommodative. For instance, though the Constitution never specifically vests the power to suspend the privilege of habeas corpus, we know that Congress can suspend it. After all, there is no reason to limit the occasions for suspension if there is no power to suspend in the first instance. By limiting its ability to suspend the privilege, the Suspension Clause implies that Congress otherwise would have unconstrained power.

Much the same could be said of the federal government’s power to suppress rebellions. No such power is expressly granted in Article I, section 8. Yet the Habeas Clause supposes that the federal government may suppress insurrections, for it contemplates that the government may permit indefinite detentions as a countermeasure to them. Moreover, Clause 15 of section 8 provides that Congress may declare when the state militias may be summoned in order to suppress insurrections, a provision implying that the Congress has a generic power to quell rebellions.\footnote{Although Section 15 could be read as granting a power to suppress rebellions, it does not so much grant a power to suppress rebellions as much as it conveys the power to...}
Consider also the Constitution’s implicit exceptions to its rights protections. The criminal protections of the Bill of Rights and Article III do not apply to members of the armed forces, despite the fact that the only express exception applies to the presentment or grand jury right found in the 5th Amendment. As the Supreme Court explained in *Ex Parte Milligan*, the 6th Amendment jury trial implicitly does not apply to members of the armed forces. This implied exception not only casts aside a constitutional right, it also eliminates a vital structural limitation, for it allows the executive to punish soldiers and sailors without the check of a regular jury.

These examples of implied emergency powers and implied exceptions to constitutional rights suggest an alternative way of understanding the Constitution’s structural and individual rights limitations. Perhaps there is an implied federal emergency power and implied emergency exception to constitutional rights. Just as there are implied court martial exceptions for the jury trial right and something like a military exception for the First Amendment, so too might there be implied emergency exception to the structural and individual rights limitations of the Constitution. Moreover, just as the Constitution clearly contemplates a power to suspend the writ, perhaps it contemplates other emergency powers as well—a power to suppress pro-rebel speech or to have military trials.

Indeed, a proponent of Accommodative Constitution might well say that every government has the power, either implied or express, to preserve itself. This power includes authority to temporarily disregard ordinary constraints as a means of ensuring self-preservation. In sum, perhaps the Constitution supposes that the preservation of it and the call up the militias to be used in their suppression. Again it presupposes a power to suppress rebellions rather than conveying such a power.

*Milligan*, 71 U.S. (4 Wall.) at 123. See also *Ex Parte Quirin*, 312 U.S. 1, 21 (1942).

The Supreme Court has said that the 1st Amendment applies to members of the armed forces. But it has said that its strictures are relaxed given the need to maintain discipline in the military. Yet a civil libertarian might instead say that the 1st Amendment does not really apply in the armed forces. Rather some ersatz version permits all manner of speech suppression that would not be tolerated in the civilian context.

The idea of implicit constitutional powers, duties, rights, and exceptions to those rights should be familiar, for our constitutional practice is rife with them. Everyone understands that the federal government may take property, for public purposes, despite the absence of an express taking power. Similarly, though the Constitution never says as much, Presidents must execute judicial judgments, whether they come from the Article III courts or the Senate impeachment court.
reprenent takes precedence over the individual rules found within it, rules meant for ordinary times.

The case for a generic emergency power, a power of self-preservation is appealing. When the existential crisis is upon us, someone (presumably the executive) may need to rule by decree and punish people without trial. Someone should have authority to rule by decree because emergencies often require quick action in rapidly changing environments, something not possible when antecedent, inflexible laws create mandatory one-size-fits-all rules. Moreover, punishment deters best when it is swift. The example made of rebels or traitors is made all the more vivid when investigation, apprehension, trial, and punishment are not dragged out.

Obviously an emergency power poses a hazard to a republic. Someone vested with a power of suspending the Constitution may abuse it. Someone granted emergency authority by statute under a suspension may be tempted to permanently seize power. Moreover, whenever a constitution has an emergency feature, there is a risk that emergencies will be declared with a frightening frequency, making emergency the norm and leaving application of the ordinary rules exceptional.

Nonetheless, those crafting constitutions might suppose that in a crisis, the choice is between two evils. Leave the government too impotent and hamstrung and one faces the real possibility that the whole regime collapses, leading to the possibility of an oligarchy, a dictator-for-life, or hereditary monarchy. Knowing this, constitution makers might create strict rules that apply in ordinary times but allow rather vast departures from these rules when there is an existential threat to the government, including the creation of a temporary dictator.\(^9\)

Abraham Lincoln made the point most trenchantly. Sometimes the doctor must sacrifice the limb to save the patient. Though his logic is impeccable, he actually overstated the sacrifice. If the limb is only severed temporarily, the limb is not totally sacrificed in a way that a patient with gangrene might have his arm chopped off for fear that the underlying

\(^9\) Of course, some revolutions bring benign, even welcome changes. But every regime wishes to maintain itself, meaning the question to ask is whether those who construct the regime will choose to disarm themselves by barring the use of extreme measures that might be necessary to save the regime on the chance that the regime’s successor might be more to their liking. I think it far more common for those who construct and modify constitutional regimes to believe that they wish to have a mechanism in place to adopt extreme measures in extreme times.
infection might spread. Under the Accommodative Constitutional regime outlined here, when the crisis has passed, the ordinary rules are supposed to apply again, meaning that any sacrifice is designed to be temporary. There is no permanent sacrifice of the jury trial right, the freedom of speech, or of the structural constitution, just a temporary expedient that the Constitution itself contemplates as a means of constitutional self-preservation.

Again, my point here is not that the Constitution clearly and necessarily incorporates the accommodative principle and that the theory of the Rigid Constitution is implausible. The rather limited point is that the Constitution is susceptible to a reading that treats its seemingly obligatory features as default rules that can be modified when an existential crisis threatens to upend the whole system. A constitution maker might well wish to adopt such a system because it makes it more likely that one’s creation lasts beyond the first emergency.

B. The Legislature as Gatekeeper to Emergency Authority

If the Constitution is accommodative, who may decide when to relax its constraints? That is who determines that an emergency exists and thereby legalizes actions that would normally be illegal?

One obvious candidate is the executive. The executive that perhaps best wields emergency authority—with its ability to act promptly, energetically, and decisively—might be the best judge of when an existential crisis exists and what measures would help weather it. Certainly, the executive seems best positioned to learn of an existential threat. The executive, unlike Congress, is always in existence and never recesses, making it more likely that it will become aware of a crisis first. Moreover, the executive branch has eyes and ears throughout the nation that report events back to the chief executive. One might say that the Constitution presupposes that the executive has an informational advantage, as it demands that the President share information about the “State of the Union” with Congress.

Structurally, the executive has a unified apex, meaning that the branch the President heads is less likely to be paralyzed by dissension. The President also might be more likely to consider the national interest, as he is the only official (other than the Vice President) elected in a nationwide contest. By comparison, members of Congress might be more inclined to focus and favor local interests in their districts.
Finally, only the President takes an oath to preserve, protect, and defend the Constitution. His unique oath perhaps suggests that the Constitution establishes a constitutional protectorate under the President. The President might be the one who decides whether an emergency that threatens the supremacy of the Constitution exists and what measures the nation must take to respond to that crisis.

In sum, because the executive has access to information, can act with dispatch and energy, is more apt to think of the nation as a whole, and takes a unique oath to safeguard the Constitution, perhaps the executive is the one to decide that an emergency exists and that ordinary constitutional restraints may be relaxed.

Of course this reading of the Constitution is, in some ways, quite troubled. The President that can act with speed, information, energy, and unity of purpose and action also may be the one entity most likely to go rogue, to seize power for nefarious reasons. Many might fear that a power in the executive to declare an emergency could lead to the Constitution’s permanent suspension. Moreover, if one has a Constitution that is accommodative during an emergency, maybe the branch that is a beneficiary (of sorts) of that flexibility should not be the one to decide that flexibility is necessary. If in the “contest for liberty, executive power has been regarded as a lion which must be caged”, then allowing the executive to declare an emergency and decide what emergency measures to adopt is to read the Constitution as if it allows the lion to release itself during crises. This is hardly a decisive argument, but it may have been one that moved a constitution’s framers.

As a matter of text, the President’s Oath imposes a duty; it does not, by its terms, empower the President. It requires the President to use his power, whatever its scope and source, to protect the Constitution. Although it is fair to say that the Oath implies that the President will have some ability to “preserve, protect, and defend” the Constitution, it hardly establishes that he may do whatever he believes is necessary to safeguard it. If the President otherwise does not have the power to declare an emergency and then select the measures necessary to respond to it, his obligation to preserve the Constitution surely does not grant him such authority.

A thought experiment makes this clear. Anyone with sufficient patriotic zeal may take an oath to preserve, protect, and defend the Constitution. But doing so would hardly mean that they have all sorts of
authority that they previously lacked, including the authority to suspend the
Constitution’s various features in an emergency. Indeed, some states
during the founding era required their officials to take a similar oath, with
no one supposing that each official thereby became a protector of the
constitution, implicitly endowed with emergency powers.

The President has constitutional powers that might grant some
emergency authority, particularly the grant of executive power and the
power implied in his command of the military. Yet the grant of executive
power seems to cover authority to execute the laws, control aspects of
foreign affairs, and direct and remove executive officers. It fits uneasily
with authority to declare an emergency and impose crisis measures.
Likewise, the power as Commander in Chief of the military does not seem
to encompass such authority. As Justices have noted, the Constitution
makes the President the supreme commander of the military, not of society.
While his authority as Commander in Chief may give him so emergency
power over the military, many emergency measures regulate civilians.

As I explain in a companion piece, none of the precursors to the
Presidency—the Crown, the state governors, or the Commander in Chief of
the Continental Army—were thought to have an emergency power. In
particular none had constitutional power to take property, to try civilians in
military courts, or appropriate funds. Any such powers came via legislation
and when such legislation expired, the powers expired with them. The
Constitution contains nary a hint that it energizes the executive in
emergencies. Rather by adopting the same phrases—granting executive
power and making the President commander in chief—it adopts the
terminology of relative executive impotence in crisis. Put another way, the
Constitution’s makers operated against a background of executive weakness
in crises and added nothing to the Constitution suggesting a departure from
the existing model.

Given the lack of a presidential emergency authority and the real
fears that the executive might improperly declare an emergency where none
exists and thereby aggrandize itself, Congress is a more likely repository of
any emergency power. The text surely points in this direction. Whatever
scope of the federal government’s authority in emergencies, there are a
number of hints that the Constitution makes the Congress the key player.
To begin with, the power to suspend the privilege rests with Congress
because it is found in a section (Article I, section 9) that almost exclusivelv
limits legislative power and because it was long understood as a legislative
power. Until the Civil War, it seems no one supposed that the President could suspend habeas corpus. Rather everyone who discussed the matter declared that the power rested with the legislature, as it had in the states and in England.

If only Congress may suspend the privilege, thereby authorizing executive detention, it seems natural to suppose that only Congress can enact other forms of emergency legislation. Indeed, it is hard to fathom why the power to authorize indefinite detention would be within Congress’s exclusive control, but that other measures like extrajudicial punishment (including execution) or the delegation of legislative power might somehow be within the constitutional competence of the President.

Another structural clue is the President’s power to summon Congress on “extraordinary occasions.” Arguably, the President has such power because such occasions might require the assistance of Congress. In particular, the power to summon Congress seems to presuppose that the executive might request legislation and congressional direction. The power to summon Congress does not exist so that Presidents may inform Congress of his extraordinary measures as a courtesy to a lesser branch.

A final structural hint comes from Congress’s sweeping authority over the principle means of thwarting an emergency. The President is made Commander in Chief of both the military and the militia. But Congress determines whether this authority is meaningful. Only Congress can create armies and a navy. And only Congress can decide when the militia will be called forth to handle invasions, rebellions, or failed execution of the laws. Moreover, Congress also decides the substructure and existence civilian executives, meaning that the President is dependent on Congress in this regard as well. If Congress has authority to decide whether the President will have a military, a militia, and a Department of Justice, all means that might be crucial in an emergency, perhaps it also has the authority to decide whether and to what extent the President will have emergency authority.

What is the source of Congress’s authority to declare emergencies and suspend constitutional protections? As noted earlier, that authority is implied in the very nature of government. Every government has a power of self-preservation, to take measures to defend and maintain itself. And governments have this power whether it is express or not. Indeed, one might say that every government has such power unless such power is expressly denied it.
If one blanches at the idea of implied powers, the most likely source of authority for legislative power in emergencies is the Necessary and Proper Clause. The Clause grants Congress authority to enact legislation that is necessary and proper for carrying into execution all powers of the federal government. This Clause seems tailor-made to authorize extreme measures in times of crisis. What is necessary and proper in times of peace and tranquility seems more limited than what might be permitted in times of emergency. Put another way, the more existential the threat, the more desperate measures are called for and the more it can be said that they are necessary and proper.

Emergency laws enacted by Congress can be said to be necessary for “carrying into execution” the powers of the government, legislative, judicial, and executive, especially when those powers face the threat of extinction from an invasion or rebellion. More generally, emergency legislation also helps carry the Constitution into execution in the sense that it helps perpetuate it. While emergency legislation might sacrifice some constitutional principles in the short run, the sacrifice is designed to ensure the longer term viability of the Constitution as a whole.

My goals in this Part have been modest. First, I have suggested that the Constitution could be read to create mandatory rules that may be modified in times of existential crisis, an Accommodative Constitution if you will. Second, I have argued that if the Constitution authorizes the relaxation of its mandatory rules, Congress is the one to make the decision. At this point, I have not come close to establishing either proposition. Indeed, I very much doubt that either can be established by reference to text, structure, and policy arguments alone.

Part II reveals that the Constitution was enacted against a backdrop of powerful legislatures that enjoyed broad emergency powers. Part III argues that after the Constitution’s creation, Congress (and not the President) was thought to have authority to respond to emergencies.

II. America’s Early Emergency Constitutions

Constitutions are products of a particular time and place. The context in which the Founders created the 1787 Constitution—the events that shaped their perspectives and influenced their lives—helps us divine the Constitution’s meaning. In particular, practice predating the Constitution’s creation helps frame how we ought to read its seeming gaps
related to emergencies. This is especially so given that the United States was birthed during a crisis, a revolution that required the sacrifice of blood, sweat, tears, and civil liberties. Surely the experiences during the Revolutionary War, at the state and continental level, help shed some light on how best to read the Constitution.

When we examine practice under the revolutionary state constitutions and the Articles of Confederation certain propositions seem reasonably clear. First, legislatures enacted numerous crisis measures, such as suspending habeas corpus and authorizing extrajudicial punishment. In some cases, the authority was vested in the executive, acting with the consent of an executive council. In a few cases, the authority was vested in a chief executive alone. At the time, legislators recognized that they were emulating the Roman practice of creating dictators, with the statutorily invigorated governors regarded as such.

Second, though some regarded such crisis measures as unconstitutional, this was a minority view. The state constitutions were best read as implicitly permitting the enactment of various emergency measures, including the quartering of soldiers, the suspension of habeas corpus, and the imposition of martial law. Where legislative power was concerned, the state constitutions did not adopt an enumerated rights strategy. Rather they imposed constraints on the use of legislative power. The wording of these constraints strongly indicates that they were understood as limitations on the otherwise broad grants of legislative power to handle crises. In other words, the state constitutions assumed a broad legislative power in times of crisis, limited in narrow respects by certain constitutional constraints.

A. Legislative Omnipotence

There is a sense among some scholars that martial law—the rule of the civilian populace by the military—was a constitutional excrescence in early America. The typical arguments begins by noting that English Jurist Matthew Hale declared it not to be “law” at all, but rather something to be

---

10 The phrase “martial law” also had a slightly less ominous meaning, namely the imposition of special rules for members of the military and militia. No one doubts the constitutional propriety of such rules as they have long been part of the Anglo-American tradition. In this article, I only refer to the broader conception, namely subjecting civilians to military justice or law.
indulged in. Then the declaration of martial law by General Gage during the Revolutionary War is cited as an example that Americans would never deign to follow, especially given the complaint that King George III had rendered the civil subordinate to the military. Finally comes the most famous American declaration of martial law prior to the Civil War, namely Andrew Jackson’s during the twilight of the War of 1812, a declaration denounced by the father of the Constitution, James Madison.

But these discussions confound two distinct issues and miss important evidence. They reduce the question of whether the federal Constitution permits various crisis measures to an inquiry into whether the President may enact such measures. They generally ignore whether legislatures may enact emergency legislation. And in so doing, they overlook the numerous instances in which early American assemblies enacted emergency legislation all the time. As far as America was concerned, Hale was wrong to say that martial law was not law at all, but something to be “indulged.” In America, martial law was real, legitimate law and something quite necessary. And American martial law satisfied the need to keep the military subordinate to the civil, for a wholly civil authority—the legislature—authorized the extreme measures.

In revolutionary America, legislatures were sovereign in the Schmittian sense of being the ones to decide whether there was to be an exception to the regular constitutional order and what exceptions ought to be made. Sometimes the legislature would delegate emergency authority to the executive in advance, thereby enabling him to meet future crises. Other times, the executive would convene the legislature in the teeth of a crisis and seek authority on an as needed basis.

As one might suppose, legislatures enacted the most sweeping delegations in the most trying of circumstances. Sometimes legislatures ceded authority to the chief executive, to be exercised only with the consent of an executive council. When authority was conveyed to the governor alone, however, legislatures were said to have appointed “dictators.” Some assemblies referenced the Roman practice in their statutory preambles, justifying the need for extraordinary legislation in uncommon times.

This pattern of broad wartime delegation was not limited to the states. The Continental Congress occasionally felt the need to do the same for its Commander in Chief. The resulting legislation, discussed in greater detail below, made a dictator of George Washington.
1. State Legislatures

Driven by necessity, state assembles again and again granted crisis powers to their executives. Many such laws granted specific authority, such as permitting the taking of war material or the detention of Tories.\footnote{Id. at 203-209, 258-59.} Such emergency legislation was always temporary in nature and often geographically constrained. Sometimes the legislation expired in a set number of days\footnote{Id. at 86.}; in other instances, the legislation expired a set period after the legislature reconvened.\footnote{Id. at 73.} While the latter rule might suggest a date certain, the ever-present possibility of a crisis delaying or preventing the next session meant that these grants could last indefinitely.

Occasionally legislatures granted truly sweeping powers to their executives. Sometimes these powers were granted to an executive checked by a council; the advice and consent of the latter was necessary to exercise such powers. Some state constitutions had created an executive council and the statutes were using that system as a means of checking the executive.

South Carolina went the furthest of any of the states. From 1779 to 1783, South Carolina passed several statutes that delegated specific powers to the Governor and Council, with a general catchall delegation nested among the specific grants. The statutes began with a justificatory preamble:

Whereas, in times of danger and invasion it has always been the policy of republics to concentrate the powers of society in the hands of the supreme magistracy for a limited time, to give vigor and dispatch to the means of safety . . . it behooves us, for the common safety, to follow such example . . .

The Acts went onto grant specific powers over the militia, commercial transactions, forts, etc. The 1779 version’s catchall was broader still, providing that the Governor and Council could “do all other matters and things which may be judged expedient and necessary to secure the liberty, safety, and happiness of this State”, save that the militia could not be
subject to Congress’s articles of war. The 1780 and 1783 versions added an additional, and unusual, exception—“except taking away the life of a citizen without legal trial.” Though the Governor ordinarily needed his council’s consent, the Act permitted unilateral action when the council could not assemble.

In his article explaining why South Carolina Governor John Rutledge acquired the reputation as a dictator during the Revolutionary War, Robert Barnwell claims that the capital exception was added because in 1779 Governor Rutledge had three blacks executed without trial. This caused something of an uproar, as Loyalists seized on the execution as proof that the rebels did not value the rights of man. Barnwell speculates that this led the legislature to create the exception relating to taking away life without a legal trial.

Barnwell rightly concludes that the title “dictator” was justified. Rutledge acted unilaterally when consultation with the council proved impossible. Using the broad authority conveyed by statute, Rutledge punished those who took British protection when the British controlled South Carolina. He barred them from voting even after they took oaths of American allegiance and also threatened to confiscate their property and banish them if they did not serve in the militia. These measures were considered extremely harsh because the people who swore allegiance to the Crown while the British controlled South Carolina had little practical choice. A Carolinian contemporary of Rutledge’s, historian David Ramsey, agreed that Governor, acting with the council, exercised “dictatorial powers.”

South Carolina was not alone. When events suggested that the executive needed more power, Virginians chose to “suspend the rules” and create what was termed at the time a “‘dictator.’” Again this meant the legislature granted extraordinary military powers to the Governor, acting with the consent of council. The first such grant occurred in December of 1776. The Congress had just fled to Baltimore and the Northern front had collapsed. Believing that additional executive vigor was needed, George Mason moved that “the usual forms of Government shou’d be suspended, during a limited time” for the speedy implementation of vigorous measures to repeal an invasion. The Senate amended the motion’s preamble,


15
eliminating the reference to the suspension of forms and just provided that additional powers be granted to the Executive. Essentially, the resolution allowed the executive to increase the army’s size, send the army wherever the executive wished, and gave the executive free access to the treasury for these purposes.

The next such experiment occurred in 1780. An act passed in May said that because of the public danger and the rapid progress of the enemy, it was necessary “to vest the executive with extraordinary powers for a limited time.” The executive could call out 20,000 militia and send them out of state; detain those suspected of disaffection from the American cause; impose martial law on those citizens who aided any insurrection or British invasion; and take property for use by the military.

A year later, in the spring of 1781, after the Virginia legislature was forced to flee Charlottesville and reconvene in Staunton, there was a move for still greater power to the executive. Delegate George Nicholas moved to appoint “a Dictator . . who should have power of disposing of the lives and fortunes of the Citizens . . without being subject to account.” Patrick Henry favored the motion and argued that the title mattered little so long as the powers were sufficient. Thomas Jefferson would claim much later that the motion lost by six votes. Perhaps. But the spirit of Nicholas’s motion prevailed, for shortly thereafter, the legislature granted the governor, acting with the council’s consent, the most sweeping powers yet. The executive could call out as much of the militia it deemed necessary and deploy it anywhere; impress any needed military supplies; detain anyone; banish suspected Tories under pain of death; extend acts relating to recruiting soldiers; and create substitute criminal courts. In a separate act, the legislature imposed martial law within a twenty-mile radius of the American army and any British encampment.

In 1780 the North Carolina legislature created a Board of War to control the military. In addition, the Board of War could empower the executive to take any measures that the Board deemed “necessary and expedient for the public safety.” In this way, the Board could delegate should the legislature itself be disrupted in some way. After the governor complained that the Board had usurped his constitutional authority to execute the laws, the legislature created a substitute “Council Extraordinary.” This time the power was vested in the Governor, acting with the Council’s consent, to “do and execute every other act and thing which may conduce to the a security, defence, and preservation of this State.” In a separate act, the legislature created a rule by which the present
Governor would continue in office should the legislature be unable to choose a successor. In this way, the North Carolina created a plural dictator\textsuperscript{16} and provided for continuity of government, thereby evading the constitutional requirement that the legislature annually choose a governor.

At the behest of the Continental Commander in Chief, the Pennsylvania Assembly declared martial law in the summer of 1780. In a long letter to the President of the Pennsylvania Executive Council, Washington, expressed his desire that the Assembly “vest the Executive with plenipotentiary powers.” Two days letter, the legislature granted his wish. The legislature declared “the exigencies which may arise in a state of war are frequently of a nature that require such sudden and extraordinary exertions as are impossible for the legislative body to provide by the ordinary course of the law . . . .” To meet those exigencies, the Assembly empowered the Executive Council to “Declare Martial Law” during its recess\textsuperscript{17}.

Although James Madison claimed that the only exception to the broad grant of power to the Executive Council related to the lives of citizens, there was no such exception. The President of the Executive Council more accurately described the resolve as granting “a power of doing what may be necessary, without attending to the ordinary forms of law.” Washington agreed saying that that the Council now had a “full discretionary power” to do “anything the public safety may require”.

Some sweeping delegations were passed, prior to any state constitution, as in the case of New York and Massachusetts. In New York in the spring of 1777, those who spied, supplied, and recruited for the enemy faced “martial law”, meaning they could be tried by court martial. In Massachusetts, months before the first state Constitution would sanction the legislative imposition of martial law, the General Assembly empowered Brigadier General Peleg Wadsworth to execute martial law in Lincoln County\textsuperscript{18}, part of present-day Maine. In his proclamation, Wadsworth forbade assistance to the enemy on “Penalty of military Execution.”

Other times legislatures could not meet and had not previously granted emergency authority. Yet this did not stop broad delegations of

\textsuperscript{16} North Carolina 1780-81 269; North Carolina booklet, Volumes 7-8, 130
\textsuperscript{17}
\textsuperscript{18}
authority. In 1779, the British occupied much of Georgia, preventing the election of an executive. Because the legislature could not meet, a convention of the people assumed power and granted “supreme authority” to a Supreme Executive Council of its own creation. The Council had “every such power as” it deemed “necessary for the safety and defence of the State and good citizens thereof”, with the proviso that they were to “keep as near” to the spirit and meaning of the Constitution “as may be.” Essentially, the Council was a joint dictatorship.\(^\text{19}\)

With the peace treaty with England, the rebels emerged victorious, greatly decreasing the need for martial law. Yet the need was not entirely eliminated. After all, anyone might rebel against the government, as the British knew too well. The most famous rebellion after Independence and prior to the Constitution took place in Massachusetts, where so-called “Regulators” chafed against debt and tax collection. Led by Daniel Shays, the rebels halted court proceedings and thwarted the government’s writ.

The Massachusetts Governor, James Bowdoin, responded with admonishments and threat of punishment, but to no avail. In late 1786, legislature supplied more muscular measures passing a Riot Act\(^\text{20}\) and later granting the governor the power to imprison “any person or persons whatsoever”.\(^\text{21}\) The first measure authorized officials to use lethal force against those who failed to disperse after having been read the Riot Act. The second suspended habeas corpus, allowing detention until July 1787.

But these measures proved insufficient as well, leading the legislature to issue a declaration. In “conformity to their oaths” and “by virtue of the authority vested in them by the Constitution”, the legislature declared that a “horrid and unnatural REBELLION and WAR” has been waged against the commonwealth. The legislature said that “all the powers of Commonwealth” would be used to suppress the rebellion, with the rebels to blame for any evils that might result.

At first glance the declaration seems somewhat beside the point, for it did no more than declare that a rebellion existed, a conclusion that observers might have made themselves. But when we dig deeper and consider the declaration in light of the Massachusetts Constitution, its significance becomes clear. The Constitution provided that martial law

---

\(^{19}\) James F. Cook, Governors of Georgia 29.

\(^{20}\) Acts and Laws of the Commonwealth of Massachusetts 1786-87, 88

\(^{21}\) Id at 102-03.
could not be imposed on civilians except by legislative authority. The proclamation indirectly provided as much. As Rufus King of Massachusetts observed, because the General Court declared a rebellion, “the powers of the Governor, by our Constitution, become almost absolute”. The governor could “exercise Law martial” and treat the rebels as “open Enemies.”

King evidently read the declaration of rebellion as legislative authorization of martial law upon civilians. A letter from the General Court to Governor Bowdoin confirms much the same, namely that the legislature chose to declare a rebellion in order to ensure that the Governor would “be possessed of the full power of the constitution.”

From the beginning of independent America right up until its constitutional transformation in 1787, legislatures delegated tremendous authority to the executive in times of war and rebellion, delegations that swept aside structural and individual rights limitations found in state constitutions. Legislatures authorized the executive to detain indefinitely, use military courts to try civilians, and even rule by decree. Such delegations were viewed as crucial wartime measures in the fight against the British and against American rebels.

2. Continental Congress

Facing the same dangers as the states—Tories, spies, and military defeat—the Continental Congress reacted in much the same way as the states. First, it made civilians subject to trial via court martial. Second, the Continental Congress granted sweeping powers over the army and civil society to the Commander in Chief, always careful to impose geographical and duration constraints.

Early resolves applied martial law to civilians who traveled with the army in the field and to spies. The nation’s first articles of war, a code of military discipline, extended martial law to “suttlers, retailers, and all persons whatsoever serving with the army in the field”. Additionally, a court martial could punish those contemptuous of its proceedings. Perhaps these extensions to civilians could be justified as a regulation of the

---

22 Letter from Rufus King (February 10, 1787) in 6 Letters of Delegates to Congress 87.
24 2 Journals of the Continental Congress 116-17.
25 id
military and its immediate associates. But Congress thereafter resolved that spies lurking around or in military camps and fortifications could be tried by court martial.\footnote{5 Journals of the Continental Congress 693.} A broader prohibition made anyone who gave intelligence, money, food, ammunition, or shelter to the enemy subject to court martial.\footnote{5 id. at 799.} Obviously, not all spies or those who aided the enemy were part of an army’s retinue, rendering Congress’s regulatory power over the army insufficient as a justification. In passing these rules, Congress had asserted its right to try those aiding the enemy, including civilians, via military justice.

In mid-December of 1776, the fear that the British might conquer Philadelphia led Congress to move to Baltimore and to grant Washington “full power to order and direct all things relative to the department, and to the operations of war.” By the end of the month, Congress passed a breathtaking six-month delegation. Believing that “desperate diseases require desperate remedies” Washington had requested powers that some might regard “too dangerous to be entrusted.” Congress obliged, authorizing him to raise 16 infantry battalions, along with 3000 light horse units, three artillery regiments, and a corps of engineers; to set pay for all of these new soldiers; to request the militia from the several states; to displace and appoint all officers under the rank of brigadier general; to take any private property with reasonable compensation; and, finally, to arrest and confine those opposed to the Revolution as well as those who refused to take continental currency as payment.\footnote{1 David Ramsay, The History of the American Revolution 316 (1789).} Washington regarded this delegation as encompassing powers “of the highest nature and almost unlimited in extent.” A committee, appointed to notify the Commander, declared that Congress had entrusted him “with the most unlimited power.”

Subsequent congressional resolutions renewed some powers and added others. For instance, Congress reconveyed the power to take property.\footnote{8 Journals of the Continental Congress 750, 752 (Worthington C. Ford ed., 1907).} Yet this power was only granted for sixty days and only exercisable within seventy miles of headquarters.\footnote{Id. } In another resolve, Congress authorized the Commander in Chief to try, by court martial, inhabitants who aided the British (with supplies or via guide services) and were captured within 30 miles of any town held by the British in New Jersey, Pennsylvania, and Delaware. Convicted civilians could be put to
death.31 The reason for subjecting citizens to court martials: “it has been found, by the experience of all states, that, in times of invasion, the process of the municipal law is too feeble and dilatory to bring to a condign and exemplary punishment persons guilty” of traitorous practices.32 Congress also made it a court martial offense for civilians to kidnap loyal Americans for purposes of taking them to the British, at least where the kidnapping occurred within seventy miles of the Continental or state armies.33

Using his statutory authority, Washington had civilians tried via court martials. His orders are replete with tales of “inhabitants” charged with aiding the enemy. Some received as much as 200 lashes, while others were executed for their crimes. Reflecting his cautious nature, he sometimes was reluctant to try civilians via courts martial. Yet he did so whenever he concluded that it was the best legal alternative.

Given the breadth of his power, little wonder that contemporaries described Washington as a dictator.34 Subsequent commentators agreed. Hamilton, writing in 1780 and 1787, noted that the Continental Congress had taken the highest acts of sovereignty, including naming a dictator.35 In 1781, Governor George Clinton of New York noted that Congress had “invested a military officer with dictatorial powers”, an evident reference to Washington.36 During the Constitution’s ratification, Edmund Randolph and Patrick Henry spoke of the Commander in Chief being given the powers of a dictator during the Revolution.37 After the creation of the Constitutions, the judges of the Pennsylvania Supreme Court praised

---

31 9 id. at 784-85.
32 Id. at 784.
33 10 id. at 204-05.
34 See The Independent Chronicle and the Universal Advertiser (Jan. 9, 1777) 3; Norwich Packet (Jan. 20, 1777) 2; New York Gazette and Weekly Mercury (Feb. 3, 1777) 2. But see Letter from John Adams to Abigail Adams (Apr. 6, 1777) (denying that Congress had made Washington a dictator).
35 General Horatio Gates, sent to Canada, was given less extraordinary powers in early 1776. He too was described as a dictator. Letter from John Adams to Horatio Gates.
36 See Alexander Hamilton to James Duane (Sept. 3, 1780) in 2 Papers of Alexander Hamilton 400, 401; Remarks on an Act Granting Congress Certain Imposts and Duties (Feb. 15, 1787) in 4 Papers of Alexander Hamilton 71, 78.
37 See 7 Writings of George Washington 442-43 * (Jared Sparks ed.).
38 See 9 DHRC 983 (comments of Edmund Randolph); 9 DHRC 1058 (comments of Patrick Henry). Apparently, James Monroe agreed that Washington had dictatorial power. See 9 id. at 1141.
Washington for the “tender regard” which he showed to “the laws and liberties” when he “possessed almost dictatorial powers.”

As one might expect, not all praised the creation of a dictator. Mercy Otis Warren wrote that many at the time were “disgusted by the dictatorial powers” granted to Washington. Some English revelled in the fact that Washington had been made a dictator because of what it suggested about the prospects that the Rebels would prevail. They saw such measures as signs of desperation.

When Washington said he had “almost unlimited” authority, he thereby recognized the constraints that were part of Congress’s acts. First were the expiration dates accompanying these laws. All acts delegating emergency authority to Commander had sunsets. Second were the geographical restrictions, ceding authority over a radius around either a Continental or British Army camp. Third, there were the subject matter limitations of these laws.

The Commander in Chief took each of these limits seriously. For instance, he chastised one Army officer for his illegal trial and execution of a Tory. He also declared that courts martial could not confiscate the property of inhabitants, concluding that they had no such authority. On another occasion, he denied that the courts martial could try citizens for simple treason, but then enumerated offenses by civilians that those courts might hear. So solicitous of civil liberties was Washington that he took the view that where the civil courts were open, inhabitants ought to be tried

---

38 Address from the Judge of the Pennsylvania Supreme Court in 2 Papers of George Washington (presidential Series) 85 n.1.
40 19 Parliamentary History of England 268 (comments of Lord George Germaine). But see 19 id. at 270 (comments of Col. Barre) (denying that Washington was a dictator because he only had power over military and because Washington had denied it). I know of no information suggesting that Washington denied he was a dictator.
41 Letter from Washington to Preudhomme de Borre (Aug. 3, 1777) (claiming crime was not punishable by martial law and that officer was not authorized to impose a capital punishment on soldiers, much less citizens).
42 See George Washington, General Orders (Feb. 8, 1778); Alexander Hamilton to the New York Committee of Correspondence (April 21-27, 1777) (expressing same view of Commander in Chief).
43 See Washington to William Smallwood (May 19, 1779) (declaring that only those inhabitants who kidnap patriots, trade with the enemy, or give intelligence to the British could be tried by court martial). For a similar episode, see Letter to Oliver Spencer (Apr. 9, 1779) (asserting that spy could not be tried by court martial).
there even if Congress had granted jurisdiction to the courts martial; it seemed that whenever there was an option, he instructed officers to have the inhabitants tried before civil courts. 44 Finally, once a law subjecting inhabitants to martial law expired, Washington instructed his officers that they should apprehend no more inhabitants for military trial. 45 This was part of a lifelong commitment to the military’s subordination to the law, a view he expressed as early as 1756 as a colonel in the Virginia militia. 46

For our purposes, what matters is that the Continental Congress read its war power as encompassing authority to subject civilians to martial law. Specifically, the Articles of Confederation power of “determining on war” was not read to merely encompass authority to decide to wage war. Rather the Confederation’s war power encompassed the subsidiary power to take measures deemed necessary to triumph in war, such as suspending habeas corpus, using military trials for civilians, and the creation of a dictator. Hence despite the lack of any specific powers over habeas and martial law or any power to delegate such matters to the Commander in Chief, the Continental Congress exercised these powers nonetheless.

B. The Legality of Wartime Emergency Measures

As noted, sweeping crisis authority sometimes sparked unease. Occasionally these qualms reflected a fear that an executive might become a Cromwell or Caesar. Before the Virginia assembly ceded broad powers to Patrick Henry, one legislator supposedly declared that Henry would “feel my dagger in his heart” should he become a dictator. 47

Other times the misgivings were constitutional in nature. After granting the governor broad authority, a 1776 Virginia statute declared that the “departure from the constitution of Government, being . . . founded only the most evident and urgent necessity, ought not hereafter to be drawn in precedent.” Whether the statute was thereafter cited as precedent or not is

---

44 See Letter to Israel Shreve (April 14, 1778); Letter to William Livingston (April 15, 1778); Letter to George Clinton (Sept. 25, 1778).
45 Letter to John Lacey (April 11, 1778).
46 See Letter to Dinwiddie (December 19, 1756) (claiming that former soldier could not be prosecuted under articles of war because he was no longer enlisted and even if he were still in army, the mutiny act had expired).
47 William Wirt Henry, Patrick Henry: Life, Correspondence, and Speeches 223 (1831).
unknown. What is certain is that the framework of broad delegations was repeated in other Virginia statutes. In those subsequent laws, there was no admission of any constitutional “departure”. This may suggest that legislators no longer viewed crisis grants as constitutional violations.

In his Notes on the State of Virginia, Jefferson railed against the constitutionality of proposals to create a state dictator. He argued that legislature lacked power to delegate their powers and that the creation of a dictator was contrary to “[e]very lineament” of the state Constitution. The example of Rome was inappropriate, for the Virginia Constitution did not have a “residuary provision” that applied the Roman version, with its ability to create a dictator, in times of crisis. It is quite likely that at least some of Jefferson’s passion reflected the politics of the moment. Jefferson probably sensed, quite accurately, that the proposal to create a dictator was an implicit criticism of his tenure as Governor. On other occasions, he supported quite sweeping delegations of authority to the executive.

Pennsylvania’s Council of Censors, a committee charged by the state constitution with examining whether the branches had stayed true to the Constitution, criticized the 1780 imposition of martial law as a “dangerous violation” of the Constitution. The rebuke was somewhat mild; the Council claimed that it was duty-bound to examine the episode and expressly left open the possibility that the violation might have been justified by necessity, even if unlawful. More generally, the Committee prefaced its entire report with an admission that the state constitution “had been invaded through necessity in times of extreme danger.”

The question is whether these constitutional criticisms were exceptional. Put another way, were they indicative of a broader sense that the delegation of authority and the imposition of martial law were unconstitutional as violations of implicit separation of powers principles and express individual rights limitations?

There are good reasons to believe that only a minority shared these constitutional criticisms. While the state constitutions imposed limitations on delegation and protected individual rights in various ways, those constitutions are best read as permitting the legislature to ignore many of those constraints in moments of crisis.

Not all constitutions had this structure and it is useful to consider the rigid frameworks first. The Maryland Constitution of 1776 fits this model. The Constitution expressly provided that “no person” except
members of the armed forces and the militia (in actual service) “ought in any case to be subject to or punishable by martial law.” The Constitution thereby barred the imposition of martial law on civilians not actively serving in the militia. It left no room for cavil.

Contrast the Maryland Constitution with the accommodative Massachusetts Constitution. The latter Constitution declared that “[n]o person can in any case be subjected to law-martial, or to any penalties or pains . . . but by authority of the legislature.” The provision did not grant authority; instead it assumed that the legislature had authority to impose martial law. More likely the provision seemed designed to make clear that the executive lacked authority to impose martial rule on civilians. In this respect, the provision was likely added out of an abundance of caution—ex abundati cautela—for it reflected the general sense that only the legislature could impose martial law.

Indeed, when we see that many other states besides Massachusetts imposed martial law (or something like it) via legislation during the war—New York, South Carolina, North Carolina, New Jersey, Georgia—it seems likely that those constitutions also were understood as authorizing the state legislatures to take extreme measures in times of war and rebellion as a necessary means of maintaining the constitutional order. Indeed, the structure of constitutional prohibitions makes that clear. The Maryland prohibition on imposing martial law on civilians was necessary precisely because in its absence, the legislature might have enacted such measures without any constraint. The Massachusetts Constitution had the same structure, for it limited the power of suspending habeas corpus to a 12 month period, a constraint evidently made necessary by a sense that the legislature otherwise would have carte blanche to suspend habeas corpus. Put simply, the state constitutions assumed that the state legislatures had generic power in emergencies to both delegate vast wartime discretion and to suspend various individual rights constraints.

Reading the state constitutions as authorizing crisis measures that would be unconstitutional in pacific times makes a good deal of sense. From a Lincolinian perspective, the temporary sacrifice of civil liberties is a price worth paying if those civil liberties can be resurrected once the crisis has passed. The era’s constitution makers were generally pragmatic and did not believe that curtailments of civil liberties in time of crisis necessarily led to continued restraints afterwards. They had seen other nations successfully and temporarily suspend civil liberties—most prominently
Rome and England. The same could happen in America. And they were right, for individual rights went back into full bloom after the Revolutionaries triumphed.

IV. The Structure of the Emergency Constitution

In some respects, the Constitution differs markedly from its predecessors. Consider the comparison to the state constitutions. The Constitution was ratified by popular conventions and thus was not an ordinary act of the legislature as were many state constitutions. To some, the manner of ratification signaled that the federal legislature could not supersede or alter the Constitution, for if Congress had not made the Constitution, it lacked authority to contravene it via ordinary legislation. The popular ratification process placed the Constitution on a higher plane.

The Constitution also differed from its national antecedent. The new legislature acquired much more lawmaking authority as compared to the Continental Congress. Even as Congress lacked a police power, it acquired powers over commerce, bankruptcy, and naturalization. This augmentation of legislative authority was counterbalanced by its loss of executive power. The creation of a President and the transfer of many (but not all) executive powers to that office made Congress somewhat weaker.

Focusing on powers relevant to crises, Congress gained some important powers and lost a few as well. Congress acquired the powers to tax and thus could now support an army and a federal establishment without requisitioning the states. Congress also obtained the power to federalize the state militias and hence could better coordinate responses to emergencies, including invasions and rebellions. Finally, Congress acquired authority over foreign commerce and therefore could impose embargoes that might help retain domestic supplies during wars and rebellions. In the past, Congress could only urge the states to impose such embargoes.

Congress also lost some practical control over the military, for it no longer had authority to appoint a commander in chief. A President, with a grant of “the executive power of the United States”, was made commander in chief ex officio. Moreover, the new Commander in Chief could not be saddled with officers not of his choosing, as Washington had, for the President appointed army and naval officers, albeit with a Senate check. Lastly, though Congress retained sweeping authority to regulate the armed forces, it was subject to a significant check. The Constitution’s new rival was not only made Commander in Chief, he also enjoyed a check on
congressional laws in the form of the veto. Lawmaking had gone from a unicameral process to something resembling a tricameral one, with one “chamber” sometimes able to benefit from legislative inaction.

Despite these significant changes and differences, the federal emergency Constitution had the same basic structure as those constitutions that preceded it. The Congress continued to enjoy the power to take necessary measures to weather the inevitable crises that buffet a nation. Textually, Congress retained the power to declare war, raise an army and navy, and regulate both. More relevant, Congress could continue to enact laws it deemed necessary to win wars and crush rebellions, such as law authorizing the taking of property, the suspension of habeas corpus and other civil liberties, and the concentration of governmental powers, both legislative and judicial, with the executive.

A. War, Rebellion, and the Necessary and Proper Clause

The Constitution is famously a document of enumerated powers. The enumeration principle clearly applies to legislative powers, for the Constitution dictates as much—Congress has the “[A]ll legislative powers herein granted”—the implication being that Congress has no legislative powers not granted.

The question is what crisis authority does the Constitution grant Congress and how do the Constitution’s many constraints on legislative power operate in time of emergency. Candor obliges that the conclusions found below are hardly without their difficulties. There are no obviously right answers, only better and worse ones.

The better answer is that Congress has, for lack of a better phrase, the power of self-preservation. With respect to wars with other nations, Congress has legislative power to enact measures designed to ensure that the government triumphs in war. This power is implicit in the power to declare war. Congress not only has the power to go to war, but also a panoply of powers related to a war’s successful termination, including the power to enact measures designed to defeat and thwart the enemy. Put another way, the federal government does not merely have the power to wage war, it also has the subsidiary powers necessary to increase the chances of emerging victorious in any wars declared.
The power of self-preservation is also ancillary to the implied power to suppress rebellions. Though a standalone power to suppress rebellions is not found in Article I, section 8, the power to call the militias to suppress rebellions implies a more general power to suppress rebellions. Put another way, in suppressing rebellions, the government is not limited to doing nothing more than using the state militias merely because that is the only means mentioned for defeating rebels in the Constitution. Instead, Congress has a broader power to take appropriate measures to suppress rebellions, including using the army and navy and enacting those emergency measures that might be necessary to defeat rebels, such as suspension of the privilege of habeas corpus and imposition of martial law.

1. Constitutional Text Reconsidered

In many ways, the Constitution presupposes a power of self-preservation with respect to rebellions and invasions. Consider treason. The Constitution does not itself make treason against the United States a crime. It merely limits Congress’s legislative power over treason. Moreover, it grants no specific power to make treason a crime and grants no generic criminalization power. Nonetheless Congress made treason a crime in 1790 and it has been so ever since. In assuming that the Constitution authorized Congress to criminalize treason, the Constitution’s makers and the first Congress merely followed in the footsteps of the Continental Congress who likewise thought that they could punish treason despite the fact that the Articles never specifically authorized as much. In my view, the source of Congress’s authority to make treason a crime is the power of self-preservation. Congress has a power to deter Americans from undermining the federal government, via warfare or assistance to a foreign enemy, and hence may enact laws criminalizing treason.

The same implied self-preservation power also authorizes suspension of the privilege of habeas corpus. The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” This Clause imposes a constraint—it limits when the privilege may be suspended. It grants no power. Because the Constitution never specifically grants power to suspend the privilege, one has to suppose that the authors of this restraint understood that Congress, during invasions and rebellions, otherwise had the power to suspend the privilege. The

---

48 1 Stat. 112.
49 Stat. 112.
power to suspend arises from the implied power to take measures necessary to prevail in war and suppress rebellions.

Finally think of the Third Amendment, an amendment barring involuntary peacetime quartering of soldiers in homes and non-legislatively sanctioned quartering in wartime. Again, the Amendment assumes that Congress has power to authorize involuntary quartering during war. Although this power could be viewed as part of Congress’s power to “supply” the Army, a more plausible view is that in times of war, Congress has the power temporarily to take property to help preserve the state.

2. Evidence from Early Federal Statutes

Aside from these constitutional hints of a self-preservation power, there are examples of early Congresses acting as if the federal government had the general power of self-preservation. Consider early legislation making spying illegal. Legislation creating articles of war for the army and navy made spying, in certain circumstances, an offense triable by court martial. Because there is no specific congressional power to make spying illegal, that power must be understood as part of the power of self-preservation. Congress can take measures designed to thwart and punish those who acquire intelligence that could be used to undermine the security of the United States. Put another way, deterring and punishing spies is necessary and proper for the execution of the federal government’s powers.

Of similar import are the early prohibitions on aiding an enemy either by corresponding, supplying provisions, or furnishing intelligence. Again, there is no specific power vested in Congress. Yet the prohibitions are constitutional as necessary and proper to carry into execution the war and rebellion powers.

Finally, in the Alien Enemies Act, Congress granted the President the ability to deport any enemy alien upon a declaration of war or a planned or actual invasion of the United States. Though Congress had authority over naturalization and authority to prevent migration to the United States, it lacked specific authority to deport all migrants. But it had such authority over enemy migrants, on the theory that they might form a fifth column, and thereby undermine or sabotage the federal government’s war efforts. Modern society frowns on legislation that relies upon such distinctions. But expulsion of enemy aliens was a somewhat common feature of warfare in the 17th and 18th centuries.
3. Limits on the Congress’s Power of Self-Preservation

The power to preserve the government might seem to be paramount, meaning that all constraints on federal legislative power must be dissolved in times of crisis. But this seems like a mistaken, overly aggressive reading of the Constitution and its interaction with principle of self-preservation. Instead, perhaps some provisions constraining the government were likely meant to apply at all times, even in times of war.

First, consider a constraint that never made it into the Constitution. Bills of credit are “paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day.” Though the Framers banned the states from emitting bills of credit, they decided against banning federal bills. Some delegates believed that the federal government might need to issue bills of credit, notwithstanding its ability to borrow funds. When a nation seemed like it might lose a war, lenders understandably would be unwilling to lend. After all, wartime losers often do not pay their bills. Think of the debt of the Confederate States of America. Forcing people to accept bills of credit in lieu of coin would enable the federal government to purchase wartime material and pay soldiers. Because delegates at Philadelphia believed that a bar on federal bills of credit would have applied even in emergencies, they elected not to bar the federal issuance of such bills.50

One absolute limit that made its way into the Constitution is the prohibition on federal bills of attainder. Bills of attainder were commonly enacted during wars and rebellions as a means of punishing. Because they were particularly associated with war and rebellions, it makes sense to suppose that the prohibition was meant to apply in both circumstances, regardless of how useful they might be in defeating an enemy or suppressing an insurrection. Put another way, the founders did not believe that bills of attainder were necessary and proper means of self-preservation. Some might have thought them unnecessary in the sense that they were not useful. After all, regular trial was always a possibility. Others might have thought that such measures were an improper means of crushing rebellions precisely because they made trials unnecessary.

Another absolute limit on the federal government is the ban on ex post facto laws. Consider, in this regard, George Mason’s objection about

50 2 Farrand at 308-10.
Despite the fact that Anti-federalists generally clamored for a bill of rights, Mason complained about this limit on federal power, insisting that all legislatures inevitably enact ex post facto laws in times of necessity and where the public safety requires it. Given that ex post facto laws were to be expected, the bar essentially guaranteed constitutional violations by the federal and state governments. Federalists replied that ex post facto laws were only required in governments with “capital flaws,” implying that the new federal system was powerful enough not to need the power to pass such laws. Both Mason’s complaint and the responses to it assumed that the bar was absolute, even during war or rebellion.

Article I section 9 and the Bill of Rights likely contain other absolute limits on Congress’s power of self-preservation. But rather than considering each express individual rights protection, perhaps it is better to speculate about what sorts of measures Congress may enact during crises. Legislation from the Revolutionary War supplies a parade of possibilities.

B. Speculating about the Emergency Constitution

The types of temporary, emergency laws Congress might enact in the interests of self-preservation are many. Dividing up these statutes into two categories might prove useful. First are those statutes that seem to undermine the Constitution’s structure. Second are those laws that seem contrary to individual rights. Of course some laws arguably violate both. When that occurs, I’ll discuss the law in both sections.

1. The Emergency Constitution and Constitutional Structure

For purposes of this discussion, assume that the ordinary Constitution has an implied separation of powers principle. At some level, most agree that the Constitution has such a rule, even as they differ on the degree of separation required. If one does not believe that the Constitution requires any separation of powers, then much of this discussion will prove unhelpful.

Notwithstanding its implied separation of powers, in times of emergency, the Constitution permits the Congress to combine the three powers of government and vest them in the President, thereby making him a dictator of sorts. Extraordinary times require extraordinary measures, as Washington wrote during the Revolutionary War. Drawing upon the
Necessary and Proper Clause, Congress may grant authority to the President to make wartime rules, for both civilians and soldiers, and to administer them via military courts.

As noted earlier, during the Revolution, state legislatures sometimes granted legislative and judicial powers to the executive, creating a dictator, with power over property and persons. Sometimes this power extended over a whole state; other times the power extended over a limited area. Similarly, the Continental Congress granted Washington dictatorial authority on several occasions. These dictatorial powers encompassed the power to rule by decree over the relevant areas and the power to punish civilians via military courts.

Though Congress was meant to have less power than the revolutionary state assemblies, the Congress does not lack power to enact measures it believes are necessary in times of rebellion or invasion. Indeed, though the Continental Congress had far less power than our Congress does, the Continental Congress also had this power of self-preservation. The Constitution’s evident expansion of federal legislative power did not come with an implicit diminution of Congress’s powers in emergencies, at least where it comes to the separation of powers.

The appeal of vesting legislative power with the President in times of crisis will be obvious to those who believe it is useful and appropriate for Congress to delegate lawmaking authority during ordinary times. For those more skeptical about the constitutionality of delegations of legislative power, perhaps it is enough to say that if ever there was a needful and appropriate delegation of legislative power, surely that time would be in the context of invasion or rebellion, where the very survival of the nation is at stake. There can be no more compelling case for the delegation of lawmaking authority.

Congress has long passed delegations of lawmaking authority to the President, usable in times of emergency. For instance, in April of 1794, Congress granted the President the power to convene it in whatever location the President chose, so long as the reason had to do with the health or safety of members.51 This was legislation enacted in response to Washington’s inability to convene Congress elsewhere in the face of the Yellow Fever that killed thousands in Philadelphia.

---

Likewise, Congress granted embargo authority to the President in the mid-1790s. This delegation, which enabled the President to halt American foreign commerce, was necessary and proper given the very real possibility that America might be drawn into the war between France and England. Given the fragile state of the nation, having won independence only recently, it was rather important to avoid another war.

Finally, the Alien Enemy Act reflected a delegation of Congress’s power under the war power to decide whether enemy aliens could remain in the nation after war with their nation had commenced. Rather than deciding which particular aliens ought to be thrown out, Congress left it to the President to determine as much, a rather sound delegation given that the President would know more about individual aliens than Congress could possibly know. Its not that Congress could not learn about individual aliens; its that in time of war, Congress’s time was better spent attending to more important matters.

The same sorts of arguments explain why it is permissible to delegate judicial authority to the executive. On some accounts, Article III vests all the judicial power in the Supreme Court and inferior federal courts. This would make a separate system of extrajudicial, executive adjudication illegal. Nonetheless, early Congress declared that those who aided the enemy by furnishing intelligence or supplies, could be tried before court martials. By imposing the punishment on those who assisted enemies, Congress essentially limited the provisions to times of war with an external enemy and perhaps to rebellions, where the insurrectionists could be described as enemies. Such legislation was necessary and proper under the theory that swift and exemplary punishment of those aiding the enemy could be expected only from court martials and not from Article III courts.

When Congress vests the President with legislative and judicial powers it necessarily diminishes the other two branches of the federal government. But if Congress can weaken the judicial branch and itself, it may do the same to the executive. At least it can so long as it supposes that doing so is necessary to save the republic. Hence not only may Congress make a dictator of the President, I believe that Congress can make a dictator of someone else, thereby temporarily supplanting the President as Commander in Chief. Again, if Congress has a self-preservation power that permits the temporary diminishment of itself and the judiciary, there is no reason why that same power cannot likewise be used to temporarily diminish the powers of the President.
There are examples of one set of executives being supplanted (or almost supplanted) by others. Obviously, Rome offers an example where the two executive consuls could be supplanted by a dictator during crises. Indeed, the consuls were barred from serving as a dictator, meaning that they could not appoint one of their own as dictator. In America, President John Adams made Washington “Commander in Chief” of the army in 1798. Though this did not make Washington a dictator, it did place him in a position to eclipse his nominal superior. While Adams had constitutional power to control his Commander in Chief (Adams never purported to grant any legal independence to Washington), in practice Adams had appointed someone who would have wide latitude. As the two-time Commander in Chief, Washington had the military experience that Adams lacked. By selecting Washington, Adams had bought credibility to the efforts to shore up the American army against a potential French invasion. But that credibility inevitably weakened his own authority over the army.

Presumably, Congress can check the delegations it grants the President. The Constitution does not oblige the President to obtain the consent of the Senate or some other council prior to making decisions related to law execution or military matters. Nonetheless, as a condition of granting extraordinary powers to the President, perhaps Congress could impose additional constraints on the President, say by requiring the consent of a council when exercising the emergency powers that Congress has conveyed. If Congress can create a dictator independent of the President, as argued above, surely it can believe it necessary and proper to convey additional powers to the President coupled with a check in the form of a requirement that he seek the advice and consent of a council.

Apart from mitigating any obligation of strict separation, the Constitution is best read as granting Congress the power to ensure its continued viability. In particular, Congress likely can enact laws designed to ensure quorums in both of its chambers. The Constitution provides that when a vacancy exists in a state’s representation in the House, the relevant governor may issue writs of election and conduct a new election. This sort of mechanism works well in peacetime. But wars and insurrections may make elections impossible. Now the loss of any one state’s representation in either chamber would not prevent either chamber from functioning. But invasions and rebellions can thwart elections in many states, as they did during the Revolutionary and Civil Wars. Given the centrality of Congress during wars and rebellions, Congress can make laws that provide for alternative means of filling House delegations.
For instance, Congress might provide that the incumbent will continue in office if a state cannot hold new elections. Where incumbents are unable or unwilling to serve, for whatever reason, Congress might appoint someone else, perhaps former Representatives and Senators to serve in the House. The point is that Congress may take necessary and proper measures to ensure the proper functioning of the House.

The same sort of reasoning applies to Senate vacancies. Though the original Constitution and the Seventeenth Amendment provide mechanisms for filling vacancies, neither might function well during an emergency. Again the need for a functioning Congress is so crucial, that Congress may provide alternate means of filling Senate vacancies.

Perhaps Congress could provide a statutory trigger for the emergency appointment of Senators and Representatives. If more than a quarter of either the House or the Senate cannot be selected by the normal processes due to a war or rebellion, then Congress’s statutory solution—appointment, extension of incumbent’s term, etc—springs into force.

Some might suppose that the Constitution’s specific methods for filling vacancies are the only constitutional means of replacing members of the House and Senate who have vacated their offices prematurely. But the relevant provisions do not by their terms claim that they are the only means of filling vacancies or, more precisely, that they apply even in situations where holding elections would be impossible. Moreover, one can read portions of the Constitution as requiring state representation in the House and Senate, thereby creating something of a hook for congressional legislation. For instance, the 17th Amendment declares that each state shall have two Senators, before further providing that the Senators shall be chosen by popular elections. One could read this as mandating that each state’s two Senators only be chosen by such elections. Alternatively, one can read this clause as having two independent requirements—equal representation and popular election. If one requirement—popular election—proves impossible to satisfy, then Congress can and should take measures to fulfill the other obligation, namely equal representation. Partial fulfillment of constitutional duties is arguably better than complete failure.

When it comes to the Presidency, the Constitution not only creates a short line of succession, it also allows Congress to extend that line. The Vice President becomes President (or “acting” President) when the latter is
removed, dies, or resigns. In case of disability, the amended Constitution provides a complicated mechanism handling situations when the President is unable to discharge the office. Furthermore, Congress may by law provide who shall serve as President when neither the President nor the Vice President may serve. This constitutional authority to create a line of succession is adequate for all emergencies that cause presidential death, disability, or resignation, meaning that no recourse to the Necessary and Proper Clause is necessary.

But there is another situation not discussed in Article II, namely the inability to choose a President. The President’s tenure automatically ends four years after he assumes office. The original Constitution never supplied an explicit rule as to what would happen should no successor or Vice President be elected. In my view, in times of war and rebellion, the Congress had legislative power to enact measures to decide who would serve as President when a presidential election yielded no successor or Vice President. The 20th Amendment made such authority express when it explicitly provided that Congress may determine who may become President should a President’s term expire and no successor be chosen.

There are natural limits to Congress’s power to enact extraordinary measures in extraordinary times. While Congress can concentrate great judicial and legislative power in the President during times of crisis, it presumably cannot delegate as much in times of tranquility. Similarly, Congress cannot enact a statute that supplants the Constitution’s prescribed means of electing Senators and Representatives when those means are functioning adequately. The point is that emergency measures necessary to ensure the preservation of the Constitution can only be used when the nation is endangered.

2. Rights Under the Emergency Constitution

As noted earlier, during wars and insurrections, the Constitution is clearly less protective of individual rights. Obviously, it permits the involuntary quartering of soldiers in wartime, as the Third Amendment

52 The need for some limit to Congress’s power to provide replacement representation is obvious. If Congress could provide for statutory solutions whenever there was a vacancy, it could wholly obviate the preferred constitutional solutions to congressional vacancies. Put another way, it would be unnecessary and improper for Congress to provide for the routine replacement of Representatives and Senators; it only has such power in emergencies, when the ordinary means have failed because elections are impossible to hold.
suggests. Furthermore, the Fifth Amendment implies that persons in the
militia who are in federal service may be held to answer for infamous
crimes “in time of war or public danger” without either a presentment or
grand jury indictment.

There are other wartime and rebellion exceptions, ones not as
apparent. As noted earlier, rights related to the jury trial, confrontation,
assistance of counsel, etc., did not (and do not) apply to trials of soldiers
and sailors, at least as a matter of the Constitution itself, even though the
Constitution lacks express exemptions from these rights for the members of
the armed forces. Similarly, in war and rebellion, it has been our nation’s
practice to try members of the militia via court martials without regard to
these ordinary trial rights. The sense is that during war and rebellions,
militia members called into federal service are no different than soldiers
and sailors when it comes to their constitutional trial rights.

Other rights fully apply during war and rebellion but contain text
suggesting that these contexts matter in their application. The right of the
people “to be secure in their persons, houses, papers, and effects” is greatly
diminished in wartime, because fewer searches can be characterized as
“unreasonable” within the meaning of the Fourth Amendment. That is to
say, the Amendment applies, but imposes a weaker constraint on searches
and seizures then it would in peacetime.

Of course, the ability to detain indefinitely exists during wars and
rebellions once Congress has suspended the writ of habeas corpus. Such
detentions are themselves severe deprivations of liberty. But we must not
forget that when Congress suspends habeas corpus, the President may
detain for any reason, including an individual’s exercise of his or her
constitutional rights. In previous wars—the Civil War, the War of 1812,
and the Revolutionary War—individuals have been detained based on their
exercise of their rights, such as the freedom of speech. In the future, one
can imagine a President detaining individuals based on their religion beliefs
or their decision to keep and bear arms. The point is that many acts
constitutionally protected during peacetime lose that protection once
Congress suspends the writ of habeas corpus, for those acts can become the
basis for detentions.

Finally, and most controversially, Congress may declare martial
law. This might mean no more than shifting some or all cases, both civil
and criminal, to the military courts. Congress might wish to substitute
military tribunals for civilian courts when it appears that the latter cannot function. Rather than wait for those courts to reopen, Congress might choose to have military courts hear cases involving civilians.

Going further, Congress might wish to grant a military commander authority to govern some area by military decree. Congress might wish to do so when an area is under siege and it believes that the area’s defense requires temporary military control. Alternatively, Congress may conclude that the division of authority, between the civilian and military authorities is too difficult to manage and may wish to create one set of authorities to avoid clashes and confusion. The sort of divided authority entirely appropriate during peacetime may be inappropriate in wars and rebellions.

Again, my aim is not to provide an exhaustive catalog of constitutional rights the federal government may breach in times of war and rebellion. As noted earlier, I think it clear that the Constitution establishes certain inviolable rights, including the right not to be punished pursuant to bills of attainders and ex post facto laws. There may be other absolute constraints on federal power, limits that apply during wars and rebellions. I leave a discussion of such rights until another day.

Conclusion

The Constitution grants Congress a power of self-preservation, a power to safeguard the Constitution and the federal government from external and internal threats. This power explains why Congress can suspend habeas corpus and enact measures to suppress rebellions. The textual hook for this power is Necessary and Proper Clause. Congress may enact measures necessary and proper for carrying into execution the powers of the federal government. Measures designed to defeat invaders are measures designed to help carry into execution federal powers because the defeat of the invasion helps ensure that the three federal branches can continue exercising their constitutional powers. Similarly, measures designed to crush a rebellion also help carry into execution federal powers because the defeat of the rebels ensures that the lawful wielders of federal power may continue to legislate, execute, and adjudicate.