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Emergency Powers: Understanding the Benefits While Mitigating the Consequences

Savannah Valentine

University of Miami School of Law

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**EMERGENCY POWERS: UNDERSTANDING THE BENEFITS WHILE
MITIGATING THE CONSEQUENCES**

*Savannah Valentine**

ABSTRACT

This note compares the short-term benefits and long-term consequences of emergency powers using examples from several countries and offers solutions to mitigate those consequences. Historically, emergency powers were only granted in times of true crises. In those circumstances, emergency powers can serve an important purpose: to help the government run smoothly and efficiently. Unfortunately, permanent power grabs are now more common and the standard for what constitutes an emergency has weakened severely, often resulting in civil rights infringements. Possible solutions to this problem include understanding the negative effects of sunset clauses in emergency acts, increased awareness of manufactured emergencies, encouraging a heightened judicial review during emergencies, and clearly defining the scope of emergency powers in constitutions.

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* J.D. Candidate, Class of 2023. University of Miami School of Law. Senior Notes and Comments Editor, *International and Comparative Law Review*. Thank you to Professor Reich for his guidance in writing this Note. Thank you to my family and friends for their unwavering support.

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I. INTRODUCTION

The use of emergency powers has increased globally in the last several decades, resulting in the normalization of state of emergency declarations.¹ By declaring a state of emergency, governments have the opportunity to invoke emergency powers, giving executives and legislatures an easier avenue to pass laws. Thus, allowing them broader discretion in which laws are passed. In 1978, there were about thirty countries in a state of emergency, which increased to seventy by the late 1980's and 147 in 1996.² One explanation for this drastic increase in use of emergency powers is that governments know that when citizens are fearful, they prefer the protection of a strong government and, thus, they are more willing to give away broad powers.³ So, countries want to keep citizens in a constant state of fear, even when that fear is unnecessary.⁴

¹ Luke Kemp, *The 'Stomp Reflex': When governments abuse emergency powers*, BBC (Apr. 28, 2021), <https://www.bbc.com/future/article/20210427-the-stomp-reflex-when-governments-abuse-emergency-powers>.

² *Id.*

³ E.g., Ira Katznelson & Samuel Issacharoff, *Fear and Democracy: Reflections on Security and Freedom*, AM. ACAD. ARTS & SCIS., <https://www.amacad.org/news/fear-and-democracy-reflections-security-and-freedom> (last visited Mar. 14, 2023) (War Powers Acts of 1941 and 1942 gave enormous economic power to the president and allowed censorship of mail, radio, and other communications.).

⁴ See Kemp, *supra* note 1.

The theory behind invoking emergency powers is that—in especially dire circumstances—granting a country's executive branch heightened power temporarily enables the country to take immediate action it would not otherwise be able to in order to protect its citizens from severe physical or economic harm. This theory is accurate insofar as emergency powers do allow governments to issue laws efficiently and those emergency powers are helpful to the country's citizens in at least some situations. For example, just recently in trying to control the spread of COVID-19, many countries declared a state of emergency and used that power to temporarily shut down travel and mandate certain restrictions on businesses, which helped to slow the spread of the virus.⁵

The issue, however, with emergency powers is not necessarily the immediate exercise of those powers, but rather the long-term consequences. Invoking emergency powers during COVID-19, for instance, has been useful in the short-term to mitigate the spread of the virus, but many countries are now, or will soon be, dealing with the consequences of granting broad emergency powers. Case in point, Thailand's Prime Minister, Chan-o-cha, was granted extensive power to contain COVID-19 and was successful for much of the beginning of the spread.⁶ Since its passing, however, the executive power has been amended several times, each time expanding the Prime Minister's power.⁷ This has raised concerns for civil liberties in Thailand.⁸ For example, the right to speak freely was amended to disallow information—even accurate information—that could scare the public.⁹ This gives the authority to government officials to decide what information can be shared as well as the authority to punish the Prime Minister's opponents.¹⁰ Thus, even though the extreme grant of power

⁵ See Chris Nichols, *Yes, Government Shutdowns Help Slow COVID-19 When Combined With Additional Measures, Experts Say*, POLITIFACT (Dec. 16, 2020), <https://www.politifact.com/factchecks/2020/dec/16/james-gallagher/yes-government-shutdowns-help-slow-covid-19-when-c>.

⁶ Emmy Sasipornkarn, *Thailand: Critics fear crackdown under COVID emergency law*, DEUTSCHE WELLE (July 22, 2021), <https://www.dw.com/en/thailand-critics-fear-crackdown-under-covid-emergency-powers/a-58576313>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

was useful in response to COVID-19 and was met with less opposition when it was granted, as the spread of COVID-19 in Thailand accelerated and the government's power has become more extensive, public opposition has grown.¹¹ In response, parliament attempted to change the country's constitution, though this attempt failed despite strong support.¹²

Moreover, after being granted emergency powers, governments commonly push for even more. Successful attempts to grab more power increase the risk that these temporary emergency powers will become permanent. For instance, the United States Department of Justice advocated for allowing judges to indefinitely detain people without trial in emergency situations.¹³ Fortunately, this request was rejected,¹⁴ but it demonstrates how governments push to seize more power in times of emergency, taking advantage of difficult circumstances. The problem of these temporary measures becoming permanent is also evident in countries like Hungary, where parliament granted the Prime Minister the ability to rule by decree indefinitely.¹⁵ Although parliament later requested to end this practice, many fear that during this time, the Prime Minister was able to expand the power of his office significantly by passing a bill that allows the government to declare a "state of health emergency" at any moment and, once again, indefinitely rule by decree.¹⁶

¹¹ *Id.*

¹² Patpicha Tanakasempipat & Panarat Thepgumpanat, *Proposal to rewrite Thailand's military-backed constitution fails*, REUTERS (Mar. 18, 2021, 3:18 AM), <https://www.reuters.com/article/us-thailand-protests/proposal-to-rewrite-thailands-military-backed-constitution-fails-idUSKBN2BA0M2>.

¹³ Betsy Woodruff Swan, *DOJ seeks new emergency powers amid coronavirus pandemic*, POLITICO (Mar. 21, 2020, 1:01 PM), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>.

¹⁴ Riley Beggin, *DOJ asks Congress for broad new powers amid Covid-19. Schumer says, "Hell no."*, VOX (Mar. 22, 2020, 2:00 PM), <https://www.vox.com/policy-and-politics/2020/3/22/21189937/coronavirus-department-justice-doj-powers>.

¹⁵ Ramya Vijaya et al., *Coronavirus versus democracy: 5 countries where emergency powers risk abuse*, CONVERSATION (Apr. 6, 2020, 6:09 PM), <https://theconversation.com/coronavirus-versus-democracy-5-countries-where-emergency-powers-risk-abuse-135278>.

¹⁶ Nick Thorpe, *Coronavirus: Hungary votes to end Viktor Orban emergency powers*, BBC (June 16, 2020), <https://www.bbc.com/news/world-europe-53062177>.

Fortunately, there are many possible solutions to the problem of expanding emergency powers. This includes having a better understanding of the negative effects of sunset clauses in legislation, increasing public awareness of manufactured emergencies, implementing a heightened judicial review for emergency actions, and clearly defining emergency powers in constitutions.

This Note discusses the benefits and the consequences of emergency powers. Part II of this paper will discuss the development and history of emergency powers. Then, Part III will discuss the short-term benefits and long-term consequences of emergency powers. Finally, Part IV will offer potential solutions to mitigate further expansion of emergency powers.

II. BACKGROUND

There are two major categories of how countries chose to structure emergency powers: the Roman model and the legislative model. The Roman model of emergency power has been especially influential on the structure of emergency powers today, though it is more common in fragile democracies and dictatorships.¹⁷ In that model, sometimes referred to as the “heteroinvestiture” model of emergency powers,¹⁸ the party exercising emergency power is separate from the party declaring the emergency.¹⁹ In Rome, the senate directed consuls to appoint a dictator, or a “consul,” for up to six months in times of emergency, and that consul could only serve one term in a ten-year span.²⁰ Consuls had complete power to address the emergency situation, then the consul would step down and the normal structure of the government would be restored.²¹ The modern adaptation of this model is called the “neo-Roman” model and is defined by a constitution explicitly delegating emergency powers to the executive.²²

¹⁷ John Ferejohn & Pasquale Pasquino, *The law of the exception: A typology of emergency powers*, 2 INT'L J. CONST. L. 210, 211 (2004).

¹⁸ *Id.* at 218.

¹⁹ *Id.*

²⁰ *Id.* at 212.

²¹ *Id.*

²² *Id.* at 213.

The advantage of the neo-Roman model is that the person who is dealing with the emergency situation is able to act immediately.²³ While this model worked well for most of Rome's history, the abuse of this structure is what led to Rome's downfall.²⁴ Gaius Marius, a general during the last century of the Roman regime, served as consul for six terms by persuading the Senate through bribes.²⁵ Marius then used his power to punish his enemies and live in luxury.²⁶ The lesson there is that checks and balances between roles in governments cannot become blurred or consolidated into one branch or person because it risks the chance of dictatorship.

Given this infamous example of how easily a strong country can fall, it is even more worrisome that the modern version of the Roman structure is not as strict as the original.²⁷ In countries that follow the neo-Roman model, the person given the extensive emergency powers is more often than not the already-elected executive who has a strong motivation to keep this expansive power,²⁸ because more power means more opportunities to increase favorable reelection outcomes.²⁹ Additionally, these countries sometimes do revise their constitutions during the emergency situation to grant even more power.³⁰

²³ See *id.* at 218.

²⁴ Lawrence W. Reed, *The Lust for Power Led to Rome's Decline and Fall*, FOUND. FOR ECON. EDUC. STORIES (Sept. 18, 2017), <https://fee.org/articles/the-lust-for-power-led-to-rome-s-decline-and-fall>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Ferejohn & Pasquino, *supra* note 17, at 213.

²⁸ *Id.*

²⁹ See Alexander Fournaies & Andrew B. Hall, *How do electoral incentives affect legislator behavior?*, LEGBRANCH (June 19, 2018), <https://www.legbranch.org/2018-6-19-how-do-electoral-incentives-affect-legislator-behavior>.

³⁰ *E.g.*, Jennifer L. McCoy, *Venezuela's controversial new Constituent Assembly, explained*, WASH. POST (Aug. 1, 2017, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/01/venezuelas-dubious-new-constituent-assembly-explained> (During an economic crisis in 1999, a constituent assembly was formed to revise the constitution.).

An example of abuse of the neo-Roman constitutional model in more fragile democracies was seen in Venezuela in 1999.³¹ During a time of economic turmoil, President Hugo Chavez implemented a new constitution that did not include anti-authoritarian restrictions like the 1961 constitution.³² Instead, the new constitution gave extensive power to the executive, allowing for expansive decree powers, more military control, the call for constitutional amendments by the president, and the abolition of the Senate.³³ This led to horrendous human rights abuses.

Additionally, in 2009, Judge Afiuni ordered a businessman who was held without trial for three years to be released.³⁴ Chavez, unhappy with this decision, ordered Judge Afiuni to be arrested.³⁵ The Judge was in prison for fourteen months, under house arrest for two years, and was eventually released under the conditions that she not use social media or leave the country.³⁶ While on probation, she reported to news outlets that she was tortured during her detainment.³⁷ This example shows how constitutions that are flexible and that give direct power to an executive can be horribly abused.

The second structure of emergency powers is the legislative model, which combines the power-creating and power-exercising functions.³⁸ There, laws are passed in a seemingly ordinary fashion, but can be recognized as emergency statutes based on certain characteristics (delegating special, temporary power).³⁹ This model is most common in advanced democracies.⁴⁰

³¹ Diego A. Zambrano, *The Constitutional Path to Dictatorship in Venezuela*, LAWFARE INST. (Mar. 18, 2019, 8:00 AM), <https://www.lawfareblog.com/constitutional-path-dictatorship-venezuela>.

³² *Id.*

³³ *Id.*

³⁴ *Human Rights Watch attacks 'abuse of power' in Venezuela*, BBC (July 17, 2012), <https://www.bbc.com/news/world-latin-america-18867310>.

³⁵ *Id.*

³⁶ *UN expert condemns new sentence for jailed Venezuelan judge as 'another instance of reprisal'*, UN NEWS (Mar. 26, 2019) <https://news.un.org/en/story/2019/03/1035451>.

³⁷ *Id.*

³⁸ Ferejohn & Pasquino, *supra* note 17, at 216-17.

³⁹ *Id.* at 217.

⁴⁰ *Id.*

The advantages of the legislative model are the temporary nature of the statutes and making the delegator the legislature. The emergency statutes passed seem to convey that the goal is to simply deal with the crisis and then get back to normalcy. Additionally, because the legislature, the branch the people have the most check on, is the branch passing the statutes, the power delegated to the executive will be less expansive.⁴¹

There are, however, disadvantages to the legislative model as well. Because the legislature is the branch that labels situations emergencies and then creates the power to deal with that emergency, there is motivation for the legislature to broaden its definition of what constitutes an emergency.⁴² Another concern is that temporary measures often become permanent as the public gets used to them.⁴³

An example of how the legislative model in an advanced country can be grossly abused is the United Kingdom's Defence Act of 1939. Passed in response to World War II, the Act gave the government the power to take "almost any action necessary to carry out the war successfully."⁴⁴ Thus, the Act gave the government power to interfere in its citizens everyday life and even allowed Parliament to pass regulations overruling existing law.⁴⁵ This resulted in everything from legislation implementing rations to passing regulations allowing the government to seize private property and enter private property with ease.⁴⁶ Even more egregiously, the government could make arrests that it would not otherwise be authorized to carry out and could give harsher penalties for certain crimes.⁴⁷ In cases of blocking the road and looting, for example, the government gave the death penalty.⁴⁸

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.* at 219.

⁴⁴ *Emergency Powers (Defence) Act 1939*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/yourcountry/collections/collections-second-world-war/second-world-war-legislation/emergency-powers-defence-act-c20-1940/> (last visited Mar. 14, 2023).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Originally, the Act was to expire after one year, in 1940.⁴⁹ Instead, the Act was renewed for an additional year, yet it was not actually repealed until the end of 1959.⁵⁰ Even still, the last of the regulations the government passed under the authority of the Act did not expire until 1964.⁵¹ This shows how legislation that was passed during a time of true emergency was expanded and lengthened even when that emergency was long over.⁵²

III. THE SHORT-TERM BENEFITS AND LONG-TERM CONSEQUENCES OF EMERGENCY POWERS

Though emergency powers are often abused and distorted in pursuit of more power or faster turnaround for certain laws, they do have a legitimate, beneficial purpose: allowing the government to act effectively in times when immediate action is necessary. It is important to keep in mind, however, that the opportunity for abuse of a wide grant of power often results in substantial harm. Generally, countries recognize three types of emergency situations that necessitate emergency power.⁵³ The first category deals with states of emergency for internal purposes (natural disasters, pandemics, economic crises, etc.).⁵⁴ The second category deals with defense.⁵⁵ These are situations where a country has a need to defend itself against terrorism or some other kind of attack.⁵⁶ Finally, the third category of emergency situations is a state of siege, where there is a threat of civil war.⁵⁷ This Note will address the benefits and consequences of emergency powers in relation only to the threats most common in countries today: pandemics, economic crises, and defense. Notably, in all the instances given below where emergency powers were beneficial to the public, the common threads are that the power was needed for a *specific* set of

⁴⁹ *Id.*

⁵⁰ *Emergency Powers (Defence) Act 1939*, *supra* note 44.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *Emergency Powers*, at 8, CDL-STD (1995) 012, [https://www.venice.coe.int/wbforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](https://www.venice.coe.int/wbforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

circumstances and that the power was granted *temporarily*. It was only after those restrictions were disregarded that the abuse occurred. So, if emergency powers were kept to these restrictions, the abuses that flow from them would likely see a dramatic decrease. The desire for more and longer-lasting power to circumvent conventional law-making routes is the root cause of the harms.

A. Pandemics

1. *Benefits*

In recent years, emergency powers have helped immensely, especially during the COVID-19 pandemic. Emergency powers are especially important during pandemics because, in the time it takes for legislatures to pass laws and regulations conventionally, the disease or virus can spread rapidly. Additionally, pandemics have severe economic repercussions and response to such a sharply decreasing economy must be immediate. Peru, for example, declared a state of emergency and quickly passed legislation that included a twenty-six billion dollar stimulus package for businesses and families,⁵⁸ helping to soften the economic impact of the pandemic. Similarly, in the Philippines, Congress granted the president temporary emergency powers to mitigate the effects of COVID-19.⁵⁹ These powers included presidential take-over of public transportation and of private entities, like hospitals and utility companies, because of the companies underperforming and overcharging.⁶⁰ As a result of this expansive power, the government was able to set up more testing facilities and slow the spread of the virus.⁶¹

⁵⁸ Vijaya et al., *supra* note 15.

⁵⁹ Julie McCarthy, *Concerns In Philippines After Duterte Given Emergency Powers To Fight COVID-19 Spread*, NPR (Mar. 24, 2020, 4:57 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820906636/concerns-in-philippines-after-duterte-given-emergency-powers-to-fight-covid-19-s>.

⁶⁰ *Id.*

⁶¹ *Id.*

2. *Consequences*

While Peru and the Philippines saw great benefits from their emergency efforts early in the pandemic, the repercussions of encouraging emergency policies are becoming more noticeable. In the case of Peru's COVID-19 legislation, for example, although the stimulus package was met with praise, human rights organizations have raised concerns over the Police Protection Act passed by the President of Congress during the state of emergency.⁶² The law exempts soldiers and officers from criminal charges for deaths or injuries they cause while the state of emergency is in effect.⁶³ This enactment was passed during a state of emergency that it had no relation to and without the opportunity for debate, yet the law is permanent and opens the door for gross abuse of citizens by police under the guise of more effective law enforcement. Likewise, in the Philippines, the expansion of emergency powers helped slow the spread of COVID-19, but President Duterte has shown a propensity for abuse of this power, jailing critics and harassing dissenting journalists.⁶⁴ This is hindering citizens' ability to get the proper information and stifling public debate, with some fearing that local governments will be reluctant to disagree with President Duterte's decisions.⁶⁵ Thus, while the powers to control testing and transportation may be needed, the power is quickly being used to grab even more power and stifle any resistance.

B. Economic Crises

1. *Benefits*

Another instance where emergency powers are needed is in times of economic crisis. Economic crises happen when there is a significant deterioration in a country's economy, often sudden.⁶⁶

⁶² Vijaya et al., *supra* note 15.

⁶³ *Id.*

⁶⁴ McCarthy, *supra* note 59.

⁶⁵ *Id.*

⁶⁶ *What is an economic crisis? Definition and examples*, MKT. BUS. NEWS, <https://marketbusinessnews.com/financial-glossary/economic-crisis> (last visited Mar. 14, 2023).

Because these crises can quickly turn into increased unemployment, homelessness, and starvation, among other things, governments must be able to help citizens as quickly and effectively as possible. Perhaps the most famous example of a dire economic crisis is the Great Depression. Prior to the Great Depression, the United States central government was relatively small.⁶⁷ When the economy crashed, however, citizens were scared and needed a strong central government to mitigate the effects.⁶⁸ This need was fulfilled by President Franklin Roosevelt, who called a special Congressional session and declared a bank holiday for four days, which shut down all banks—even the Federal Reserve.⁶⁹ Once the banks were deemed financially stable, they could reopen.⁷⁰ Days later, the Emergency Banking Act was introduced and passed in three days in response to people taking their money and gold out of banks and keeping it at home.⁷¹ The Act expanded presidential power in banking crises, including the power over all banking functions and foreign transactions.⁷²

Comparably, because Venezuela faces a major continuing economic crisis after the price of oil declined, in 2013 the Venezuelan legislature passed the Enabling Law that allowed President Maduro to enact laws on a variety of issues without public or legislative approval for one year.⁷³ An example of a law passed this way is the Law for the Control of Costs, Prices, Profits, and Protection of the Venezuelan Family, aimed at regulating the price of goods sold because businesses were charging up to twelve times the actual value of the goods.⁷⁴ This

⁶⁷ Gene Smiley, *Great Depression*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/GreatDepression.html> (last visited Mar. 14, 2023).

⁶⁸ Stephen Greene, *Emergency Banking Act of 1933*, FED. RESRV. HIST. (Nov. 22, 2013), <http://www.federalreservehistory.org/essays/emergency-banking-act-of-1933>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Andrew Cawthorne, *Venezuela's Maduro seeks decree powers to face U.S. 'imperialism'*, REUTERS (Mar. 10, 2015, 10:57 AM), <https://www.reuters.com/article/us-venezuela-usa/venezuelas-maduro-seeks-decree-powers-to-face-u-s-imperialism-idUKKBN0M61JK20150310>.

⁷⁴ Berta Joubert-Ceci, *Venezuela Enabling Law provides new hope for Bolivarian revolution*, WORKERS WORLD (Dec. 12, 2013), <https://www.workers.org/2013/12/12004>.

is beneficial because businesses and the wealthy launched an attack against this legislation, arguing that it hurt economic growth,⁷⁵ which could have pressured the legislature not to pass it even though those with lower incomes are supporters of the law.

2. *Consequences*

Unfortunately, emergency powers used in economic crises are prone to abuse as well. The 2000 Venezuelan Enabling Law, for instance, has been used positively, but similar Venezuelan Enabling Laws are not as beneficial. If prior legislation passed under the Enabling Law is any indication of the future of President Maduro's use of the Enabling Law, Venezuela may once again be subjected to a harsh executive.⁷⁶ Under President Chavez, a similar Enabling Law faced criticisms that it silenced opposition and effectively stripped the wealthy of their interests in the economic regime.⁷⁷ By the same token, the 2013 Enabling Law got rid of any public debate on laws passed under it, many of which are laws that keep businesses and wealthy people from their expected profit.⁷⁸ If this Act is abused or renewed past the one-year limit, there could, again, be economic consequences and public outcry.

Another instance where an economic response has gone too far is the standard of government expansion after the Great Depression. The Emergency Banking Act of 1933 was necessary when it was first implemented because it helped check banks and restore public trust in them.⁷⁹ The Act, however, gave the president extensive control over banks during a banking crisis, not *that* banking crisis.⁸⁰ Although this

⁷⁵ *Id.*

⁷⁶ Mario J. Garcia-Serra, *The "Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela*, 32 U. MIA. INTER-AM. L. REV. 265, 265-66 (2001).

⁷⁷ *Id.* at 285.

⁷⁸ Correo del Orinoco, *What You Need to Know About the Enabling Law*, VENEZUELANALYSIS (Aug. 19, 2013, 4:55 PM), <https://venezuelanalysis.com/analysis/9955>.

⁷⁹ Greene, *supra* note 68.

⁸⁰ *Id.*

was passed in the same way as normal legislation, Congress acted quickly in passing the Act to mitigate the effects of the Great Depression and, in doing so, it granted immense power over banks to the executive permanently without proper time for debate.

C. Defense

1. *Benefits*

In cases of war, emergency powers have been similarly useful. Although not always as rapid as the spread of a disease or virus, there are circumstances where a country must promptly respond to a threat without the hinderance of extensive public debate or time-consuming legislative processes. Proclamation 7463, for example, was a necessary emergency power when it was declared by President George W. Bush on September 14, 2001.⁸¹ In response to the September 11 terrorist attacks, the Proclamation allowed the President—for one year—to mobilize the military, call the National Guard and Reserve, override the limit on the amount of generals that could serve, and hire and fire military personnel.⁸² The Proclamation had bipartisan support when it was signed and was seen as necessary to protect the country from further attack.⁸³

2. *Consequences*

Emergency powers are especially susceptible to abuse in cases of war because of the fear from citizens. Proclamation 7463, for instance, had positive effects because it allowed the United States to quickly respond to a terrorist threat.⁸⁴ Those powers were meant to last for just one year—enough time to properly respond to that threat.⁸⁵ On September 9, 2022, however, President Biden renewed Proclamation

⁸¹ Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001).

⁸² Gregory Korte, *A permanent emergency: Trump becomes third president to renew extraordinary post-9/11 powers*, USA TODAY (Sept. 14, 2017, 12:18 PM), <https://www.usatoday.com/story/news/politics/2017/09/14/permanent-emergency-trump-becomes-third-president-renew-extraordinary-post-9-11-powers/661966001>.

⁸³ *Id.*

⁸⁴ Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001).

⁸⁵ *See id.*

7463 “for an additional year.”⁸⁶ The Proclamation has been renewed each year since 2001, even though the immediate threat from the September 11 attacks is long over.⁸⁷ The justification used, seen in the 2021 renewal, is “the continuing and immediate threat of further attacks on the United States.”⁸⁸ Thus, the government is in a perpetual state of emergency that grants extensive power to the president just in case there is a terrorist attack in the *future*. This ignores the tradition of emergency powers: that they are granted *in response* to some specific instance, not in anticipation of the possibility of some vague future emergency.⁸⁹

Each of these examples shows how seemingly well-intentioned emergency powers were granted and later abused because of a lack of proper restrictions. To reduce future abuses of emergency powers or emergency legislation, countries must understand why emergency powers are prone to abuse and work to regulate them.

IV. SOLUTIONS

Because there are benefits to emergency powers despite cases of dire long-term consequences, governments must find a balance between the two. Ways to mitigate the negative effects of emergency powers include understanding how sunset clauses work against public interest, increasing awareness of manufactured emergencies, strengthening the standard of review for government actions during emergencies, and defining emergency powers clearly in constitutions.

⁸⁶ Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 87 Fed. Reg. 55897 (Sept. 9, 2022).

⁸⁷ Korte, *supra* note 82.

⁸⁸ Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 87 Fed. Reg. 55897 (Sept. 9, 2022).

⁸⁹ Oren Gross, *Emergency Powers in the Time of Coronavirus...and Beyond*, JUST SEC. (May 8, 2020), <https://www.justsecurity.org/70029/emergency-powers-in-the-time-of-coronaand-beyond>.

A. Detrimental Effects of Sunset Clauses

A sunset clause is a measure within legislation that includes a time when the legislation will become inactive.⁹⁰ Sunset clauses are common in emergency legislation and orders, but they are particularly popular in counterterrorism legislation.⁹¹ For example, Proclamation 7463, passed in response to the September 11 attacks, was meant to have effect for only one year, yet it has been renewed each year since.⁹² The appeal of sunset clauses is obvious: having emergency powers automatically become ineffective after some period of time when the danger is presumably over is beneficial because the excess power ceases without having to worry about struggling for new legislation to revoke the power. More specifically, sunset clauses are purported to have three benefits: (1) the ability to collect more information over time and incorporate it into renewed policies, (2) more time for the public and policymakers to debate the legislation, and (3) the distribution of the policy's management between current and future policymakers.⁹³ Furthermore, temporary legislation can also allow policymakers to experiment because it lets them take greater risks at a lower cost—a major reason they are so popular during times of emergency.⁹⁴

Unfortunately, the benefits of sunset clauses never come to fruition because of psychological responses to temporary powers. Policymakers are more willing to pass a law that is temporary because they believe it will come up for debate again. The public, however, allows those temporary laws to keep getting extended or become permanent because people tend to prefer the present circumstances to any change.⁹⁵ This preference undercuts the sunset clause benefits of

⁹⁰ Marina Motsenok et al., *The slippery slope of rights-restricting temporary measures: an experimental analysis*, 5 BEHAV. PUB. POL'Y 1, 2 (2020).

⁹¹ See Sean Molloy, *COVID-19, emergency legislation and sunset clauses*, by Sean Molloy, UNIV. EDINBURGH (May 11, 2020), <https://blogs.ed.ac.uk/covid19perspectives/2020/05/11/covid-19-emergency-legislation-and-sunset-clauses-by-sean-molloy> (listing several countries where COVID-19 legislation that include sunset clauses was passed).

⁹² Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001).

⁹³ Motsenok et al., *supra* note 90, at 3.

⁹⁴ *Id.*

⁹⁵ *See id.*

incorporating new knowledge into the policies or having a true debate when policies are up for renewal.

To understand the psychological effect that temporary measures have on the public and policymakers, it is first important to distinguish between prospective temporary measures and retrospective temporary measures.⁹⁶ The former is when policymakers are considering the legislation for the first time and making it temporary is an available option.⁹⁷ The latter is when the policy has already been passed as a temporary measure and its extension is up for debate.⁹⁸

In the case of prospective temporary measures, legislators feel more comfortable passing temporary policies because they expect it will eventually be reevaluated.⁹⁹ As a result, it allows legislators to shift accountability for the legislation to a later date while also allowing them to compromise between not passing any policy and passing an extreme permanent policy.¹⁰⁰ In a case study where the subjects were given the option to pass new temporary rights-restricting legislation that allowed for physical interrogations in cases of national security or to pass that same legislation permanently, 53.3% approved it for six months while only 43.2% approved it permanently.¹⁰¹ This suggests that people are more willing to pass a policy that they believe is temporary because, once the sunset clause takes effect, the idea is that the benefits will come to fruition: officials can incorporate the learned information into the renewed policy or revoke it altogether after public input and debate.¹⁰²

While these benefits are appealing, in reality, they are hardly ever realized. Instead, in the case of retrospectively temporal measures, policies that have passed already as temporary are much more likely to be passed again (sometimes for longer periods of time) or become permanent when up for reevaluation.¹⁰³ This effect is called

⁹⁶ *Id.* at 4-5.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.*

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 13-14.

¹⁰² *See id.*

¹⁰³ *Id.* at 5.

the “status quo bias,” which means that people feel more comfortable with the country as it is and, therefore, would rather keep everything the same.¹⁰⁴ Ergo, people’s fear of the unknown allows temporary emergency powers to become permanent. For instance, in the same experiment as the prospective study, researchers presented the same policy, but this time told the subjects it was already passed as temporary legislation, and they had the option to reinstate it.¹⁰⁵ Notably, the subjects were not told whether the policy was effective.¹⁰⁶ This time, there was significant difference between willingness to pass new legislation and willingness to pass legislation already in effect.¹⁰⁷ Interestingly, there was no significant relationship between approval and the amount of time the policy had been in effect.¹⁰⁸ A mere six months was sufficient for 72.8% of the subjects, and two years was sufficient for 77.4%.¹⁰⁹ In other words, for most people, status quo bias truly means *current*—even revoking policies that were not in effect just months before is unpopular.¹¹⁰

Thus, the issue with sunset clauses is that policymakers are more likely to pass through legislation if it includes a sunset clause, and the public is unwilling to revoke the powers in the legislation once granted.¹¹¹ So, although allowing legislators to grant emergency powers with ease may be beneficial for the sake of quick acting and experimentation, the problem is that the temporary legislation will not actually be temporary. It will often be passed as permanent or extended out of fear of the unknown, especially if everything has gone well while the policies are in effect. Though this phenomenon was probably accidental, there is no question it can be—and likely has been—abused. The major concern is that policymakers can pass legislation under the guise that it is temporary and then simply keep extending it, knowing that people prefer the status quo.

¹⁰⁴ *Id.* at 6.

¹⁰⁵ Motsenok et al., *supra* note 90, at 8-9.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 10. (72.8% approved when told it was in effect for six months, 73.5% for one year, and 77.4% for two years.).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.* at 18.

The solution to this issue is to either ban sunset clauses altogether or make the public more aware of what legislation is being renewed. Although both options sound too daunting to actually achieve, there is the potential of success for both. For the former, banning sunset clauses would discourage policymakers from passing permanent policies that they would have otherwise only passed if they were temporary. As a result, the problem of riskier temporary measures and those the public approved of only because it was temporary becoming permanent without debate is solved. Evidence of this can be seen in the study that found approximately a 10% drop in approval for the same policy presented as permanent rather than when it was presented as temporary.¹¹²

Meanwhile, the latter solution has already been successful in the case of the Patriot Act.¹¹³ The Patriot Act, passed in response to the September 11 attacks, contained several provisions with sunset clauses.¹¹⁴ Since its initial passing, the Patriot Act was regularly renewed with little public notice or debate until 2013,¹¹⁵ when Edward Snowden leaked information from the National Security Agency about how much the Act trespassed on private information.¹¹⁶ After the leak, the public was outraged that the legislation they believed was keeping them safe from external evils was also being used to monitor their internal affairs as well. In 2020, Section 215 of the Act (the portion that allowed the government to collect extensive phone records) was not renewed after much debate.¹¹⁷ This is an encouraging example of how putting the public on notice that temporary measures are up for renewal and transparency in what that means can allow the public to decide whether or not to extend temporary legislation that is often passed in fear and panic.

¹¹² *Id.* at 13-14.

¹¹³ India McKinney & Andrew Crocker, *Yes, Section 215 Expired. Now What?*, ELEC. FRONTIER FOUND. (Apr. 16, 2020), <https://www.eff.org/deeplinks/2020/04/yes-section-215-expired-now-what>.

¹¹⁴ *Id.*

¹¹⁵ LastWeekTonight, *Government Surveillance: Last Week Tonight with John Oliver (HBO)*, YouTube (Apr. 6, 2015), <https://www.youtube.com/watch?v=XEVlyP411M>.

¹¹⁶ *End Mass Surveillance Under The Patriot Act*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/end-mass-surveillance-under-patriot-act> (last visited Mar. 14, 2023).

¹¹⁷ McKinney & Crocker, *supra* note 113.

B. Spotting Manufactured Emergencies

Similar to sunset clauses, where people are often fearful of changing or revoking policies, politicians understand that fear of bad events and the unknown scares people into keeping the leaders already in office, who then use that fear to expand their power.¹¹⁸ A manufactured emergency is one that elected officials, sometimes the legislative branch but more commonly the executive, creates out of deception to implement some law or project that does not have popular support or even a factual basis.¹¹⁹ Today, spreading false information is easier than ever and deciphering what information is accurate is harder than ever because of social media algorithms and seemingly legitimate news outlets.¹²⁰ Although there are times when a fear response is inevitable, such as a crashing economy or a terrorist attack, politicians and other government officials use the public's fear to their advantage by taking non-dangerous or even ordinary events and framing it as potentially detrimental so that people will be less willing to elect new leaders. Even something that began as a legitimate threat can be used as a source of fear well beyond its expiration. Of course, the major problem with fearmongering is that simply telling people not to be afraid is difficult because fear is an instinctual response, and even the idea that there is a slight threat is enough to keep people fearful.¹²¹ The public, then, must learn to recognize fearmongering – a skill that is becoming more and more rare in the age of social media.

A prominent example of an event that began as a legitimate reason for fear but has since been abused to allow politicians to keep office and grow power is the September 11 attacks. President George W. Bush's approval rating was 57-62% until September 2001, when it

¹¹⁸ John Tierney, *The Politics of Fear*, CITY J. (May 20, 2020), <https://www.city-journal.org/the-politics-of-fear>.

¹¹⁹ Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F., 590, 592 (2020).

¹²⁰ See Filippo Menczer & Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It*, SCI. AM. (Dec. 1, 2020), <https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it>.

¹²¹ Tierney, *supra* note 118.

rapidly climbed to 90%.¹²² During his next election campaign, President Bush used imagery from the attacks in his advertisements and pressed the public on how his administration will keep the country safe and the economy progressing.¹²³ People speculated this was to remind the public that he was the leader that they approved and trusted during the attacks and that he alone could keep them safe.¹²⁴ Despite the reality that another event like the September 11 attacks is extremely unlikely,¹²⁵ President Bush was ultimately reelected for another term in 2004 and the public's fear for their safety and comfortability with the status quo was undoubtedly a factor.¹²⁶

Recent examples of fearmongering from ordinary or non-dangerous events are abundant in President Trump's election campaigns and presidency. In several speeches, for instance, President Trump raged about supposedly dangerous immigrants entering the country illegally who were committing heinous crimes at high rates and insisting that politicians who deny this are ill-equipped to be leaders.¹²⁷ Not only did President Trump make these speeches before people who were already susceptible to take them as true without further investigation,¹²⁸ but the accusations were false.¹²⁹ In fact, native

¹²² David W. Moore, *Bush Job Approval Highest in Gallup History*, GALLUP (Sept. 24, 2001), <https://news.gallup.com/poll/4924/bush-job-approval-highest-gallup-history.aspx>.

¹²³ *Bush 9/11 ads spark anger*, GUARDIAN (Mar. 4, 2004, 12:53 PM), <https://www.theguardian.com/world/2004/mar/04/uselections2004.usa4>.

¹²⁴ *Id.*

¹²⁵ *The Evolving Nature of Terrorism: Nine Years After the 9/11 Attacks: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 2 (2010).

¹²⁶ See Joseph A. Boscarino et al., *Fear of Terrorism in New York After the September 11 Terrorist Attacks: Implications for Emergency Mental Health and Preparedness*, 5 INT'L J. EMERGENCY MENTAL HEALTH 199, 201 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2697567>.

¹²⁷ Molly Ball, *Donald Trump and the Politics of Fear*, ATLANTIC (Sept. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116>.

¹²⁸ Julia Belluz & Brian Resnick, *Trump understands what many miss: people don't make decisions based on facts*, VOX (Feb. 8, 2017, 9:53 AM), <https://www.vox.com/policy-and-politics/2016/11/16/13426448/trump-psychology-fact-checking-lies>.

¹²⁹ Michael T. Light et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, 117 PROC. NAT'L ACAD. SCIS. U.S. 32340, 32345 (2020), <https://www.pnas.org/content/117/51/32340>.

U.S. citizens are far more likely to commit violent crimes than legal or illegal immigrants.¹³⁰ Despite the lack of factual foundation, millions of people now believe that immigrants pose a threat to the United States because President Trump fabricated facts to instill fear so that he could be elected.¹³¹

However hazardous politicians' fear mongering is, even more dangerous is the media that often perpetuates or validates their lies for ratings. After September 11, for example, the amount of news coverage dealing with terrorism reached its peak.¹³² This coverage greatly hurt Muslims, often painting them in a stereotypical light, and also helped keep the fear of terrorism alive in the public even though the fear was disproportionate to reality.¹³³ News outlets are aware of this, though, and aim to make people fearful so that they keep watching.¹³⁴ This is why buzz words and phrases are often thrown around to keep people's attention, like "growing alarm" or "breaking news."¹³⁵ And, of course, when people hear others telling them to fear something over and over again, they will eventually be afraid – whether consciously or not.¹³⁶

This constant state of fear allows policymakers to push through legislation that would otherwise be too controversial.¹³⁷ While governments generally act slowly, when the public is scared they want the government to act quickly to stop further damage and are thus more willing to expand power temporarily that, unfortunately, often becomes permanent.¹³⁸ For example, during the COVID-19 pandemic governments have implemented severe lockdown restrictions that are

¹³⁰ *Id.*

¹³¹ Ball, *supra* note 127.

¹³² Setareh Motamedi, *Proliferating a Culture of Fear* 14 (Earl Babbie Rsch. Ctr., Working Paper Series 1, 2018) https://www.chapman.edu/wilkinson/research-centers/babbie-center/_files/WorkingPaperSeriesV.1.pdf.

¹³³ *See id.* at 14-15.

¹³⁴ *See* Jeffrey M. McCall, *Media spread fear, Americans listen*, HILL (May 30, 2021, 6:00 PM), <https://thehill.com/opinion/technology/556160-media-spread-fear-americans-listen>.

¹³⁵ Gene Collier, *Cable news ups the fear factor*, ORLANDO SENTINEL (July 19, 2021, 5:35 AM), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-cable-news-fear-factor-20210719-fdl6uqdcyrcpxl6q45yonf6xwi-story.html>.

¹³⁶ McCall, *supra* note 134.

¹³⁷ Tierney, *supra* note 118.

¹³⁸ *Id.*

meant to be temporary.¹³⁹ Economist Robert Higgs, however, has predicted that at least some of these measures will become permanent because of the “negativity effect.”¹⁴⁰ This means that because negative events impact people more than positive events, people are more determined to avoid the negative events than they are to achieve benefits.¹⁴¹ In other words, people are more willing to give up personal freedoms to receive safety in return.

Mitigating the effects of fearmongering means being aware of its influence.¹⁴² This requires simply understanding the effects fear can have on opinions and recognizing when someone is attempting to induce a fear response for their benefit.¹⁴³ Once people are able to recognize when a politician (or someone else) is using fear as a strategy to persuade them, they are able to respond to the fear mongering appropriately and not be persuaded by it.¹⁴⁴

C. Heightening Judicial Review During Emergencies

Countries are at their most vulnerable when they are in emergency situations. This is not only because being in an emergency often means the country has suffered some physical attack or economic loss, but also because being in a state of emergency gives governments broad authority to expand power while the public is fearful and the judiciary deferential. Therefore, another way to stop the unnecessary expansion of emergency powers through a more traditional route is to have judicial branches lessen the degree of deference to the executive and legislative branches during emergencies.¹⁴⁵ This is especially important now, when governments seem to be in a perpetual state of emergency because of fearmongering and manufactured emergencies. Now, most governments have judicial branches that give the

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Kirk Waldroff, *Fear: A powerful motivator in elections*, AM. PSYCH. ASS'N (Oct. 13, 2020), <https://www.apa.org/news/apa/2020/fear-motivator-elections>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Cristie Ford, *Rethinking Judicial Oversight in a Time of Crisis*, REGUL. REV. (May 5, 2020), <https://www.thereview.org/2020/05/05/ford-rethinking-judicial-oversight-time-crisis/>.

executives and legislatures great deference to decide what measures are needed during times of emergency.¹⁴⁶ This deference, however, overlooks the fact that emergency policies are often passed in haste, leaving little to no time for political debate, let alone public input.

Further, and as already noted, policies that are passed rapidly under the assumption of being emergent and temporary too often become permanent without having to go through the usual amount of notice or debate.¹⁴⁷ Thus, judicial branches should not immediately defer to political branch decisions during emergencies. Instead, judicial branches should ensure that the emergency is legitimate and the response appropriate.¹⁴⁸

A particularly striking example of how too much judicial deference in times of emergency can lead to horrific outcomes is the case of *Korematsu v. United States*, where the United States Supreme Court upheld a policy that put innocent Japanese Americans in internment camps after the attack on Pearl Harbor.¹⁴⁹ In doing so, the Court emphasized the importance of deferring to the executive and the military for national security policies during emergencies.¹⁵⁰ Later, however, the Court admitted the opinion was wrong.¹⁵¹ Today, *Korematsu* is considered one of the most egregious opinions from the Court.¹⁵²

Yet, U.S. courts have continued to allow irreparable harm to be done to innocent people by again deferring too much to the government. In 2002, for instance, Yaser Hamdi, a dual citizen of Saudi Arabia and the United States, was captured and sent to a detention facility at Guantánamo Bay.¹⁵³ Upon finding out that he had actually been born in the United States, he was moved to a U.S. prison but was refused access to counsel and was held indefinitely.¹⁵⁴ When Hamdi's

¹⁴⁶ Tsai, *supra* note 119.

¹⁴⁷ See *supra* Part IV.A.

¹⁴⁸ Ilya Somin, *Judicial Review and Emergency Powers*, JOTWELL (June 29, 2020), <https://conlaw.jotwell.com/judicial-review-and-emergency-powers>.

¹⁴⁹ *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

¹⁵⁰ *Id.* at 223-24.

¹⁵¹ Somin, *supra* note 148.

¹⁵² *Id.*

¹⁵³ Kim Lane Scheppele, *The New Judicial Deference*, 92 BOS. U.L. REV. 89, 112 (2012).

¹⁵⁴ *Id.*

father filed a petition on Yaser's behalf, claiming that Yaser was a U.S. citizen and thus had the right to counsel and to due process, the district court agreed and ordered Yaser be provided with counsel. The Fourth Circuit, however, reversed and remanded, ordering the district court to allow more deference to the government's argument that giving Yaser counsel was a threat to national security.¹⁵⁵ There is no justification—not even a potential risk to national security—for denying counsel to a U.S. citizen when it has been touted repeatedly by courts as a basic right embedded in the Sixth Amendment.¹⁵⁶ Clearly, then, judicial deference in emergency cases can be excessive, so much so that courts are willing to overlook the Constitution itself.

Unfortunately, this problem is not unique to the United States. In the United Kingdom, the courts are not allowed to decide whether there is truly an emergency that justifies the government's actions.¹⁵⁷ Instead, that question is left to the political branches.¹⁵⁸ The rationale for this is that declaring something an emergency requires "making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did."¹⁵⁹ Thus, it was made a political, not judicial, decision.¹⁶⁰ Though they first have to identify an emergency, political branches are also the most likely to manufacture emergencies for the sake of gaining more power or remaining in office. So, allowing judicial branches to review the facts of an alleged emergency for obvious misrepresentation works to restrain the political branches from declaring emergency after emergency.

The solution to the problem of too much deference in times of crisis is to heighten the level of scrutiny judges use when evaluating emergency actions. As simple as that may sound, there are specific processes that must be set up that allow less judicial deference in emergencies while also keeping the public safe and the government responsive. One proposed way to accomplish this is called the

¹⁵⁵ *Id.*

¹⁵⁶ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

¹⁵⁷ Mark Elliott, *United Kingdom: Detention without trial and the "war on terror,"* 4 INT'L J. CONST. L. 553, 558 (2006).

¹⁵⁸ *See id.*

¹⁵⁹ *Id.* at 556 (quoting [2004] UKHL 56, [2005] 2 AC 68 (HL 2004)).

¹⁶⁰ *See id.*

“collapsible approach,” which allows judges to choose not to defer to lawmakers when they believe the motive is unconstitutional.¹⁶¹ That way, the burden is on whoever challenges the emergency action to present evidence that the President or Congress is acting irrationally or under a manufactured emergency.¹⁶² Then, the government may refute the accusations and courts will ultimately decide if the emergency is legitimate or not.¹⁶³ If it is, the court will proceed with greater deference to the government, and if it is contrived the court will give no deference.¹⁶⁴

Another related solution is the Emergency-Relevant Factual Review, which proposes that courts have the power to review the government’s facts.¹⁶⁵ This minimal review would give courts the ability to stop grabs for power if there are unsubstantiated claims of a present emergency.¹⁶⁶ This process would differ from most current mode of analysis, where emergency actions are reviewable only under a rational basis review or a similar standard.¹⁶⁷

A potential criticism of a heightened judicial review is that the political branches will be prohibited from acting as they see fit during emergencies, when countries are vulnerable and require quick action. This concern, however, is erroneous. Neither the collapsible approach nor the Emergency-Relevant Factual Review require a court to harshly scrutinize the facts of an emergency or the government’s response. In fact, under the collapsible approach, courts would only review the response if challenged, and the burden rests on the challenger, not the government.¹⁶⁸ Further, under the Emergency-Relevant Factual Review, courts are conducting only a surface-level analysis to see that there is an actual emergency.¹⁶⁹ In either case, the standard of review is relatively minimal, thus allowing the government flexibility to respond to emergencies while also preventing expansions of power through fake emergencies.

¹⁶¹ Tsai, *supra* note 119, at 602.

¹⁶² *Id.* at 603.

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 604.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 605.

¹⁶⁸ *Id.* at 603.

¹⁶⁹ *Id.* at 604.

By giving judicial branches broader authority to examine the government's evidence that there is an emergency, policies that are now put into effect under the guise of manufactured emergencies will be thwarted.

D. Clearly Defining the Scope of Emergency Powers

Another procedural solution to the abuse of emergency powers is having clearly defined emergency powers in constitutions. When emergency powers are clearly defined in a fixed document like a constitution, the opportunity to expand power based on vague language diminishes.

An example of loosely defining emergency powers is evident in Venezuela's Enabling Law under President Chavez.¹⁷⁰ The language in the 1961 Venezuelan Constitution describing Enabling Laws is broad, giving the legislature the ability to grant any power necessary to the executive for as long as necessary with a three-fifths vote. Predictably, the use of such general language to grant the executive emergency powers was quickly abused.

In 1999, Chavez used it to ask Congress to allow him to pass reforms without its consent to which it agreed, as well as did 92% of the Venezuelan population.¹⁷¹ Again, though, people are much more willing to grant excessive amounts of power to those in leadership during financial crises,¹⁷² and Venezuela was facing high unemployment rates and falling oil prices.¹⁷³ Thus, the decision to hand over this power was made under stress. And Chavez went further, preventing the Supreme Court from meeting in chambers using military force.¹⁷⁴ The justices were planning to stop Chavez from dissolving Congress and the Supreme Court through Constitutional Assembly, but they were ultimately unsuccessful.¹⁷⁵ By the end of 1999, a new Constitution that abolished the Senate, gave increased authority over the military to the president, and allowed the president

¹⁷⁰ Garcia-Serra, *supra* note 76, at 274.

¹⁷¹ *Id.*

¹⁷² Waldroff, *supra* note 142.

¹⁷³ Garcia-Serra, *supra* note 76, at 274.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

to propose constitutional amendments was adopted by a simple majority of 44.3%.¹⁷⁶ This shows how—in a very short amount of time—a country can go from democracy to dictatorship simply because the procedures in place allow for extensive grants of power during emergencies.

In contrast, Germany purposefully omitted emergency powers from the West German Basic Law in 1949 and adopted constitutional amendments that allowed for emergency power only as a last resort in 1968 in response to the Cold War.¹⁷⁷ For historical context, the Enabling Act of 1933 was a grant of emergency power passed in Germany after bribery and intimidation from the Nazi Party.¹⁷⁸ The Act allowed Hitler to bypass limits in the Weimar constitution and effectively established a dictatorship.¹⁷⁹ Additionally, the Decree for the Protection of People and State, also passed in 1933, enabled Hitler to implement martial law in Germany.¹⁸⁰ After World War II, Germany's new constitution excluded any mention of emergency powers.¹⁸¹ In 1968, however, Germany amended it to include emergency powers over major protest.¹⁸² These amendments were narrowly drawn to ensure they could not be abused, focusing on specific areas where the executive may exercise emergency powers, like external attacks on the country and natural disasters.¹⁸³ The amendments also describe the powers. For instance, the executive can call the federal police and military for support.¹⁸⁴ Neither of the amendments have ever been used—a testament to Germans' understanding of how grossly emergency powers can be abused.¹⁸⁵

¹⁷⁶ Zambrano, *supra* note 31.

¹⁷⁷ Constanze Stelzenmüller & Sam Denney, *COVID-19 Is a Severe Test for Germany's Postwar Constitution*, LAWFARE (Apr. 16, 2020, 3:01 PM), <https://www.lawfareblog.com/covid-19-severe-test-germanys-postwar-constitution>.

¹⁷⁸ Jeffrey Herf, *Emergency powers helped Hitler's rise. Germany has avoided them ever since.*, WASH. POST (Feb. 19, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/02/19/emergency-powers-helped-hitlers-rise-germany-has-avoided-the-m-ever-since>.

¹⁷⁹ *Id.*

¹⁸⁰ Stelzenmüller & Denney, *supra* note 177.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.*

When deciding how to define the scope of emergency powers, a common concern is that too narrow a definition will hinder the country from taking helpful measures to mitigate or prevent crises because that power was not specifically written down. This concern is valid but can be alleviated through trial and error revision. Recently in Germany, for example, there has been a lot of debate on emergency powers, with many citizens frustrated with slow-moving government efforts during COVID-19.¹⁸⁶ Soon, however, Germany is expected to revise the internal emergency power amendment to change the language from “slow motion natural catastrophe” to “pandemic.”¹⁸⁷ Hence, Germany’s restrictions on emergency powers have worked thus far, the only problem has been the lack of specificity in the exclusion of language for pandemics. Again, this demonstrates that using specific language is effective in keeping the executive and legislature in check while also allowing the government to appropriately respond during emergencies.

V. CONCLUSION

Emergency powers, while sometimes beneficial in the short-term, can – and often do – have long-term consequences that outweigh their benefits. To keep the benefits of allowing governments to act quickly when responding to a threat but also restrain policymakers from expanding their own power, voters should demand that: sunset clauses be eliminated or the government be more transparent when legislation is up for renewal; the public be given increased awareness of manufactured emergencies designed to create fear; the standard of review for emergency government responses be heightened; and emergency powers be clearly defined in constitutions.

Additionally, because it is clear that opportunities for abuse of power are best contained when the power is granted temporarily for a specific circumstance,¹⁸⁸ the neo-Roman model is best to prevent abuses of power because it allows the constitution itself to be the delegator of emergency power while the legislative and judicial

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See supra* Part II.

branches are the supervisors.¹⁸⁹ Therefore, issues like manufactured emergencies would be less common because legislators and executives could not just conjure up a fake crisis that scares the public into approving large grants of power because the power would have to already be in the constitution. The legislative model, on the other hand, incentivizes the delegator to grant more power than necessary for longer periods of time and escapes a procedural process that could ensure the grants were legitimate.

Although the neo-Roman model has seen many downfalls in fragile democracies and in dictatorships,¹⁹⁰ it has been misused in those regimes. More often than not, countries that followed the neo-Roman model were also countries that adopted flexible constitutions and thus were more vulnerable to authoritarianism. When the constitution itself is what delegates powers as opposed to just structure, it is unwise to have the constitution be easily amendable or too broad in the description of those powers. This is evident in the difference between Venezuela and Germany, both of which expressly delegate emergency powers in their constitutions, but one of which uses narrow language and is appropriately respected.¹⁹¹ Thus, when Germany faces a crisis, it does not succumb to the public's fear or the temptation for more power.

¹⁸⁹ Ferejohn & Pasquino, *supra* note 17, at 219.

¹⁹⁰ *Id.*

¹⁹¹ Zambrano, *supra* note 31; Stelzenmüller & Denney, *supra* note 177.