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## Inherent Executive Power: A Comparative Perspective

**ABSTRACT.** In light of recent debates regarding the scope and basis of inherent executive power, particularly with regard to foreign affairs and national security, this Essay examines different conceptions of executive power in five modern democracies. The Essay's study of British and German parliamentary systems, the semi-presidential French system, and the presidential Mexican and South Korean systems suggests that executive power is highly contingent and shaped by political context. The Essay identifies the common features of all these governmental structures, including the fluid line between executive and legislative power, and emphasizes that all of these nations have recognized the importance of placing limits on executive power, including in the spheres of foreign affairs and national security. These comparative examples thus provide a counterweight to recent arguments that executive power inherently requires unchecked authority in these spheres.

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**INTRODUCTION**

Does the executive possess inherent emergency powers related to foreign affairs and national security? Are there circumstances in which the executive can act on its own initiative, without support from legislation? When, if ever, can the executive act in direct contravention to the will of the legislature?

Today's most important constitutional and policy debates center on precisely these questions. Some have recently argued that the U.S. President has broad, independent powers in matters related to foreign affairs and national security.<sup>1</sup> In addition to their theoretical importance, these arguments have immediate practical significance for real world cases and situations. For example, can the executive order the military to torture in violation of legislative enactments?<sup>2</sup> Order warrantless wiretaps, circumventing procedures set up by Congress?<sup>3</sup> Seize and detain terrorists without trial or subject them to military commission trials, in the absence of specific legislative authorization?<sup>4</sup> Determine unilaterally whether persons in U.S. custody have rights under international treaties?<sup>5</sup>

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1. See, e.g., Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 9, 2002), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek> [hereinafter Detainees Memo]; Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents012202bybee.pdf> [hereinafter January 2002 Bybee Memo]; Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Torture Memo]; see also Scott Shane, *Behind Power, One Principle as Bush Pushes Prerogatives*, N.Y. TIMES, Dec. 17, 2005, at A1 (quoting a Sept. 25, 2001 memorandum by John Yoo arguing that no statute passed by Congress "can place any limits on the president's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response").
  2. See Detainees Memo, *supra* note 1; January 2002 Bybee Memo, *supra* note 1; Torture Memo, *supra* note 1.
  3. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
  4. Transcript of Oral Argument at 29, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (No. 05-6396) (statement of Judge Luttig), available at <http://www.wiggin.com/db30/cgi-bin/pubs/Transcript%20of%20Oral%20Argument.pdf> ("The question is whether there is another emergency power that resides in the inherent power of the President of the United States.").
  5. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Although the topic of inherent executive power is particularly salient today, the nature of executive power has occupied American constitutional scholars for decades. Scholars have searched for answers in the parsimonious text of Article II and the history of the Founding period.<sup>6</sup> This Essay takes a different, more functional approach, examining conceptions of executive power in a handful of modern democracies: the United Kingdom, Germany, France, Mexico, and South Korea. These comparative examples suggest that there is nothing inherent or fixed about the scope of executive power; instead, executive power is highly contingent, shaped by political context and the path-dependent evolution of particular legal systems.

The countries discussed in this Essay have been selected because they start from a range of basic institutional structures—from parliamentary British and German systems, to the semi-presidential French system, to the presidential Mexican and South Korean systems. The ages of their current structures vary—with the long-established Westminster system contrasting with the post-War constitutions of Germany and France and the still-evolving Korean and Mexican systems. They also represent a spectrum of development, from fully industrialized, entrenched democracies to still-emergent, newer democracies.

The experiences of these other nations do not point in a single direction. In some ways, the scope of executive power has been broader in these countries than in the United States; in other ways it has been narrower. There are, however, a few commonalities. In all of these countries, as in the United States, the line between executive and legislative powers is fluid. Regardless of formal governmental structures, all have witnessed a tendency toward executive dominance of national politics. At the same time, all now formally recognize some limits on executive power. These limits preserve a liberty-protecting balance of political power with the legislature and the courts, even in matters touching on foreign affairs or national security. These examples thus provide a counterweight to recent arguments that executive power, by its very nature, requires unchecked authority to act independently in these areas. More fundamentally, they help refute the notion that the “executive Power” vested in the President by Article II of the U.S. Constitution has an abstract content that can be determined by reference to theoretical first principles. Instead, the experiences of these other countries reinforce the lesson of U.S. history that executive power is a malleable and evolving concept.<sup>7</sup>

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6. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

7. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

## I. THE INHERENT EXECUTIVE POWER THESIS: “WHEN THE PRESIDENT DOES IT, THAT MEANS THAT IT IS NOT ILLEGAL”

While it is not the purpose of this Essay to fully explore the current domestic debate about inherent executive power, it is important to sketch the main arguments to show how the comparative examples that are the focus of this Essay enter and enhance that dialogue. Advocates of inherent executive power assert that the phrases “executive Power”<sup>8</sup> and “Commander-in-Chief”<sup>9</sup> in Article II of the U.S. Constitution encompass a particular bundle of powers that are inherently “executive” in nature, including power over matters related to foreign affairs, the military, and national security.<sup>10</sup>

Modern scholars have advanced the inherent power theory in a variety of permutations.<sup>11</sup> Not surprisingly, the theory has also been popular with Presidents themselves, who have claimed authority to do whatever is necessary for the good of the nation. President Nixon, for example, asserted that when “the President does it, that means that it is not illegal.”<sup>12</sup> President Lincoln put it more eloquently when he explained, “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”<sup>13</sup>

The most recent executive branch defense of the inherent power theory emerged in a series of internal memos related to Bush Administration policies in the war on terror, including treatment of detainees, use of military force, and domestic wiretapping. The most infamous of the secret memos is the August 2002 “Torture Memo” signed by Assistant Attorney General Jay Bybee and reportedly written by John Yoo.<sup>14</sup> This memo considers the applicability of a

8. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).
9. *Id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).
10. The inherent power thesis dates back to the Pacificus-Helvidius debates between Hamilton and Madison over George Washington’s 1793 proclamation of neutrality. JACK N. RAKOVE, ORIGINAL MEANINGS 356 (1996).
11. See, e.g., JOHN YOO, THE POWERS OF WAR AND PEACE (2005); Prakash & Ramsey, *supra* note 6.
12. *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.
13. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 2 LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 585 (Don E. Fehrenbacher ed., 1989).
14. Torture Memo, *supra* note 1, at 2; see Al Kamen, *Taking Terrorism Law on the Road*, WASH. POST, Feb. 24, 2006, at A13 (describing former Justice Department official John Yoo as the

federal statute criminalizing torture;<sup>15</sup> it is representative of the reasoning used in many of the documents justifying controversial anti-terror policies.<sup>16</sup> The memo contends that the Constitution “vests in the President an unenumerated ‘executive power’” encompassing matters related to national security,<sup>17</sup> a power that may not be limited by Congress or the courts.<sup>18</sup> The memo concludes that the President can authorize torture, laws to the contrary notwithstanding.

In terms of bread-and-butter domestic constitutional arguments, there are serious flaws in the inherent power thesis, particularly as articulated in the Bush Administration memos. The theory is inconsistent with the U.S. Constitution’s textual allocation to Congress of substantial powers related to foreign affairs and the military.<sup>19</sup> It finds a supposed clarity in the original understanding of the phrase “executive Power” that is not supported by the historical record.<sup>20</sup> And it ignores two centuries’ worth of judicial decisions skeptical of broad and unchecked inherent executive power.<sup>21</sup>

The purpose of this Essay is not to thoroughly catalog the flaws of the Bush Administration’s assertions of power, for those criticisms are now well known.<sup>22</sup> But recognizing the weakness of the inherent executive power thesis on conventional domestic constitutional grounds opens space for this Essay, which augments these criticisms with the perspective of comparative analysis. To the extent the inherent power thesis is not supported by constitutional text, originalism, or precedent, it devolves into an argument based on two

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“author of the famous Torture Memo and proponent of a most interesting view of presidential power”).

15. 18 U.S.C. § 2340A (2000).
16. See, e.g., Shane, *supra* note 1 (discussing the argument that the President has inherent power to wiretap).
17. Torture Memo, *supra* note 1, at 2.
18. *Id.* at 34-35.
19. See U.S. CONST. art. I, § 8.
20. See generally RAKOVE, *supra* note 10, at 244-87 (describing Founding-era debates about executive power); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (describing the lack of historical support for the inherent executive power thesis).
21. See, e.g., Hamdan v. Rumsfeld, 126 S. Ct 2749, 2798 (2006) (“The Executive is bound to comply with the Rule of Law that prevails in this Jurisdiction.”); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).
22. See, e.g., R. Jeffrey Smith, *Slim Legal Grounds for Torture Memo*, WASH. POST, July 4, 2004, at A12; Peter Brooks, *The Plain Meaning of Torture*, SLATE, Feb. 9, 2005, <http://www.slate.com/id/2113314>.

possibilities: an essentialist argument based on political theory or practice and a prudential argument based on wise policy.

These comparative examples help refute, first, the essentialist argument that executive power consists of a certain bundle of prerogatives that can be deduced from political theory or praxis. If there were a core set of powers that were intrinsically executive, one would expect to see at least some convergence in the allocation of these powers to executive officials in societies with democratic values comparable to our own. Instead, other modern democracies have gone in the exact opposite direction and require that powers over war, national security, and foreign affairs be shared with legislators and judges.

Second, these examples cast doubt on the prudential argument that it is necessary or wise to grant the executive branch broad, unchecked power related to war, foreign affairs, and national security. Some of these foreign examples are cautionary tales of how executives can and will abuse power in the name of national security, and also of countries' attempts to entrench the rule of law by limiting executive power after periods of dictatorship.

It is important to acknowledge the limits of these comparative examples. First, they are obviously not controlling in terms of the interpretation of the U.S. Constitution. However, to the extent that other methods of constitutional analysis, such as textualism and originalism, yield indeterminate results, comparative examples can provide valuable insight in choosing between different plausible interpretations of vague constitutional provisions. Despite "relevant political and structural differences" between foreign legal systems and our own, their "experience may . . . cast an empirical light on the consequences of different solutions to a common legal problem."<sup>23</sup>

Second, there are important legal, political, and social differences between the United States and the other countries examined in this Essay. Indeed, there are substantial differences *among* the other countries examined—from basic choices between presidential and parliamentary systems<sup>24</sup> to more nuanced differences such as the maturity of their democracies, their histories, and their social and economic conditions. The substantial differences between the countries, however, make even more striking the similar decisions to avoid concentrating too much power in the executive.

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23. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

24. Generally, in a parliamentary system the chief executive and other ministers are from the legislature and must enjoy the confidence of the legislature to remain in office, while in a presidential system the chief executive is directly elected and does not depend on the legislature to stay in office.

Third, in terms of normative argument, these comparative examples cannot prove that some particular constitutional arrangement is optimal. They do, however, suggest that the secrecy, dispatch, and vigor of the executive are not always virtues. At a minimum, this shifts the burden to advocates of expansive executive power<sup>25</sup> to support their position with more than conclusory assertions about the comparative institutional advantages of the executive branch.

## II. INHERENT EXECUTIVE POWER IN COMPARATIVE PERSPECTIVE

### A. Structuring the Executive Branch: Evolution and Revolution

Before examining specific constitutional allocations of powers, it is important to begin by noting the most striking feature of executive power in all the legal systems examined in this Essay: the degree to which executive power is not fixed and determinate but instead has evolved over time. Within each system, the exercise of such power has fluctuated greatly, with the actual distribution of power at any given moment shaped by social and political circumstances, as well as the letter of a constitution. As Charles de Gaulle is reported to have said, “A constitution is an envelope; . . . what is inside can be changed.”<sup>26</sup> That being so, executive power essentialists have it wrong at the most basic level: Even within one legal system, there is generally no particular bundle of powers that can be exercised by the executive branch at all times and in all circumstances.

France is a good example of the changing nature of executive power. On paper, France’s 1958 Constitution appears to create a parliamentary regime with a ministerial government accountable to the legislature.<sup>27</sup> The President, who is elected by direct universal suffrage,<sup>28</sup> has relatively few enumerated powers<sup>29</sup> (though many of those powers do relate to foreign affairs and are designed to increase in times of emergency).<sup>30</sup> In practice, however, even without the invocation of emergency powers, the French President has

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25. See, e.g., Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

26. WILLIAM G. ANDREWS, PRESIDENTIAL GOVERNMENT IN GAULLIST FRANCE 211 (1982).

27. See DAVID S. BELL, PRESIDENTIAL POWER IN FIFTH REPUBLIC FRANCE 10 (2000); see also ANDREWS, *supra* note 26, at vii, 2, 25-26.

28. 1958 CONST. art. 6 (Fr.) (amended 2000).

29. BELL, *supra* note 27, at 10.

30. 1958 CONST. arts. 5-19 (Fr.) (amended 2000).

dominated his country's government.<sup>31</sup> This appears to have been largely due to the personal political strength of the individuals who have occupied the office, beginning with Charles de Gaulle.<sup>32</sup> The cohesion of French society has also been cited by some observers as explaining the trend toward presidentialization.<sup>33</sup>

Even in France, however, presidential power has waxed and waned. The Prime Minister's powers have increased during periods of "cohabitation," when the President does not share the party of the parliamentary majority.<sup>34</sup> During such periods, Prime Ministers have dominated domestic lawmaking.<sup>35</sup> Though Presidents have retained significant control over foreign and defense policy during periods of cohabitation, leadership in these areas, too, has been shared with the Prime Minister. In 1986, then-Prime Minister Jacques Chirac set a precedent in this regard by accompanying then-President François Mitterrand to the G7 summit.<sup>36</sup> During the cohabitation between 1993 and 1995, when Mitterrand's political power had waned considerably, Prime Minister Édouard Balladur's government was extremely active in foreign policy, including the situations in Rwanda and the former Yugoslavia.<sup>37</sup> And in 1999, President Chirac and Prime Minister Lionel Jospin jointly managed the Kosovo crisis.<sup>38</sup> In short, the precise balance of power during the different cohabitation periods has varied substantially, "showing how the political resources possessed by the two major actors affect the division of power between them."<sup>39</sup>

Germany provides an interesting counterpoint because, despite some facial similarities to the French system, executive power has functioned quite differently. The German Constitution, the Basic Law, also provides for a dual executive in the form of both a President and a Federal Chancellor.<sup>40</sup> On paper, it looks similar to France's division of power. Unlike his French counterpart,

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31. *Id.*

32. See BELL, *supra* note 27, at 10.

33. See, e.g., ANDREWS, *supra* note 26, at 211.

34. ANDREW KNAPP & VINCENT WRIGHT, THE GOVERNMENT AND POLITICS OF FRANCE 115 (4th ed. 2001).

35. *Id.* at 116.

36. *Id.* at 117.

37. *Id.* at 119.

38. *Id.*

39. *Id.* at 113.

40. GRUNDGESETZ [GG] [Constitution] art. 62 (F.R.G.) ("The Federal Government shall consist of the Federal Chancellor and the Federal Ministers.").

however, the German President has ended up serving a largely symbolic role.<sup>41</sup> Although the Basic Law gives the German President the power to conclude treaties, receive envoys, and represent the country in its foreign relations,<sup>42</sup> in reality the Chancellor is more prominent. The Chancellor, who is selected by the Bundestag and depends on parliamentary support to remain in office, is the true head of the government.<sup>43</sup> Over time, the autonomy of the German Chancellor from her political party has increased, and her personal leadership has become more important during elections.<sup>44</sup> Political scientists sometimes refer to this as the “presidentialization” of parliamentary regimes.<sup>45</sup> Nevertheless, despite these increases in executive power, Germany’s system involves “a degree of executive accountability as high as any likely to be found among the world’s constitutional democracies,”<sup>46</sup> with the legislature exercising significant supervisory powers, even over foreign affairs and military policy.<sup>47</sup> What explains the differences between France and Germany in the actual exercise of power? Given the structural similarities in their constitutions, other social and political factors – for example, a German distrust of unchecked executive power following the Nazi era – must account for the difference.

In the United Kingdom, which lacks a written constitution, governmental structures are dictated by traditions evolved over time. The current structure is, of course, a classic parliamentary system, in which the chief executive is a Prime Minister whose tenure in office depends on the support of a parliamentary majority. The degree to which the Prime Minister enjoys autonomous power depends a great deal on his or her political strength and ability to utilize the institutional tools that accompany the office.<sup>48</sup> While the Prime Minister controls the legislative agenda to a much greater degree than, for example, the President in a system of separated powers like that of the United States, this control is not complete. The Prime Minister must still manage the possibility of a rebellion within his or her own party, either in

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41. See Thomas Poguntke, *A Presidentializing Party State? The Federal Republic of Germany*, in *THE PRESIDENTIALIZATION OF POLITICS* 63, 63 (Thomas Poguntke & Paul Webb eds., 2005).

42. GRUNDGESETZ [GG] art. 59(1) (F.R.G.).

43. *Id.* arts. 62, 63.

44. Poguntke, *supra* note 41, at 65.

45. See generally *THE PRESIDENTIALIZATION OF POLITICS*, *supra* note 41 (describing the “presidentialization” of regimes).

46. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 149 (2d ed. 1997).

47. See *infra* notes 64–71 and accompanying text.

48. Richard Heffernan & Paul Webb, *The British Prime Minister: Much More Than ‘First Among Equals,’* in *THE PRESIDENTIALIZATION OF POLITICS*, *supra* note 41, at 26, 32–33.

general or with respect to particular legislation.<sup>49</sup> As with France's Charles de Gaulle, personally strong Prime Ministers like Margaret Thatcher have contributed to the prestige and strength of the office in Britain. Executive power in Britain depends not on law or abstract political theory, but on political practicalities.

Mexico and South Korea also provide an interesting set of similarities and contrasts. Both Mexico and South Korea have presidential systems; both did not enjoy functioning democracies until relatively recently; and though both still have strong chief executives, these executives' power has decreased as the countries have moved toward greater democracy in recent years. Mexico's shift has taken place gradually, with a great deal of legal continuity and minor amendments to the 1917 Constitution. Seemingly small steps have led to dramatic differences in the degree of democratization and the extent to which executive power is functionally checked by other branches of government.<sup>50</sup> South Korea, on the other hand, has had a more discontinuous and revolutionary history with six separate constitutions since World War II. The inception of the current democratic system coincided with the adoption of an entirely new constitution in the late 1980s.<sup>51</sup>

In addition to illustrating the fallacy of executive power essentialism, the degree of fluctuation in executive power in other legal systems demonstrates that executive power is an extremely malleable and contingent concept. We should not become too complacent that executive power in the United States will never depart dramatically from its historical range; the one essential attribute of executive power seems to be its tendency to vary.

*B. The Fallacy of Executive Power Essentialism: War, Emergencies, and Foreign Affairs*

The general observations suggested by the preceding overview of different executive structures are borne out when one examines in greater detail the exercise of powers related to war, emergencies, and foreign affairs. This comparative analysis undermines the essentialist argument for inherent executive power in these areas; given the great variation in how democracies divide power between chief executives and legislators, it is extremely hard to argue that any particular bundle of powers must be vested in the chief

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49. *Id.* at 43.

50. See *infra* notes 164-167 and accompanying text.

51. See *infra* notes 117-130 and accompanying text.

executive, as a matter of either abstract political theory or the practical functioning of governments in the modern world.

These examples are also relevant to prudential arguments about the best allocation of powers. None of the democracies examined in this study deem it prudent to give the chief executive broad, unchecked power even in the area of national security; all divide powers in this area between the chief executive and the legislature, often including a role for the courts as well. While all of these countries may have it wrong, this suggests that proponents of exclusive, inherent executive power at least have the burden of providing empirical support for claims that exclusive allocation of these powers to the executive branch enhances national security; they cannot rest simply on intuitions about relative institutional competence.

### 1. *War Powers*

Proponents of the inherent executive power thesis generally argue that the power to wage war is intrinsically “executive” in nature. Far from recognizing war-making as an inherently executive function, however, other modern democracies typically divide both the decision to commit troops to action and the actual control of the military forces between the executive branch and the legislature.<sup>52</sup> Some even involve the courts in judicial review of these decisions. To be sure, like U.S. Presidents, executives in these countries have not always obtained advance legislative approval for use of military force. Nevertheless, the fact that the power over war is legally divided between the executive and other branches of government imposes restraint on unilateral executive action by structuring the political context in which the executive acts.

At one legal extreme is the United Kingdom. British law vests the power to go to war in the Crown as a royal prerogative, a prerogative exercised by the Prime Minister today.<sup>53</sup> No parliamentary approval is legally required.<sup>54</sup> Yet, in practice, as Prime Minister Tony Blair has noted, the Prime Minister almost always seeks some kind of approval from Parliament,<sup>55</sup> and it would be

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52. See generally Lori Fisler Damrosch, *Constitutional Control over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 U. MIAMI L. REV. 181 (1995) (discussing the prevalence of requiring legislative authorization for the use of armed force).

53. PAUL BOWERS, *PARLIAMENT AND THE USE OF FORCE* (2003), available at <http://www.parliament.uk/documents/upload/sn1a-01218.pdf>.

54. *Id.*

55. Like the U.S. President, the British Prime Minister often defends his or her unilateral war powers in theory while actually consulting with legislators in practice. For example, Blair submitted the decision to go to war in Iraq in 2003 to Parliament for advance approval, but

politically inconceivable that the government would proceed with the use of troops if Parliament actually disapproved.<sup>56</sup> Parliament has debated all of the major deployments of British troops since World War II, though admittedly not all of these debates have taken place prior to the deployment, nor have all culminated in a substantive vote.<sup>57</sup>

In contrast to the United Kingdom, the other countries discussed in this Essay all formally require some kind of legislative participation in the decision to go to war. The French Constitution provides that “[a] declaration of war shall be authorized by Parliament.”<sup>58</sup> In addition, the legislature is given power to determine “the general organization of national defense.”<sup>59</sup> In practice, modern French Presidents have not always sought advance parliamentary approval for their actions.<sup>60</sup> Indeed, many French legal scholars have argued that today, the declaration of war is illegal under international law, leaving only defensive actions (for which they argue no advance authority is needed) and U.N. peacekeeping actions (which are undertaken pursuant to the U.N. Charter).<sup>61</sup> Between the 1970s and 1990s, French troops were deployed to Zaire, Chad, Lebanon, and the former Yugoslavia without advance debate in the National Assembly. During the 1991 Gulf War, the government sought legislative endorsement of its actions by calling for a vote of confidence on the policy of participation in the war. The vote was strongly in favor of the government.<sup>62</sup> But while a no-confidence-vote would have forced the Prime Minister to resign, France’s quasi-presidential system paradoxically meant that President Mitterand would have stayed in office.<sup>63</sup> Thus, while on paper the French Constitution gives the legislature a greater formal role in declaring war than the British Parliament, the reality is somewhat different. Because the British Prime Minister depends more directly on the support of Parliament, he or she is in some sense more politically constrained than the French President.

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he has thwarted recent efforts by the opposition to enact legislation, similar to the U.S. War Powers Act, that would require the executive to seek advance parliamentary approval for military actions. Matthew Tempest, *Government Kills Short’s War Bill*, GUARDIAN (London), Oct. 21, 2005, <http://politics.guardian.co.uk/iraq/story/0,12956,1597883,00.html>.

56. *Id.*

57. BOWERS, *supra* note 53, at 6-7.

58. 1958 CONST. art. 35 (Fr.).

59. *Id.* art. 34.

60. Elisabeth Zoller, *The War Powers in French Constitutional Law*, 90 AM. SOC’Y INT’L L. PROC. 46, 48-49 (1996).

61. *Id.* at 49.

62. *Id.* at 50.

63. *Id.*

Germany's Basic Law not only requires legislative approval for military action, but also contains detailed provisions related to the allocation of authority over military operations. Command of the armed forces is vested in the executive branch, with the Federal Minister of Defense in ordinary times<sup>64</sup> and with the Chancellor during a state of defense.<sup>65</sup> However, the Basic Law explicitly provides for legislative oversight of foreign affairs and defense matters by stating that the Bundestag "shall appoint a Committee on Foreign Affairs and a Committee on Defense."<sup>66</sup> Moreover, it provides that "[a] Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary control over the Armed Forces."<sup>67</sup> The legislature also has the power to declare peace.<sup>68</sup>

In Germany, the courts have also played an active role in regulating the use of force. In contrast to U.S. courts, which generally have declined to review presidential decisions to use armed force abroad, the German Constitutional Court in 1994 reviewed whether Germany could constitutionally commit troops to participate in U.N. peacekeeping operations in Somalia and the former Yugoslavia.<sup>69</sup> While the German Basic Law allows defensive warfare and participation in collective security arrangements, it denounces aggressive war. The court held that troops could be deployed as peacekeepers provided that the Bundestag provided approval in advance.<sup>70</sup> The participation of the legislature was required, the court found, as a consequence of the "democracy principle" embedded in the German Basic Law. In accordance with this decision, the German government obtained approval from the Bundestag before committing to involvement in the Kosovo action during 1998 and 1999.<sup>71</sup>

The current South Korean Constitution explicitly provides for legislative control not only over the formal declaration of war, but also over certain other

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64. GRUNDGESETZ [GG] art. 65a (F.R.G.).

65. *Id.* art. 115b.

66. *Id.* art. 45a(2).

67. *Id.* art. 45b.

68. *Id.* art. 115l(3) ("The conclusion of peace shall be determined by a federal law.").

69. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 12, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286, translated in 106 INT'L L. REP. 326 (1997).

70. *Id.*

71. John Schmid, *Bonn Commits Jet Fighters for Action in Yugoslavia*, INT'L HERALD TRIB., Oct. 17, 1998, at 2.

uses of military force, including “the dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.”<sup>72</sup> In light of the country’s experience with military dictatorships, the constitution also makes clear that the military is constrained to operate within the framework of laws passed by the legislature, stating that “[t]he President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act,” and that “[t]he organization and formation of the Armed Forces is determined by law.”<sup>73</sup> In conformity with the constitution, the South Korean government obtained parliamentary approval before deploying troops to Iraq in 2004<sup>74</sup> and has limited the participation of those troops to peacekeeping and support operations in conformity with the parliamentary mandate.<sup>75</sup>

On the whole, these comparative examples do not support the essentialist thesis that waging war is inherently an executive function. While advance legislative approval is not always obtained, executives in other democracies generally do seek some sort of legislative affirmation of their actions, even if only after the fact. Even when legislative involvement occurs only after the fact, the formal legal requirement of such involvement seems to have imposed a level of democratic accountability by requiring the chief executive to ensure that there is sufficient support for the action. In Germany, the involvement of the courts appears to have induced the legislature to fulfill its constitutional role by authorizing military actions in advance. In South Korea, the scope of military action endorsed by the legislature has also acted as a constraint. Requiring a high degree of legislative participation does not appear to have handicapped these nations in responding to military threats with the necessary speed or decisiveness. Those who argue prudentially that the executive needs to have exclusive authority to initiate military action must provide more than intuition to support their arguments about the inability of legislatures to respond to military threats.<sup>76</sup>

Legislatures, moreover, are frequently granted the power to enact laws concerning the governance of the armed forces; this is viewed as an essential attribute of civilian control of the military. While it may not be feasible to have

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72. TAEHANMIN’GUK HEONBEOP [Constitution] art. 60(2) (S. Korea).

73. *Id.* art. 74.

74. Andrew Ward, *S. Korean Parliament Endorses Iraq Dispatch*, FIN. TIMES, June 17, 2004.

75. Steve Herman, *South Korean Parliament Extends Military Deployment in Iraq, but Reduces Troop Numbers*, VOICE OF AMERICA, Dec. 30, 2005, <http://www.voanews.com/english/archive/2005-12/2005-12-30-voa7.cfm>.

76. See, e.g., YOO, *supra* note 11; Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

a legislative body command the tactical operations of troops in the field, it does appear feasible to allow the legislature to set general guidelines for the conduct of the military (for example, rules prohibiting torture). In sum, unchecked executive power in the area of war-making does not appear to be a typical or desirable characteristic of modern democracies.

## 2. *Emergency Powers*

Some proponents of the inherent executive power thesis contend that the U.S. President has inherent power to respond to emergency situations, by acting either without express legal authorization or in direct violation of law.<sup>77</sup> Rather than relying on inherent executive power to deal with emergencies, however, many foreign constitutions have explicit emergency provisions. These provisions expand executive authority, but they also subject the executive's power to limitations by the legislature and the courts. Moreover, these emergency provisions define what constitutes an emergency and specify which government actors determine whether those criteria have been met. The provisions also impose time limits on the emergency and define the additional powers that executives may exercise. None of these other democracies permit its executives to assume unchecked power, even in response to an emergency. In short, foreign laws and constitutions help rebut the essentialist argument that there is something inherent in the concept of an executive that entails plenary power in emergencies.

The German Basic Law contains particularly elaborate checks and balances on emergency powers, no doubt motivated by the notorious failure of the Weimar Constitution in this regard. To begin with, the Basic Law rejects the idea of inherent executive power to act outside the law: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."<sup>78</sup> The Basic Law limits a "state of defense" to when the country is under armed attack or imminently threatened with attack.<sup>79</sup> The legislature has primary responsibility for declaring such a state,<sup>80</sup> though if the full legislature

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77. Even assuming such power might exist in a sudden, unforeseen crisis, there is the further question whether the current war on terror in any way qualifies as such an emergency. Because the effort to suppress international terrorism has already lasted several years, and is likely to last for many more, the President has had ample time to ask Congress to provide him with any additional powers he needs.

78. GRUNDGESETZ [GG] art. 20(3) (F.R.G.).

79. *Id.* art. 115a(1). The German Basic Law also provides for the declaration of a lesser "state of tension." *Id.* art. 80a.

80. *Id.* art. 115a(1).

cannot convene, then a special group of legislators called the Joint Committee can authorize a state of defense.<sup>81</sup> The ordinary legislature is empowered to terminate such a state of emergency, however.<sup>82</sup>

During a state of defense, the legislative process may be expedited and the legislative powers of the federal government are expanded in a variety of ways. Federal laws may, for example, “establish a time limit for deprivations of freedom” longer than normal “but not exceeding four days, for cases in which no judge has been able to act within the time limit that normally applies.”<sup>83</sup> However, the “Basic Law may neither be amended nor abrogated nor suspended in whole or in part.”<sup>84</sup>

While the Basic Law also expands the powers of the executive branch in an emergency, it does so in considerably more limited ways. For example, the government may “issue instructions not only to federal administrative authorities but also to Land governments,”<sup>85</sup> but the Bundestag, the Bundesrat, and the Joint Committee must be informed “without delay” of such measures.<sup>86</sup> Legislative officials are to continue in office during a state of defense, and the Bundestag may not be dissolved.<sup>87</sup> Laws enacted during a state of defense are of limited duration and terminate automatically within a fixed time period after the end of the state of defense.<sup>88</sup> Moreover, the Constitutional Court must be allowed to continue to perform its functions.<sup>89</sup>

As elaborate as they are on paper, the emergency powers under the German Basic Law have not been used, so it is difficult to tell how well they would work in practice. The French Constitution’s emergency provisions, on the other hand, have been employed. Article 16 of the French Constitution contains one of the broadest grants of emergency powers to the executive in a modern democratic constitution:

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the

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81. *Id.* art. 115a(2); *id.* art. 53a.

82. *Id.* art. 115l.

83. *Id.* art. 115c(2).

84. *Id.*

85. *Id.* art. 115f.

86. *Id.*

87. *Id.* art. 115h.

88. *Id.* art. 115k.

89. *Id.* art. 115g.

proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council.<sup>90</sup>

Yet even these powers are constrained, rebutting the essentialist argument that unlimited emergency powers are inherent in the concept of an executive. In France, the measures are limited insofar as they “must stem from the desire to provide the constitutional public authorities, in the shortest possible time, with the means to carry out their duties.”<sup>91</sup> Other branches of government retain authority. In particular, “Parliament shall convene as of right”<sup>92</sup> and “[t]he National Assembly shall not be dissolved during the exercise of the emergency powers.”<sup>93</sup> In addition, “[t]he Constitutional Council shall be consulted with regard to such measures.”<sup>94</sup> The French Constitution also grants the Council of Ministers the power to declare martial law but provides that “[i]ts extension beyond twelve days may be authorized only by Parliament.”<sup>95</sup>

Article 16 of the French Constitution has been invoked only once, in an episode that illustrates, first, the degree to which implementation of legal rules depends a great deal on political context, and second, the degree to which legal rules help structure political context. Charles de Gaulle invoked Article 16 during the Algerian crisis in April 1961, following consultation with the Prime Minister, the Constitutional Council, and the presidents of the assemblies. The Constitutional Council issued an opinion in favor of the declaration, noting that the criteria for invocation of Article 16 had been met by the “open rebellion” in Algeria.<sup>96</sup>

De Gaulle promulgated eighteen orders during the emergency. These orders provided, among other things, for punishment of leaders of the insurrection and their supporters, military courts, detention of suspects for up

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90. 1958 CONST. art. 16 (Fr.).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* art. 36.

96. Martin Harrison, *The French Experience of Exceptional Powers: 1961*, 25 J. POL. 139, 140 (1963) (quoting Decision of April 24, 1961, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 24, 1961, p. 3876).

to two weeks, and censorship.<sup>97</sup> The legislature met throughout the crisis, as it was constitutionally entitled to do.<sup>98</sup> De Gaulle, however, asserted that it should only concern itself with ordinary business and should not address emergency measures.<sup>99</sup>

Things became more politically complicated during the summer when a domestic agricultural crisis arose, accompanied by large public demonstrations.<sup>100</sup> The legislature, which would not ordinarily have been able to convene during the summer without de Gaulle's acquiescence, was entitled to remain in session under Article 16. Having previously argued that the legislature was not allowed to discuss the emergency measures taken under Article 16, de Gaulle now paradoxically asserted that the crisis that had precipitated the invocation of Article 16 was the only thing the legislature could address in extraordinary session; any legislation related to the agricultural crisis would be out of order.<sup>101</sup> The Socialists proposed a motion of censure under Article 49 of the Constitution, which if supported by a majority would have required the Prime Minister and Cabinet to tender their resignations. This would have left the President in an awkward position since the legislature could not be dissolved for new elections while the emergency continued. Political and legal maneuvering ensued to avoid a vote, with the government claiming that a censure motion was not allowed during the extraordinary session and the Constitutional Council ruling that the issue lay beyond its competence.<sup>102</sup> Shortly thereafter, de Gaulle terminated the emergency.<sup>103</sup> Some observers take this as less of a capitulation than an example of de Gaulle's deft political maneuvering.<sup>104</sup> In any event, the crisis ended with the powers of the President and legislature during an emergency left in a state of uncertainty.

Since then, no French President has invoked Article 16. Instead, emergency measures, to the extent necessary, have been taken by the President and the Prime Minister jointly with the support of the legislature. The recent riots in the suburbs of Paris are an example. With the support of the Prime Minister and the Cabinet, President Chirac issued a decree invoking emergency legislation, on the books since 1955, which allowed the government to impose

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97. *Id.* at 141.

98. *Id.* at 147-48.

99. *Id.* at 148.

100. *Id.* at 149.

101. *Id.* at 150.

102. *Id.* at 151.

103. *Id.* at 152.

104. *Id.* at 153.

curfews, conduct house-to-house searches, and limit public gatherings.<sup>105</sup> The legislature subsequently voted to extend the emergency powers for an additional three months.<sup>106</sup> In December the Conseil d'État, the highest administrative court, rejected a challenge to the invocation of the emergency laws, finding that the level of violence and the possibility of recurrence justified the temporary infringement of civil liberties.<sup>107</sup> Thus, whether under the constitution's emergency provisions or not, invocation of emergency powers in France in past decades has meaningfully involved all branches of government.

Emergency powers in the United Kingdom have also been exercised in a legal framework involving the legislature and the courts. To the extent that the executive has exercised emergency powers in the past half-century, it has not done so unilaterally but rather under delegated authority from Parliament. This was certainly the case during World War II.<sup>108</sup> Moreover, the legislative check has been a meaningful one as the Prime Minister's generally high degree of control over the legislature in the parliamentary system has not always guaranteed support for particular emergency measures. In November 2005, for example, the House of Commons voted down anti-terror legislation proposed by Blair's government that would have extended the amount of time terrorism suspects could be detained without charge to ninety days.<sup>109</sup>

Additional constraints have been imposed by the courts and the European human rights system. When the United Kingdom has invoked the emergency derogation provisions of the European Convention on Human Rights ("ECHR"), there has been specific parliamentary approval of the derogations, as required by the 1998 Human Rights Act.<sup>110</sup> Emergency measures related to terrorism in the United Kingdom have been scrutinized by the European Court

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105. Decree No. 2005-1386 of Nov. 8, 2005, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Nov. 9, 2005, p. 17,593; *French Riots Defy Emergency Plan*, BBC NEWS, Nov. 9, 2005, <http://news.bbc.co.uk/2/hi/europe/4419770.stm>.

106. *France MPs Back Emergency Powers*, BBC NEWS, Nov. 15, 2005, <http://news.bbc.co.uk/2/hi/europe/4437800.stm>.

107. John Vinocur, *No Real Answer to Riots in Political Wrangling*, INT'L HERALD TRIB., Dec. 27, 2005, at 2.

108. CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 185-89 (1948).

109. See Ed Johnson, *Great Britain: Parliament Rejects Crucial Blair Antiterrorism Bill*, MIAMI HERALD, Nov. 10, 2005, at A15.

110. See Human Rights Act 1998 (Designated Derogation) Order, 2001, no. 3644 (U.K.), available at <http://www.uk-legislation.hmso.gov.uk/si/si2001/20013644.htm>; see also John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 215 (2004) (describing British use of legislation to grant emergency powers).

of Human Rights and also, increasingly, by domestic courts pursuant to the Human Rights Act.<sup>111</sup> For example, the House of Lords found incompatible with the ECHR the practice of indefinite detention of alien terrorists, as well as the use in immigration proceedings of testimony obtained in other countries through torture. In so doing, Lord Hoffman questioned whether terrorism could even be described as a “war or other public emergency threatening the life of the nation”<sup>112</sup> within the meaning of the ECHR and concluded that it could not be: “Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.”<sup>113</sup>

Similarly, the House of Lords concluded that the government had no emergency power to override the laws prohibiting torture. It noted that although torture had been illegal under common law, the Crown had at times exercised extraordinary powers to authorize it, but such powers in the Crown had ultimately been rejected during the constitutional struggles of the seventeenth century.<sup>114</sup> Even without formal constitutional constraints, then, the exercise of emergency powers in Britain has been constrained both procedurally and substantively.

Article 29 of the Mexican Constitution likewise limits the President’s invocation of emergency powers, providing that “he must do so for a limited time, by means of general preventive measures without such suspensions being limited to a specified individual.”<sup>115</sup> If Congress is in session, it must authorize the emergency measures, and it must be convened without delay if not in session. Moreover, certain basic human rights protections, such as the prohibition of torture, “cannot be suspended in any circumstances.”<sup>116</sup>

The current South Korean Constitution also constrains emergency executive power. It provides for emergency powers in defined circumstances of “internal turmoil, external menace, natural calamity, or a grave financial or

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111. *A (FC) & Others (FC) v. Sec’y of State for the Home Dep’t* [2005] UKHL 71 (invalidating the use in immigration proceeding of evidence obtained by torture by foreign governments); *A (FC) & Others (FC) v. Sec’y of State for the Home Dep’t* [2004] UKHL 56.

112. European Convention on Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 222.

113. *A (FC) & Others (FC) v. Sec’y of State for the Home Dep’t* [2004] UKHL 56, [96].

114. *A (FC) & Others (FC) v. Sec’y of State for the Home Dep’t* [2005] UKHL 71, [12].

115. *Constitución Política de los Estados Unidos Mexicanos* [Const.], art. 29, *as amended*, *Diario Oficial de la Federación* [D.O.], 5 de Febrero de 1917 (Mex.).

116. Ahcene Boulesbaa, *The Nature of the Obligations Incurred by States Under Article 2 of the UN Convention Against Torture*, 12 *HUM. RTS. Q.* 53, 88 (1990).

economic crisis.”<sup>117</sup> When there is no time to await the convocation of the legislature, the President is empowered to act immediately “for the maintenance of national security or public peace and order.” And when there are “major hostilities affecting national security,” the President may issue orders having the effect of law, but “only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.” Moreover, the President must promptly notify the National Assembly and obtain its approval; “[i]n case no approval is obtained, the actions or orders shall lose effect.”<sup>118</sup> The current constitution also provides for the declaration of martial law by the President, but he must promptly inform the legislature, which can lift the declaration.<sup>119</sup>

South Korea adopted these safeguards after its extensive and extremely negative experience with emergency powers. This history illustrates the potential for abuse of emergency powers. After the failure of the First<sup>120</sup> and Second Republics,<sup>121</sup> a military coup led by General Park Chung Hee began decades of dictatorial rule under emergency powers. General Park ruled the country by decree for two years and established the Third Republic in December 1963. That constitution contained an emergency provision through which the President’s powers were circumscribed by the National Assembly. This check was not, however, a robust one in practice. On December 6, 1971, responding to a year of student protests against unemployment, mandatory military service, and government corruption, Park declared a national state of emergency, which was ratified by the Assembly on December 26.<sup>122</sup>

Even the formal legislative check on the executive’s emergency powers vanished in the Fourth Republic, which came to power in a “coup-in-office” – again led by General Park – in 1972. The fourth South Korean Constitution, ratified December 12, 1972, dramatically expanded and elaborated on the emergency powers of the President.<sup>123</sup> The National Assembly no longer had a

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117. TAEHANMIN’GUK HEONBEOP art. 76 (S. Korea).

118. *Id.*

119. *Id.* art. 77.

120. See C.I. Eugene Kim, *Emergency, Development, and Human Rights: South Korea*, 18 *ASIAN SURV.* 363, 366 (1978).

121. U.S. DEP’T OF STATE, BACKGROUND NOTES: SOUTH KOREA 36-38 (1997), available at <http://www.umsl.edu/services/govdocs/backgroundnotes/45.htm>.

122. C.I. Eugene Kim, *Korea at the Crossroads: The Birth of the Fourth Republic*, 46 *PAC. AFF.* 218, 227 (1973).

123. Under these provisions, the President could “temporarily suspend the freedom and rights of the people as defined in the present Constitution.” YUSIN HEONBEOP [Constitution] art. 53 (S. Korea), reprinted in Kim, *supra* note 120, at 367-68. Although the President was required

role in ratifying decrees made under the emergency power. Put simply, under the new constitution, President Park enjoyed “a blanket power of emergency.”<sup>124</sup> President Park did not hesitate to use his new emergency powers, and human rights abuses were rampant.<sup>125</sup>

The Fourth Republic came to an abrupt end on October 26, 1979, with the assassination of General Park. Major General Chun Doo Hwan then assumed power in a December 12 coup. Facing continuing uprisings, the military declared “extraordinary martial law” on May 17, 1980, through which the military moved from maintaining order to exerting political control over the country. Korea’s fifth constitution was born under this state of martial law. The President’s emergency powers under the new constitution were more limited, once again requiring confirmation by the National Assembly in order to take effect.<sup>126</sup> Furthermore, Article 51(5) stated that the legislature could force the President to lift emergency measures “with the concurrence of a majority of the total members of the National Assembly.”<sup>127</sup> Although the President still retained the ability to dissolve the National Assembly, no Assembly could be dissolved twice for the same reason, and the President had to wait one year after the formation of the Assembly to exercise this power.<sup>128</sup>

South Korean politics continued to be volatile throughout the 1980s. A new sixth constitution was ultimately agreed upon, the result of “painstaking negotiation and compromise among the major political parties in the National Assembly, unlike the preceding two constitutions, which were essentially unilaterally drafted by the executive branch and then submitted to referendums under emergency measures or martial law.”<sup>129</sup> Significantly, it “strengthened the power of the National Assembly and considerably reduced the power of the

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to notify the National Assembly, the Assembly had only the power to “recommend to the President to lift the emergency measures” by majority vote, but even then the President was not required to comply if “there [we]re any special circumstances and reasons.” *Id.* The emergency measures were not to be subject to “judicial deliberations.” *Id.* The President was also empowered to proclaim martial law. *Id.* art. 54, reprinted in Kim, *supra* note 120, at 368.

124. Kim, *supra* note 120, at 367.

125. *Id.* at 376.

126. HAROLD C. HINTON, *KOREA UNDER NEW LEADERSHIP* 185 (1983). This restriction was seen as a very weak one, if any restriction at all. See ROBERT E. BEDESKI, *THE TRANSFORMATION OF SOUTH KOREA* 36 (1994).

127. HINTON, *supra* note 126, at 185.

128. *Id.* at 62.

129. FED. RESEARCH DIV., LIBRARY OF CONG., *SOUTH KOREA: A COUNTRY STUDY* 201-02 (Andrea Matles Savada & William Shaw eds., 1992), available at <http://countrystudies.us/south-korea>.

executive.”<sup>130</sup> After decades of instability and autocratic control, the current Korean Sixth Republic has proven much more stable and democratic than its predecessors. Control of emergency powers is an important component of this stability.

South Korea’s experience demonstrates the downside of extensive use of emergency powers. While exercise of emergency executive powers does not always lead to authoritarian rule, the absence of meaningful legislative control of such powers and of judicial review are certainly danger signs. More fundamentally, these comparative examples provide little support for the essentialist argument that unenumerated, unlimited emergency powers are an inherent, inevitable, or desirable part of executive power in democracies. Rather, such powers seem to be a typical characteristic of military dictatorships.

### 3. *Treaty Powers*

Article II of the U.S. Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>131</sup> Proponents of the inherent power thesis assert that the power to make, interpret, and break international agreements is executive in nature and cannot be interfered with by the legislature or the courts.<sup>132</sup>

The variety of approaches followed by other countries with respect to the power to enter into and withdraw from international legal obligations belies the notion that this power, or some subset of this power, is inherently executive in nature. While all give the executive a prominent role in making international agreements, they also involve the legislature and the courts.

At one apparent extreme is the United Kingdom, where under the unwritten constitution, the executive branch controls treaty-making and the legislature’s consent is not formally required. In practice, however, executive power over treaties is not as great as it seems. Treaties cannot be given effect in domestic law until Parliament passes implementing legislation. As a consequence, it is standard practice for the government “to insist that any

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130. *Id.* at 202.

131. U.S. CONST. art. II, § 2, cl. 2.

132. See, e.g., Detainees Memo, *supra* note 1, at 29 (“The President could justifiably exercise his constitutional authority over treaties by regarding the Geneva Conventions as suspended in relation to Afghanistan.”). Cf. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (stating that determining the meaning of treaties is “emphatically the province and duty” of the judiciary) (internal quotation marks and citation omitted).

necessary UK legislation . . . must be in place before a treaty is ratified or acceded to” in order to avoid breaching the country’s international legal obligations.<sup>133</sup> In addition, since 1924, a quasi-constitutional practice called the Ponsonby Rule has required that all treaties subject to ratification be laid before the Parliament for twenty-one days for potential objection.<sup>134</sup> In addition, Parliament may pass legislation or implement structures requiring its advance approval for particular kinds of treaties even if they do not require domestic legislation for implementation, as Parliament has done with respect to certain European Union measures.<sup>135</sup> Because treaties generally require implementation in domestic law by Parliament, parliamentary supremacy means that the executive is not free to breach treaties or insist on particular interpretations of treaties once they have been implemented. Thus, power over international legal obligations is shared between the executive and Parliament in the United Kingdom to a greater degree than might initially be apparent.

France, Germany, and South Korea all require that certain types of international agreements be ratified by the legislature, but they also give international law direct effect in the national legal system. In these countries, treaties are subject to interpretation and enforcement by the courts; the executive enjoys no monopoly on treaty interpretation.

For example, the French Constitution gives the President the basic power to “negotiate and ratify treaties,”<sup>136</sup> but specifies that certain types of treaties “may be ratified or approved only by virtue of an Act of Parliament,” namely “[p]eace treaties, commercial treaties, treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory.”<sup>137</sup> Once ratified, treaties prevail over acts of parliament.<sup>138</sup>

The German Basic Law likewise divides the power to enter into international agreements between the executive and the legislature. It provides

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133. U.K. FOREIGN & COMMONWEALTH OFFICE, EVIDENCE TO THE ROYAL COMMISSION ON THE REFORM OF THE HOUSE OF LORDS 2-3 (1996) [hereinafter EVIDENCE TO THE ROYAL COMMISSION]; U.K. FOREIGN & COMMONWEALTH OFFICE, TREATIES AND MOUS: GUIDANCE ON PRACTICE AND PROCEDURES 7 (2004).

134. EVIDENCE TO THE ROYAL COMMISSION, *supra* note 133, at 3-4.

135. *Id.* at 3.

136. 1958 CONST. art. 52 (Fr.). It also provides that “[h]e shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification,” which in practice means agreements negotiated by the ministerial government. *Id.*

137. *Id.* art. 53.

138. *Id.* art. 55.

that “[t]he Federal President shall represent the Federation in terms of international law. He shall conclude treaties with foreign states on behalf of the Federation.”<sup>139</sup> However, “[t]reaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.”<sup>140</sup> The Basic Law also explicitly contemplates executive agreements.<sup>141</sup> Though it gives the federal government the primary power to conduct foreign relations, the Basic Law also requires the federal government to confer with the states, or *Länder*, about treaties that would affect their special interests and allows the *Länder* to enter into treaties in certain circumstances.<sup>142</sup> Like France, Germany provides for the direct effect of international law: “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”<sup>143</sup>

Under the South Korean Constitution, “[t]he President shall be the Head of State and represent the State vis-a-vis foreign states.”<sup>144</sup> He also “shall conclude and ratify treaties; accredit, receive, or dispatch diplomatic envoys; and declare war and conclude peace.”<sup>145</sup> Like France and Germany, South Korea requires the participation of the legislature in concluding certain types of treaties, including “treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.”<sup>146</sup> The Korean Constitution likewise provides that “[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of

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139. GRUNDGESETZ [GG] art. 59 (F.R.G.).

140. *Id.* The Basic Law further provides for legislative involvement in foreign affairs by requiring that “[t]he Bundestag shall appoint a Committee on Foreign Affairs and a Committee on Defense.” *Id.* art. 45a.

141. *Id.* art. 59.

142. *Id.* art. 32(1)-(3) (“Relations with foreign states shall be conducted by the Federation; Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely fashion. . . . Insofar as the *Länder* have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.”).

143. *Id.* art. 25.

144. TAEHANMIN’GUK HEONBEOP art. 66 (S. Korea).

145. *Id.* art. 73.

146. *Id.* art. 60.

international law have the same effect as the domestic laws of the Republic of Korea.”<sup>147</sup>

The Mexican Constitution grants the President the power “[t]o direct diplomatic negotiations and make treaties with foreign powers, submitting them to the ratification of the federal Congress.”<sup>148</sup> In some cases, even greater legislative participation is required. In one recent example, Mexico amended its constitution, with the support of the national and state legislatures, in order to ratify the treaty of the International Criminal Court.<sup>149</sup>

In sum, none of the examples supports the notion that it is an inherent part of executive power to enter into, interpret, and break international agreements. Rather, these countries recognize that treaties are a form of law binding on the executive.

### C. *The Inherently Expansive Character of Executive Power*

One thing that does seem inherent in executive power is its tendency toward expansion. In the past half-century, the *de facto* trend in many countries with seemingly disparate systems—from parliamentary to presidential—has been toward strong chief executives.<sup>150</sup> Given the widespread nature of this phenomenon, the reasons for this trend appear to have little to do with the precise constitutional structures of executive power that nations have chosen. Factors cited by political scientists as potentially responsible for this trend include the growth of the bureaucratic state, the erosion of political parties based on fixed social group identities, changes in mass communications, and the increase in the number of issues governed by international agreements that are likely to be negotiated by executive branch officials.<sup>151</sup>

Executive power has shown a tendency toward expansion even in democracies. But many nations have crossed the line from democracy to dictatorship as the result of undue expansion of executive power and elimination of checks and balances. Understanding why this happens in some

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147. *Id.* art. 6.

148. Constitución Política de los Estados Unidos Mexicanos [Const.], art. 89(X), *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

149. See Coalition for the Int’l Criminal Court, Updates on Mexico (Dec. 31, 2005), <http://www.iccnw.org/?mod=newsdetail&news=215>.

150. See Thomas Poguntke & Paul Webb, *The Presidentialization of Politics in Democratic Societies: A Framework for Analysis*, in *THE PRESIDENTIALIZATION OF POLITICS*, *supra* note 41, at 1.

151. See *id.* at 13–15.

societies and not in others is beyond the scope of this Essay, but it is worth noting the contrasts between South Korea and Mexico with respect to expansions and contractions of executive power. South Korea's years of military dictatorship were enabled by the invocation of emergency powers under its previous constitutions; Mexican Presidents managed to maintain dictatorial control for decades without ever needing to invoke emergency powers because of excess party identification in the legislature. South Korea achieved democracy only following dramatic constitutional revision; Mexico became a functioning democracy following the reform of its election laws, without substantially altering the constitutional powers of the President. There is more than one path to excess executive power and more than one path back to a balanced separation of powers.

As noted previously, executive power in South Korea has ebbed and flowed dramatically through six constitutions, from brief parliamentary control in the early 1960s, to extremely autocratic executive control in the 1970s, to a strong but checked President under the current democratic Sixth Republic.<sup>152</sup> Commentators have noted a popular "cultism" that surrounds the Korean President. Cults of personality have thwarted democratization attempts over the decades, despite various constitutional structures that attempted to limit the executive's power, at least on paper. The Korean concept of *daekwon*, or ultimate power, "denotes the power of the highest office in the South Korean political system: the presidential power or the presidency."<sup>153</sup> According to one observer, the term is often used in connection with presidential power, and reflects a popular understanding of broad presidential power.<sup>154</sup> Similarly, the Korean term for the incumbent president himself is *daetongryong*, a term that "generates special awe in Korean people, unlike the terms 'president' or 'prime minister.'"<sup>155</sup> This cultural attitude may help explain the ineffectiveness of formal constitutional constraints on the exercise of executive power during South Korea's years of dictatorship. At the same time, it also explains why limits on executive power, particularly emergency power, are such an important component of South Korea's current democratic constitution.

Mexican history also illustrates the degree to which factors other than constitutional law may impact executive power. Mexico has undergone a

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152. See *supra* notes 117-130 and accompanying text.

153. Sung Chul Yang, *An Analysis of South Korea's Political Process and Party Politics*, in *POLITICS AND POLICY IN THE NEW KOREAN STATE* 6, 24 (James Cotton ed., 1995); see also Manwo Lee, *South Korea's Politics of Succession and the December 1992 Presidential Election*, in *POLITICS AND POLICY IN THE NEW KOREAN STATE*, *supra*, at 35, 38.

154. Sung, *supra* note 153, at 24.

155. *Id.* at 25.

revolutionary shift toward democracy in recent years but has not dramatically changed its President's formal constitutional powers. Although the 1917 Mexican Constitution established a system of divided government modeled on the U.S. Constitution, throughout most of the century the sitting President had virtually unchecked de facto power because the legislature was governed by the highly disciplined ruling party, the PRI.<sup>156</sup> Despite its formal constitutional powers, the legislature's role was extremely limited in PRI-controlled Mexico, merely a "rubber stamp"<sup>157</sup> for the President and a place to either groom underlings on their way up or pay off loyal functionaries on their way down.<sup>158</sup> As such, it lacked prestige and did not attract political talent: "Over the years, as the Mexican executive continued to exercise more influence and grow in size, it became apparent to most astute politicians that a career in the legislative branch would not lead to the upper echelons of the power structure . . . ."<sup>159</sup> The President selected the majority leader, and legislators relied on the executive branch for information and policy recommendations.<sup>160</sup> As long as it was controlled by the ruling party, the legislature provided no real limit on executive power. Nor was the judicial branch a significant check on the Mexican President's power. It "normally limit[ed] itself to a nonpolitical role and has not mounted frontal challenges to Mexican presidents."<sup>161</sup>

Writing in 1992, one scholar put it this way: "When in office, [presidents] are subject to few if any legal or constitutional constraints. A Mexican president can, literally, get away with murder, although it is fair to say that murderers do not generally become presidents."<sup>162</sup> Because of its stability, the Mexican system earned the dubious and much-used moniker of "the perfect dictatorship."<sup>163</sup>

In light of this history, Mexico's peaceful transformation into a functioning multi-party state is remarkable. Unlike South Korea, Mexico's transformation

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156. Kenneth F. Johnson, *Mexico's Authoritarian Presidency*, in *PRESIDENTIAL POWER IN LATIN AMERICAN POLITICS* 33, 49 (Thomas V. DiBacco ed., 1977).

157. *Id.* at 50.

158. See MARTIN C. NEEDLER, *MEXICAN POLITICS* 82 (3d ed. 1995).

159. Roderic Camp, *Mexico's Legislature: Missing the Democratic Lockstep?*, in *LEGISLATURES AND THE NEW DEMOCRACIES IN LATIN AMERICA* 17, 21 (David Close ed., 1995).

160. *Id.* at 24.

161. NEEDLER, *supra* note 158, at 84.

162. GEORGE PHILIP, *THE PRESIDENCY IN MEXICAN POLITICS* 4 (1992).

163. See Manuel Pastor & Carol Wise, *The Fox Administration and the Politics of Economic Transition*, in *MEXICO'S DEMOCRACY AT WORK* 89, 89 (Russell Crandall et al. eds., 2005); see also Chappell Lawson, *Mexico's Unfinished Transition: Democratization and Authoritarian Enclaves in Mexico*, 16 *MEX. STUD.* 267, 283 (2000).

occurred without significant constitutional change in the powers of the executive. Instead, Mexico focused on reform of the electoral process for the legislature. The most important reforms came into force in 1988 and, by a decade later, had led to a sea change in legislative control. Power was distributed among three major parties, and for the first time in sixty-eight years, the PRI lost its congressional majority.<sup>164</sup> The legislature began to emerge as a major check on the once insuperable power of the executive. For example, the number of legislative initiatives originating in the Congress between 1997 and 2000—as opposed to the presidency—increased by 150% as compared to the 1994-1997 session.<sup>165</sup>

The election of Vicente Fox on July 3, 2000, was another watershed, as it was the first time a non-PRI candidate won the presidency in seventy-one years. “The victory of a party other than PRI essentially stood the Mexican political model on its head, destroying permanently the incestuous, monopolistic relationship between state and party.”<sup>166</sup> The judicial branch also took on additional powers in the mid-1990s and began to show its independence when the high court ruled against the President in a dispute with Congress over the release of records in a banking scandal.<sup>167</sup>

One of the most interesting possibilities suggested by these comparative experiences is the degree to which legal arrangements may set the political context that either allows or disallows the expansion of executive power—for example, as when electoral reform in Mexico changed the composition of the legislature and thereby altered its willingness to exercise the formal powers it had always possessed on paper, or when the potential for power-sharing created by the French Constitution’s dual executive came to fruition in periods of cohabitation.

These examples also suggest that one under-explored area in our understanding of the powers of the U.S. President is the way in which our laws influence the structure of politics. In other words, to the extent that politics plays the greatest role in checking the powers of the executive, scholars of executive power might need to consider the effect of our election laws on the ability of Congress to act as a significant check on the powers of the President. In recent years, there has been a trend in redistricting toward increasingly

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164. See Ma. Amparo Casar, *Executive-Legislative Relations: The Case of Mexico (1946-1997)*, in *LEGISLATIVE POLITICS IN LATIN AMERICA* 114, 114 (Scott Morgenstern & Benito Nacif eds., 2002).

165. RODERIC AI CAMP, *POLITICS IN MEXICO* 173 (4th ed. 2003).

166. *Id.* at 197.

167. *Id.* at 180 (quoting Kevin Sullivan & Mary Jordan, *Mexican Supreme Court Refuses To Take Back Seat*, *WASH. POST*, Sept. 10, 2000, at A31).

“safe” congressional seats – that is, districts in which one party enjoys so large a majority as to make the general election essentially non-competitive. These “safe” seats tend to be occupied by more extreme partisan candidates; this is because the winner is determined by the party primary and the average primary voter tends to be more partisan and extreme than the average general election voter.<sup>168</sup> This may have resulted in a greater tendency for legislators in the President’s party to be party loyalists and to support the President’s agenda, particularly with respect to foreign affairs. Further empirical research is needed to determine whether this has had any effect on the willingness of legislators to act as a check on the President in the realm of foreign affairs and national security, but if it has, reform of election laws to make congressional elections more competitive might prove an interesting mechanism for checking the power of the executive branch. Regardless of whether this particular hypothesis is correct, the insights gained from these comparative examples suggest that this might be a fruitful area for research.

## CONCLUSION

What do these comparative examples tell us about the scope of inherent executive power under the U.S. Constitution? Nothing definitive. What they do suggest is that executive power is generally not fixed but contingent and is strongly influenced by political context. They thus suggest that we should be skeptical of arguments that the “executive Power” vested in the President by Article II of the U.S. Constitution has a broad and abstract content that can be determined by reference to theoretical first principles.

The examples also provide a counterweight to recent arguments that executive power, by its very nature, requires unchecked authority to act independently based on invocation of inherent power. Other contemporary democracies generally recognize legal or constitutional limits on executive power. Those limits preserve a balance of political power with the legislature and the courts that protects liberty; this balance is maintained even in matters touching on war, foreign affairs, and national security. As in the United States, however, the practical effectiveness of formal divisions of power seems to depend a great deal on political context. This suggests some reason for caution with respect to recent suggestions that the legislature, rather than the courts, is

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168. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35 (2000); see also David Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974) (noting the decrease in competitive congressional elections).

the best check on executive power in times of crisis.<sup>169</sup> Legislators appear no more eager (and perhaps less eager) than judges to disagree with a powerful and popular executive, and legislators are often quite willing to cede their powers. Perhaps that is the most important lesson. To the extent that the current environment in the United States makes broad claims of inherent executive power politically plausible, that is a dangerous sign.

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169. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).