
William Feldman

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William Feldman†

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† J.D., candidate, Cornell Law School, expected 2006; B.S., Cornell University, 2003. The author would like to thank Michael Horn and Ariel Gordon for their suggestions, insight, and editing assistance.

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Introduction

Any democratic government faced with a war, an invasion, a domestic insurrection, or other type of emergency must determine how it will respond. How much power will the executive be given? What will be the role of the other branches of government? How long will the response last? How will the government administer justice during such a period? What, if any, fundamental rights will be sacrificed in order to protect the nation? The way in which a nation responds to such questions will undoubtedly determine how successful it will be in responding to the crisis with which it is faced.

The United States, as well as other common law nations, such as Great Britain, has developed the doctrine of “martial law.” Martial law is not mentioned by name in the U.S. Constitution, nor are any emergency powers explicitly granted to the President. This has left development of the doctrine to the courts. Though no one authoritative definition of “martial law” has developed, it has been defined by the Supreme Court as follows: “Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed.” At its essence, martial law is based on the concept of necessity, and provides little limitation on the use of military power when circumstances require its imposition. While martial law has never been imposed throughout the entire United States, it has been imposed occasionally by both state governments and the federal government in certain parts of the nation, most notably during the Civil War and World War II.

In contrast to the American system is the French état de siège (state of siege), which, while similar in basic concept, has a distinct origin and has been implemented far differently. The state of siege is explicitly mentioned in the 1958 French Constitution of the Fifth Republic, and has been further defined by statute. This “extreme legality” is a centrally important distinction between the state of siege and martial law. Emergency powers have been utilized on several occasions in France, especially during the World Wars. Since the ratification of the 1958 Constitution, however, the President has only implemented emergency powers once, in 1961, to

3. See discussion infra Part I.B.
5. See discussion infra Part I.A.
6. See discussion infra Part I.A.
8. Id.
counteract a military insurgence in Algeria. Nevertheless, the history of the state of siege evidences a regulated process, often refined to address weaknesses and abuses by those in power.

This Note will argue that the French state of siege is better equipped to handle domestic emergencies than American martial law, in terms of its ability to strike an effective balance between protecting the nation and its interests without too greatly sacrificing the nation's underlying values and the fundamental rights of its people. Given the critical periods in which a nation must exercise its emergency powers, it is important to consider which approach is best able to counteract the threat without undermining the basic values of the nation itself. This topic takes on particular relevance in the twenty-first century, given the rising incidence of terrorism and the continuous threat of a large-scale attack, which could easily overwhelm civilian infrastructure.

In Part I.A., this Note explores the historical origins of the French state of siege, as well as current treatment of the doctrine under the 1958 Constitution of the Fifth Republic. Part I.B. considers American martial law, reviewing relevant history and Supreme Court case law. Part II provides an analysis of the key differences between the state of siege and martial law, and explores the relative benefits and detriments of the two approaches. Part III presents concluding remarks, and discusses possible future developments of the emergency powers doctrine in the United States.

I. Background

A. The State of Siege

1. Historical Origins

One cannot fully appreciate the state of siege doctrine without considering its development over time. As the French constitutional system has evolved continuously through the past decades, the state of siege doctrine has evolved along with it. A consideration of the past formulations of the doctrine will serve to highlight its current strengths, as well as its weaknesses.

Before beginning this historical review, it is necessary to make one important distinction—the distinction between the état de siege réel (actual state of siege) and the état de siege fictif (constructive state of siege). Etat de siege réel refers to situations in which a territory has been taken over by the enemy or where military operations are current and ongoing. A situ-

10. See discussion infra Part I.A.
11. See e.g., Davies, supra note 1, at 67-68 (describing how a wide-scale small-pox attack could affect the entire nation).
12. Bell, supra note 9, at 1-16.
ation such as this suspends all law.\textsuperscript{14} Military decisions in such a situation must be made in a way that does not allow the proper and careful thought that would be subject to review, and thus the state of siege provisions in the Constitution or in statutes have little applicability.\textsuperscript{15} In contrast, during the \textit{état de siège fictif}, normal life is not entirely interrupted, though there is a danger that it might be.\textsuperscript{16} Civilian institutions are disrupted only to the extent necessary, and the obligation to maintain legal order and constitutional guarantees remains.\textsuperscript{17} While the distinction between the \textit{état de siège réel} and \textit{état de siège fictif} may sometimes be only a matter of degree, it is the latter situation to which the various statutes and constitutional provisions discussed throughout this Note most directly apply.

Prior to the French Revolution of 1789, declaring a "state of siege" meant that all governmental power would be transferred to a military commander in an area under attack.\textsuperscript{18} Its application was a matter of custom and it remained in effect as long as a threat persisted.\textsuperscript{19} It was not until after the Revolution when the state of siege was first articulated in statutory form.\textsuperscript{20} The law of July 10, 1791 established the rules governing the implementation and continuation of a state of siege as it related to military posts.\textsuperscript{21} Though applicable only to fortified areas, the 1791 law marked the beginning of the modern statutory basis of the state of siege.\textsuperscript{22} Six years later, in 1797, the concept expanded in a statute that authorized the declaration of a state of siege in case of foreign invasion or rebellion.\textsuperscript{23} The statute was interpreted broadly, however, as "rebellion" was considered to include any type of domestic disturbance.\textsuperscript{24} For example, Napoleon I and Napoleon II invoked the doctrine to combat political opposition.\textsuperscript{25} This abuse, as well the creation of the Second Republic in 1848, led to further revisions in the state of siege doctrine. The 1848 Constitution specifically allowed for the declaration of a state of siege, stating that "a law will fix the occasions in which the state of siege can be declared, and will regulate the forms and effects of this measure."\textsuperscript{26} Soon after, the law of August 9, 1849 was passed, giving substance to Article 106 of the constitution.\textsuperscript{27} Article 7

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} ROSSITER, \textit{supra} note 7, at 80.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Kelly & Pelletier, \textit{supra} note 18, at 44.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} ROSSITER, \textit{supra} note 7, at 81 (citing \textit{CONST.} art. 106 (1848) (Fr.)); see also Kim Lane Scheppele, \textit{Law in a Time of Emergency: States of Exception and the Temptations of 9/11}, 6 U. Pa. J. Const. L. 1001, 1006-07 (2004).
\item \textsuperscript{27} The pertinent provisions of the Law of 1849, in English translation, reads as follows:
\end{itemize}
of the 1849 law provides that upon the declaration of a state of siege, police powers pass from the civilian authorities to the military, with the civilian authorities retaining any powers not assumed by the military. Article 8 grants jurisdiction to military tribunals to try civilians for offenses against the safety of the Republic, against the constitution, or public order. Article 9 gives the military the power to infringe upon fundamental liberties, such as the right to assemble and the right to privacy. Despite its constitutional origins and statutory articulation, the doctrine was still abused by those in power. Napoleon III used it frequently, even declaring a state of siege to deal with a hostile Constituent Assembly.

It was just four years later, in 1852, when France ratified a new constitution. In that document, the power to declare a state of siege was transferred from the legislature to the head of state, with the Senate retaining power to confirm or reject the declaration. Constitutional laws passed in 1875 reorganized the configuration of French government, essentially making the organizational aspects of the law of August 9, 1849 inapplicable to the new power structure. In order to correct this problem, the law of April 4, 1878 was passed, which updated the state of siege doctrine and brought it into conformity with the new governmental system, while maintaining the basic substantive concepts embodied in the 1849 legislation.

7. As soon as the state of siege has been declared, the powers of the police and those others with which the civil authority has been clothed for the maintenance of order pass in their entirety to the military authority.

The civil authority continues nevertheless to exercise those of its powers of which it has not been dispossessed by the military authority.

8. The military courts may take jurisdiction over crimes and offenses against the safety of the Republic, against the Constitution, against public peace and order, whatever be the status of the principal perpetrators and their accomplices.

9. The military authority has the power, (1) to conduct searches by day or night in the homes of citizens; (2) to deport liberated convicts and persons who do not have residence in the areas placed in the state of siege; (3) to direct the surrender of arms and munitions, and to proceed to search for and remove them; (4) to forbid publications and meetings which it judges to be of a nature to incite or sustain disorder.

11. Despite the state of siege, citizens continue to exercise the rights guaranteed by the Constitution whose enjoyment is not suspended by the preceding articles.

13. Following the lift of the state of siege, the military courts continue to recognize crimes and offenses over which they have already assumed jurisdiction.

The Law of August 9, 1849 (translated in ROSSITER, supra note 7, at 83).

28. ROSSITER, supra note 7, at 83.
29. Id.
30. Id.
31. ROSSITER, supra note 7, at 81.
32. Id.
33. Radin, supra note 13, at 638.
34. ROSSITER, supra note 7, at 82.
35. Id. The full text of the Law of 1878 provides:
Article 1 of the 1878 law provided the Senate with the sole authority to declare a state of siege, and limited its declaration to situations in which a foreign invasion had occurred or an armed insurrection existed. This provision greatly narrowed the broad authorization under the law of 1849 to declare a state of siege in the event of an "imminent danger to internal or external security," a standard open to very broad interpretation.

Thus, the 1849 and 1878 laws became the basis of the state of siege doctrine. Though both were created under constitutional regimes that later collapsed, these two statutes remained the fundamental building blocks upon which later developments in the state of siege doctrine were based.

The state of siege was first invoked in the twentieth century during World War I; on August 2, 1914, President Poincaré issued a decree placing the entire nation under a state of siege. It was the largest such declaration in French history, and did not comply with the state of siege requirements established in the 1878 law. Specifically, it violated the 1878 law by encompassing the entire nation, and thus was not limited to areas in which armed invasion had actually occurred. Further, the declara-

1. The state of siege can only be declared in the event of imminent danger resulting from a foreign war or an armed insurrection.
   Only a law can declare the state of siege.
   This law will designate the communes, arrondissements [municipal subdivisions in French cities], and departments to which it is to apply. It will fix the period of its duration.
   At the expiration of this period, the state of siege ceases automatically, unless a new law shall prolong its effects.

2. In the event that the Chambers are adjourned, the President of the Republic can declare the state of siege, on the advice of the Council of ministers; but then the Chambers meet automatically two days later.

3. In the event the Chamber of Deputies is dissolved, and until elections shall have been entirely completed, the state of siege cannot, even provisionally, be declared by the President of the Republic.
   Nevertheless, in the event of a foreign war, the President, on the advice of the Council of ministers, can declare the state of siege in the territories menaced by the enemy, on condition that he convvoke the electoral colleges and reassemble the Chambers in the shortest possible delay.

4. In the event that communications with Algeria are interrupted, the governor can declare all or part of Algeria in a state of siege, under the conditions of this law.

5. In the occasions foreseen by Articles 2 and 3, the Chambers, as soon as they shall have reassembled, shall maintain or lift the state of siege. In the event of a disagreement between them, the state of siege is lifted automatically.

6. Articles 4 and 5 of the law of August 9, 1849 are hereby maintained, as well as the provisions of its other articles not contrary to the present law.

Id. at 82-83.
36. ROSSITER, supra note 7, at 84-85; Radin, supra note 13, at 638.
37. ROSSITER, supra note 7, at 85.
38. Id. at 83.
39. Id.
40. Id. at 91.
41. Id. at 91-92.
tion did not have an established expiration date. In areas that were invaded by foreign forces, the army took control entirely, administering the area in line with military ideas of authority and liberty. All matters of municipal governance resided in the military commander, who determined which specific functions of local government, if any, the military would assume. In Paris, for example, which came under direct attack in 1914, the military assumed full control over the city's civilian population.

Due in part to these difficulties in World War I, France made changes to the state of siege laws in 1938, providing more thorough instructions for the transition from civil to military rule during war time. However, due to the collapse of the French war effort in the early days of World War II, it has been difficult for scholars to determine the effect of these changes on the operation of the state of siege.

2. The State of Siege Under the Constitution of the Fifth Republic

The advent of the Constitution of the Fifth Republic, ratified in 1958, brought with it a new approach to the state of siege and the operation of governmental emergency powers. Two articles of the 1958 Constitution dealt with the powers of government during an emergency. Article 16, addressing “emergency powers,” grants unilateral authority to the President to declare an emergency “when 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 when the proper functioning of the constitutional public powers is interrupted.” Under Article 16, it is for the President alone to determine

42. Id. at 92.
43. Id. at 93.
44. Kelly & Pelletier, supra note 18, at 44.
45. Id. at 44-45.
46. Id. at 46.
47. See id.
48. BELL, supra note 9, at 14-16.
49. CONST. art. 16 (Fr.), translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: FRANCE 5-6 (Gisbert H. Flanz ed., 2000). The full text of Article 16, translated into English, reads as follows:

When the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted, the President of the Republic takes the measures required by these circumstances, after officially consulting the Prime Minister, the Presidents of the Assemblies as well as the Constitutional Council.

He informs the Nation of these measures in a message.

The measures must be prompted by the desire to provide the constitutional public powers, in the shortest possible time, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures.

Parliament convenes as of right.

The National Assembly cannot be dissolved during the exercise of emergency powers.
how long the emergency endures. Further, Article 16 requires that the Parliament meet when emergency powers are invoked. Although the executive is normally able to dissolve the Parliament, Article 16 prohibits its dissolution while emergency powers are being exercised. Article 16 also requires the President to consult the Conseil Constitutionnel prior to the use of emergency powers. The Conseil responds by issuing an advisory opinion, which is provided to the general public. While the President can disregard the opinion of the Conseil Constitutionnel, an adverse judgment would have a powerful impact on the public, and the prospect of a negative opinion can serve as a constraint on presidential abuse, especially in the absence of a legislative check.

The addition of Article 16 to the Constitution may have been due in part to proposals during the constitutional debate from Charles de Gaulle, who suggested that the president should have inherent powers to act in an emergency situation, such as World War II. He wanted the president's authority to act when governmental institutions collapsed recognized in the Constitution itself. Article 36, the other provision of the 1958 Constitution addressing emergency powers, deals directly with the declaration of a state of siege. The Article gives the Council of Ministers, led by the President, the authority to declare a state of siege for up to twelve days on its own motion. Any extension beyond twelve days must be approved by the Parliament. The laws of 1848 and 1878, discussed above, remained in force under the

50. Id.; see also Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029, 1038 n.19 (2004).
53. The Conseil Constitutionnel, though performing what could be considered a "judicial" function, is not technically part of the judiciary. It is an independent branch of government, addressed in separate articles of the 1958 Constitution, with the special function of reviewing the constitutionality of governmental actions, especially laws prior to their promulgation. See BELL, supra note 9, at 27, 29-34, 62.
55. See BELL, supra note 9, at 31.
56. See id. at 31; Ackerman, supra note 50, at 1038 n.19.
57. BELL, supra note 9, at 14.
58. Id. at 15.
59. Const. art. 36 (Fr.), translated in 7 Constitutions of the Countries of the World: France 10 (Gisbert H. Flanz ed., 2000). The full text of Article 36, in English translation, reads as follows:

The state of siege is decreed in the Council of Ministers.
Its extension beyond twelve days cannot be authorized except by Parliament.

Id.
1958 Constitution to the extent compatible with Article 36. The main distinction between Article 36 and Article 16 relates to the extent of executive power. Article 16 was likely included in order to circumvent the strict legislative control over the executive in World War I, which had resulted in legislation reducing the jurisdiction of military tribunals and prematurely ordering the return of police powers to civilian authorities in many parts of the nation. Despite this distinction, both articles have been interpreted to encompass the same type of powers. Charles de Gaulle preferred the use of Article 16 emergency powers to the state of siege powers in Article 36 in any situation short of war or open domestic insurrection. Article 16 has been invoked only once, during the attempted military insurrection in Algeria in 1961. There, de Gaulle interpreted his Article 16 powers quite broadly, forming special military courts, limiting the basic rights of civilians, and censoring the press. He was criticized for his decision to continue the state of emergency for months after the threat had been suppressed.

Despite the new procedures articulated in the 1958 Constitution, the effects of the state of siege continue to be primarily defined in the laws of 1849 and 1878. These substantive effects will be considered next.

3. Operation of the State of Siege

Once a state of siege is declared, Article 7 of the law of 1878 grants police powers, ordinarily exercised by civilian authorities, to the military. The military commanders in the area administer local justice and maintain order in the place of civilian authorities. This grant of police powers is limited, however, and it is expected that civilian authorities will exercise their duties, to the extent possible, to keep the peace. The military has no power to interfere with local business of a strictly civil character, such as the setting of tax rates. Of the various functions performed by the military during a state of siege, the administration of justice and the effect on civil liberties are of primary significance, and thus will be considered in detail.

62. Kelly & Pelletier, supra note 18, at 47.
63. Id. at 45-47.
64. Id. at 47.
65. See id. at 48.
66. Ackerman, supra note 50, at 1038 n.19; see Bell, supra note 9, at 16; Ferejohn & Pasquino, supra note 9, at 216.
68. Ackerman, supra note 50, at 1038 n.19; Kelly & Pelletier, supra note 18, at 48.
69. Kelly & Pelletier, supra note 18, at 47.
70. Rossiter, supra note 7, at 86.
71. Id.
72. Id.
73. Id.
a) Military Tribunals

During a state of siege, the military establishes its own courts, similar in design to courts-martial, to try civilians. Article 8 of the law of 1849 and Article 8 of the law of 1878 provide military courts with jurisdiction over crimes and offenses against the safety of the nation, the constitution, and public peace and order. Civilian courts are allowed to retain jurisdiction over cases that do not fit within these categories. During World War I, when a state of siege was declared, the French military established courts in each military district in the nation, and provided for special courts for more serious cases. Courts of appeal were established to review tribunal decisions. Despite the limited offenses listed in Article 8, the military courts were able to exercise jurisdiction over virtually any case, as they broadly interpreted the jurisdictional language of the statutes. Disputes between civilian and military authorities regarding jurisdiction over important cases were referred to a bureau anonyme in the Palace of Justice, composed of both civilian and military members. With the exception of these special cases, the military retained the full right to decide which cases it would adjudicate. The military courts even invoked jurisdiction over crimes that had no clear connection to national safety, such as theft in a train station and the attempted murder of a private individual. Despite this occasional expansion of jurisdiction, routine cases were usually assigned to the civil courts within the appropriate territory.

In response to the sometimes unwarranted exercise of jurisdiction by the military tribunals, the French Parliament passed the Statute of April 27, 1916, which explicitly defined the military tribunal's jurisdiction. The statute established military jurisdiction only in those cases where civilians were accused of crimes against the state, such as espionage, treason, or any other crime "interfering with the national defense," or other serious crimes under the penal code.

In sum, French military courts possess broad jurisdictional powers over civilians during a declared state of siege, though this power has been limited by statute. The military trials were equitable but swift, and became more summary in nature the closer they were to the front lines. Penalties were proportional to the nature of the crisis, and were fixed by the penal code, as neither the military authorities nor the civilian courts could create

74. Id. at 83, 86.
75. Id. at 85–86; see also Kelly & Pelletier, supra note 18, at 49 (describing the delegation of cases between military and civilian courts).
76. Kelly & Pelletier, supra note 18, at 49.
77. See id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Radin, supra note 13, at 641.
83. Kelly & Pelletier, supra note 18, at 49.
84. Id.
85. Rossiter, supra note 7, at 94.
their own penalties.  

b) Individual Rights

Article 9 of the law of 1849 allows the military to suspend certain constitutional protections during a state of siege. Under Article 9, the military can (1) search homes of citizens at any time, (2) deport liberated convicts and persons who are not residents of the area under the state of siege, (3) require the surrender of arms and munitions and search for and remove any weaponry at any time, and (4) censor any publications and meetings it judges to incite or sustain disorder.

French courts have historically deferred to the actions of government during a state of siege. There have been few instances in which civilians received compensation in a civil court for the actions of the French military during a state of siege. Such compensation has been limited to cases in which the authorities committed criminal actions. Despite these exceptions, the expansive use of power during a state of siege has been sanctioned by both the Conseil d'État and the Cour de Cassation, France's high courts.

During World War I, the military restricted the freedom of assembly, prohibiting marches and demonstrations, and even closing bars and restaurants. Such restrictions were upheld by the Conseil d'État. During this time, freedom of the press was also restricted. Acting under the authority of Article 9, the Parliament passed the Statute of August 4, 1914. The statute banned the publication of any information pertaining to military operations that had not been communicated previously by the pertinent authorities. Further, it prohibited publishing any appraisal of military or diplomatic events that might aid opposing forces or harm the morale of the army or the nation as a whole. The military authority also instituted curfews and food rationing, both of which were upheld by the Cour de Cassation.

Similar restrictions on individual liberties occurred in response to unrest in Algeria in 1955 and 1961. France instituted travel restric-
tions, "kill on sight zones," curfews, internment, unlimited search rights, media censorship, and military jurisdiction primarily for crimes against the security of the state.\textsuperscript{101}

B. Martial Law

I. Historical Origins

If the French state of siege is a product of statutes and constitutional provisions, in keeping with the civil law tradition, then American martial law is emphatically a product of the courts. While some scholars have interpreted certain constitutional provisions to authorize a declaration of martial law,\textsuperscript{102} there is no explicit reference to it in the Constitution.\textsuperscript{103}

Martial law has been invoked on several occasions in various parts of the nation, though never nationally. In 1812, General Andrew Jackson placed New Orleans under martial law.\textsuperscript{104} During the Civil War, President Lincoln declared martial law in several areas of the nation.\textsuperscript{105} States and territories have at times been placed under martial law by their governors.\textsuperscript{106} For example, martial law was declared in Hawaii following the attack on Pearl Harbor.\textsuperscript{107}

Despite the institution of martial law on several occasions, the Supreme Court did not consider a case relating to its imposition until 1848, in \textit{Luther v. Borden}.\textsuperscript{108} The Court considered the imposition of martial law in Rhode Island, but dismissed the case as a political question under the Guarantee Clause in Article IV of the Constitution.\textsuperscript{109} The substantive issue was only addressed in dicta. Referring specifically to state imposition of martial law, Chief Justice Taney declared that a state could impose martial law to combat an insurrection, and the decision as to whether to do so is left to the state itself.\textsuperscript{110} Thus, the Court suggested that states possessed the power to declare martial law without being sub-

doctrines is that the "state of urgency" applies to only certain parts of the territory, while the "state of siege" applies nationally. See id. at 66–67.
\textsuperscript{100} Id. at 47–49.
\textsuperscript{101} Id. at 47–48, 67.
\textsuperscript{102} See, e.g., John M. Bickers, \textit{Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe}, 34 \textit{TEX. TECH. L. REV.} 899, 903 (2003). The two provisions most often cited as implicitly providing presidential authority to declare martial law are Article I, Section 8, Clause 15 ("The Congress shall have power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union.") and Article IV, Section 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence"). Id. at 903 n.21.
\textsuperscript{103} Davies, supra note 1, at 69.
\textsuperscript{104} Weida, supra note 4, at 1397.
\textsuperscript{105} Id. at 1398.
\textsuperscript{106} Id.
\textsuperscript{107} See Archibald King, \textit{The Legality of Martial Law in Hawaii}, 30 \textit{CAL. L. REV.} 599, 599 (1942).
\textsuperscript{108} 48 U.S. (7 How.) 1 (1849).
\textsuperscript{109} Id. at 45–47.
\textsuperscript{110} Id. at 45.
Shortly after the conclusion of the Civil War, the Court heard its second martial law case, *Ex parte Milligan.* The case arose out of the arrest of Lambdin Milligan in 1864, a confederate sympathizer in Indiana, while the state was under martial law. Milligan was tried and convicted by military commission (tribunals established to try specific persons for specific offenses). He then filed a writ of habeas corpus in federal court, disputing the jurisdiction of the military commission. The Lincoln Administration claimed that Milligan's detention was legal under the Habeas Act of 1863. The Act allowed Lincoln to suspend the writ of habeas corpus during the Civil War, whenever "public safety may require it." The Act did, however, require the release of prisoners whom a grand jury declined to indict. The grand jury hearing Milligan's case had failed to return an indictment prior to his military trial. The Supreme Court, in rendering a 5-4 decision in Milligan's favor, analyzed the imposition of martial law in Indiana. The Court held that Milligan, a civilian, could not be tried by a military commission while the civilian courts in the jurisdiction remained open. The court reasoned that in jurisdictions in which the civilian judicial proceedings are not interrupted, the authority of the government is not in peril, and thus martial law is not permitted. As there were no active military operations in Indiana when martial law was declared, the Court held that martial law could not be imposed. Not only did the executive lack the power to declare martial law in such a situation, but Congress lacked the authority to delegate that power to the executive. The Court concluded:

*[Martial law] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed . . . [N]o usage of war could sanction a military trial [in such a state] for any offence whatever of a citizen in civil life . . .* 

Chief Justice Chase, in a concurring opinion, provided a concrete explanation of when martial law could be invoked. He asserted that it could be exercised only "in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger

111. See id.
112. 71 U.S. (4 Wall.) 2 (1866).
113. Id. at 107.
114. Id.
115. Id. at 108.
118. Id.
120. Id. at 121.
121. Id.
122. Id. at 127.
123. Id. at 121-22.
124. Id.
125. See id. at 141 (Chase, C.J., concurring).
requires its exercise.\textsuperscript{126}

Despite the Milligan holding, martial law continued to be somewhat amorphous and contentious at the state level. For example, the declaration of martial law by the governor of Colorado to quell labor disputes was challenged in the Supreme Court in Moyer v. Peabody.\textsuperscript{127} In addition to censoring the press and imposing curfews, Colorado Governor Peabody ordered the arrest of Charles Moyer, a union president, for flag desecration.\textsuperscript{128} The Court, in deciding how much deference to afford a governor's determination that the declaration of martial law was warranted, concluded that: "[T]he Governor's declaration that a state of insurrection existed is conclusive of that fact . . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment."\textsuperscript{129} The decision in Moyer thus allowed state governors to implement martial law in response to certain economic and social crises, without the governor's decision being subject to significant judicial review. This holding was later refined in Sterling v. Constantin,\textsuperscript{130} a case involving Texas Governor Sterling's decision to place certain counties in Texas under martial law in order to control oil production.\textsuperscript{131} While the Court did not overrule its decisions in Luther v. Borden and Moyer v. Peabody, it instituted a proportionality test—the means employed by a governor in his exercise of martial law must have a direct relation to the disorder being faced.\textsuperscript{132} This proportionality test limited the deference afforded the executive in Moyer, and allowed for a review of the executive's decision by the judiciary.\textsuperscript{133} Ultimately, the Court decided that Governor Sterling's declaration of martial law was not a proportional response to the emergency caused by oil overproduction during a period of depressed prices.\textsuperscript{134} Thus, after Sterling, the Court appeared to retreat from its deferential approach to martial law, and granted authority to the judiciary to review decisions made by state governors to invoke emergency powers.

It was not until the bombing of Pearl Harbor and the subsequent United States entry into World War II that the Supreme Court next dealt with the imposition of martial law during wartime. In Duncan v. Kahanamoku,\textsuperscript{135} the Court considered the utilization of martial law in Hawaii. Duncan was arrested for attacking two Marines in a naval yard, and tried by military commission under paragraph 8.01, Title 8 of General

\textsuperscript{126} Id. at 142 (Chase, C.J., concurring).
\textsuperscript{127} 212 U.S. 78 (1909).
\textsuperscript{128} George G. Suggs, Jr., Colorado's War on Militant Unionism: James H. Peabody and the Western Federation of Miners (1972).
\textsuperscript{129} Id. at 83-85.
\textsuperscript{130} 287 U.S. 378 (1932).
\textsuperscript{131} Id. at 388-89.
\textsuperscript{132} Id. at 399-400.
\textsuperscript{133} See id.
\textsuperscript{134} Id. at 403-04.
\textsuperscript{135} 327 U.S. 304 (1946).
Orders No. 2, prohibiting assault on military personnel. He was tried and convicted by military commission; Duncan then filed a petition for habeas corpus. In the Supreme Court, the resolution of the case was based primarily on the interpretation of the Hawaiian Organic Act, in which Congress had given the territorial governor the authority to invoke martial law in Hawaii. The Court held that the Hawaiian Organic Act did not allow armed forces to replace the civilian judiciary during a period of martial law without actual combat in the territory. Justice Black held that the imposition of military tribunals went beyond the power that Congress had delegated to the territorial governor. As the court did not declare the imposition of martial law itself unconstitutional, the case seems to suggest that martial law is constitutional under certain circumstances, and Congress may determine the extent of powers under martial law through its delegations to the executive.

While the cases discussed above dealt with martial law in the greatest depth, Justice Jackson's now famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* created an analytical framework helpful in examining the use of emergency powers by the government in future situations. In considering the constitutionality of President Truman's seizure of steel mills during the Korean War, Justice Jackson identified three categories of presidential power under the Constitution to implement emergency measures. The first category involved situations in which the executive acted with express or implied authorization from Congress. In this category, presidential power was at its highest, since he possesses all of his own powers, plus those delegated by Congress. The courts are most likely to defer to the President in such situations. In the second category, the President acted, but Congress was silent on the matter. Here, the President could use only his independent authority, and the constitutionality of the emergency measure would depend on whether such activity was within his own inherent powers. Finally, the third category addressed situations in which the President had acted in direct opposition to the express or implied will of Congress. When the President's actions fell within this third category, his acts were of very low con-

136. *Id.* at 310-11.
137. *Id.* at 311.
139. Duncan v. Kahanamoku, 327 U.S. at 324.
140. *Id.*
141. *Id.*
142. 343 U.S. 579 (1952).
143. *Id.* at 634 (Jackson, J., concurring).
144. *Id.* at 635 (Jackson, J., concurring).
145. *Id.*
146. *Id.*
147. *Id.* at 637 (Jackson, J., concurring).
148. *Id.*
149. *Id.*
150. *Id.*
This framework provides a useful way for courts to analyze the constitutionality of specific emergency measures.152

The framework has been applied recently in cases following the September 11th attacks. For example, in Padilla v. Rumsfeld,153 the Second Circuit Court of Appeals considered Jose Padilla's detention after being arrested in Chicago for alleged affiliation with al-Qaeda.154 The court, following the Youngstown framework, first considered congressional authority for the detention, and found that none existed.155 Further, Congress had expressly prohibited such a detention in the Non-Detention Act, which provides "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."156 With no congressional resolution authorizing the detention, and no inherent presidential authority to detain Padilla without congressional authorization, Padilla was released.157

While there has yet to be an opportunity for the judiciary to apply the Youngstown framework to a declaration of martial law, it may provide a basis for determining the constitutionality of certain martial law measures.

2. Martial Law Today

From this background, the vague notion of "martial law" in American jurisprudence begins to take on a more definitive shape. Of martial law's various characteristics, four are particularly relevant to this Note—the authority of the President to declare martial law, judicial review of decisions made under martial law, the use of military tribunals in territories under martial law, and the limitations on individual liberties once martial law has been declared.

a) Presidential Authority to Declare Martial Law

Ex parte Milligan provides the clearest articulation of when martial law can be imposed by the President, acting as Commander-in-Chief. Given the Supreme Court decision in Milligan, "proper" martial law can only be imposed in certain limited situations.158 Specifically, it can be declared only where strictly necessary, only during foreign invasions or civil war, only when the civilian courts in the jurisdiction are no longer

151. Id. at 637-38 (Jackson, J., concurring).
153. 352 F.3d 695 (2d Cir. 2003).
154. Id. at 699.
155. Id. at 718.
158. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866).
able to operate, and only in the area of "actual war." In recent years, necessity has been highlighted as the key consideration in the implementation, continuation, and termination of martial law. Milligan makes clear that any evaluation of the exercise of emergency powers by the President must also take into consideration congressional will. The Milligan Court did not hold that the declaration of martial law itself that was unlawful; rather the Court found that the exercise of powers contrary to congressional intent posed constitutional problems.

b) Judicial Review of Governmental Decisions Under Martial Law

Government actions taken during martial law are subject to judicial review, as evidenced by the discussion of case law above. Judicial review was explicitly addressed in Kanahamoka, where Justice Murphy, in a concurring opinion, stated that "[c]onstitutional rights are rooted deeper than the wishes and desires of the military." He concluded that the military deserved no special deference from the courts when military actions carried consequences for the civilian population.

c) Military Tribunals

Ex parte Milligan again provides the basic rule for the use of military tribunals during martial law. There, the Court rejected the use of a military tribunal to try Milligan, as the civilian courts in the jurisdiction were open and still able to function. This strongly suggests that military tribunals may operate only when civilian courts are entirely unable to handle cases, presumably incapacitated due to the nature of the emergency itself. Thus, once the military tribunals are established, they would have jurisdiction over all crimes committed in the territory after the declaration of martial law, regardless of the nature of the offense.

d) Individual Liberties

The declaration of martial law grants the military broad authority to "do all acts which are reasonably necessary for the purpose of restoring

159. This has been interpreted to mean that the courts of the jurisdiction must be physically open, have unobstructed jurisdiction, and be functioning in the proper manner. ROBERT S. RANKIN, WHEN CIVIL LAW FAILS 63 (1939).
161. See 32 C.F.R. § 501.4 (2003) ("Martial law depends for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration.").
162. Davies, supra note 1, at 100.
163. Davies, supra note 1, at 99-100.
165. Id. at 331-32 (Murphy, J., concurring).
166. Ex parte Milligan, 71 U.S. (4 Wall.) at 127.
167. Some legal scholars have suggested that Milligan is irrelevant to the question of the use of military tribunals, as it discusses the limitations on the imposition of martial law, not the use of military tribunals to try civilians. See, e.g., Bickers, supra note 102, at 906.
and maintaining public order."\textsuperscript{168} The Code of Federal Regulations allows the armed forces to "exercise police powers previously inoperative in the affected area, restore and maintain order . . . and initiate necessary relief efforts."\textsuperscript{169} The armed forces are required to inform those in the affected population of the "rules of conduct and other restrictive measures."\textsuperscript{170} Though not stated in the Federal Regulations, these include restricting individuals' movement, imposing punishment through military trials, and suspending other fundamental rights.\textsuperscript{171} Generally, the Supreme Court has sanctioned some violations of civil liberties, at least during the actual war or emergency.\textsuperscript{172}

\textit{Korematsu v. United States}\textsuperscript{173} provides insight into the type of invasion of civil liberties the Court might uphold once martial law is declared. In \textit{Korematsu}, a case which dealt with the internment of Japanese-Americans during World War II, the Court first recognized the necessity principle, and permitted otherwise unacceptable civil rights violations to occur because the conditions warranted them.\textsuperscript{174} Further, the Court recognized that the severity of the governmental actions must bear relation to the threat level faced, stating that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."\textsuperscript{175} Given this statement, it appears that the only true limitation on the infringement of fundamental liberties is the extent of the necessity. This interpretation garners further support from the \textit{Milligan} opinion, where the Court stated that "martial law . . . destroys every guarantee of the Constitution and effectively renders the military independent of and superior to the civil power."\textsuperscript{176} A military commander theoretically has the discretion, if exigencies require, "to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will."\textsuperscript{177}

Of the various fundamental liberties, the writ of habeas corpus has been routinely suspended when martial law has been declared. In \textit{Ex parte Merryman},\textsuperscript{178} Supreme Court Chief Justice Taney, sitting as circuit judge, held that only Congress had the authority to suspend the writ of habeas corpus.\textsuperscript{179} Despite this ruling, Lincoln ignored Chief Justice Taney's opin-

\begin{itemize}
\item \textsuperscript{168} 53 Am. Jur. 2d Military and Civil Defense § 441 (1996).
\item \textsuperscript{169} 32 C.F.R. § 501.4 (2003).
\item \textsuperscript{170} \textit{Id}.
\item \textsuperscript{171} \textit{See} Davies, supra note 1, at 87.
\item \textsuperscript{172} Jules Lobel, The War on Terrorism and Civil Liberties, 63 U. Pitt. L. Rev. 767, 768 (2002).
\item \textsuperscript{173} 323 U.S. 214 (1944).
\item \textsuperscript{174} \textit{See} Korematsu, 323 U.S. at 219-220 ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions."). \textit{Id} (emphasis added).
\item \textsuperscript{175} Davies, supra note 1, at 105.
\item \textsuperscript{176} \textit{Ex parte} Milligan, 71 U.S. (4 Wall.) 2, 124 (1866) (internal quotations omitted).
\item \textsuperscript{177} \textit{Id}.
\item \textsuperscript{178} 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).
\item \textsuperscript{179} \textit{Ex parte} Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487).
\end{itemize}
ion and Merryman remained imprisoned.  

II. Analysis  

A review of martial law and the state of siege clearly demonstrates the differences between the two doctrines. Given the importance of an effective and controlled governmental reaction during an emergency, it is necessary to analyze each doctrine to determine which is better able to provide such a response. Specifically, this Note will focus on the doctrines' ability to handle a crisis without compromising the basic checks and balances of democratic government or the fundamental liberties of the people. While the analytical portion will focus primarily on the distinctions between American martial law and the French state of siege, at the outset it is important to consider briefly their similarities.

A. Similarities Between Martial Law and the State of Siege

On a basic level, both martial law and the state of siege have the primary purpose of protecting the government and the populace by making it easier to prevent or quell any disturbance, and to more effectively contend with foreign aggression. While World War II may be seen as a failure for the state of siege, both systems increase military readiness as needed to meet the challenges of a foreign invasion or other emergency.

As should be apparent from the preceding section, both the state of siege and martial law are designed to increase the power of the executive, enabling him to deal quickly and effectively with a crisis. As discussed above, Article 16 of the French Constitution grants unilateral emergency powers to the President when the peace and security of the nation is threatened. Further, Article 36 gives the executive the authority to declare a state of siege for a maximum of twelve days without approval by the Parliament. Likewise, the American system grants broad authority to the President, who can declare martial law as long as the necessary conditions articulated by the Supreme Court exist in the territory at issue. Despite these similarities, it is important to note the primary restraints on executive power in the French system, including the persuasive authority of the Conseil Constitutionnel, which can act as a preememptory check on the president and the requirement of legislative approval for any long-term implementation of a state of siege. No such checks on executive power exist in the American system, as the courts only have the authority to

181. Kelly & Pelletier, supra note 18, at 53.
182. Id. at 46.
183. Id. at 53.
184. See supra notes 48-50 and accompanying text.
185. See supra notes 59-61 and accompanying text.
186. See supra notes 158-160 and accompanying text.
187. See supra notes 53-56 and accompanying text.
188. Kelly & Pelletier, supra note 18, at 47.
address wrongs already committed. While Youngstown Sheet & Tube Co. v. Sawyer\textsuperscript{189} and Duncan v. Kahanamoku\textsuperscript{190} suggest a greater role for Congress in the declaration and maintenance of martial law, the American system clearly imposes fewer burdens on the executive than the French system.\textsuperscript{191}

Finally, despite the different mechanisms by which each system operates, some commentators have suggested that in practice, martial law and the state of siege are almost indistinguishable, in terms of their response to threats and limitations on individual liberties.\textsuperscript{192} While there are similarities in operation, at least on a general level, between the two systems, the paucity of comparable circumstances in which emergency powers have been invoked make a meaningful comparison difficult.

B. Differences Between Martial Law and the State of Siege

This section of the Note will analyze the differences between American martial law and the French state of siege, focusing first on the implications of the constitutional versus case law dichotomy. Following this discussion, the Note will examine the differences in the use of the courts, the legislature, military tribunals, and the limitations on fundamental liberties during a time of crisis. In each case, the primary focus will be on which system is better able to handle an emergency, in terms of its ability to effectively counteract the threat without compromising the basic guarantees of democratic decision-making or fundamental rights.

1. Constitutional Basis

A constitutionally-based scheme of emergency powers has many advantages. First, structuring a response to an armed invasion or other national crisis before one actually occurs allows for a more clearly reasoned system, rather than one devised in the midst of an emergency. This means that greater attention can be paid to protecting individual rights and makes a more effective military response possible. Since it is sometimes the case in emergency situations that the ordinary means of decision-making and government action are too burdensome to use in a situation which requires a rapid response, having an alternative mechanism enshrined in the constitution itself ensures that the basics principles of democracy are respected, even in situations when the democracy itself is threatened.\textsuperscript{193} This is clearly seen in the French system, where the Conseil Constitutionnel and legislature are both actively involved in the decision to use emergency powers, at least in the long-term.\textsuperscript{194} In contrast, the American system lacks such a finely wrought decision making process, leaving the bulk of power

\textsuperscript{189}. 342 U.S. 579 (1952).
\textsuperscript{190}. 327 U.S. 304 (1946).
\textsuperscript{191}. See Kelly & Pelletier, supra note 18, at 57.
\textsuperscript{193}. Ferejohn & Pasquino, supra note 9, at 233.
\textsuperscript{194}. See supra notes 51–52, 61 and accompanying text.
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to the executive, as long as the generally appropriate conditions are met
and the exercise of those powers is not contrary to congressional will.\textsuperscript{195}

Second, constitutional emergency powers safeguard the operations of
the civilian legal system from the events of the emergency.\textsuperscript{196} This
approach is often referred to as the concept of constitutional dualism.
Constitutional dualism is "the notion that there should be provisions for
two legal systems, one that operates in normal circumstances to protect
rights and liberties, and another that is suited to dealing with emergency
circumstances."\textsuperscript{197} While this second system has a constitutional founda-
tion, its separation from the normal constitutional structure ensures that
any infringements upon normal guarantees of freedom and liberty will be
limited to the circumstances at hand. Such is not the case in martial law.
As a concrete example, consider \textit{Korematsu v. United States}.\textsuperscript{198} While few
would suggest that \textit{Korematsu} has applicability beyond the limited circum-
stances in which it was decided, it still held that the internment of Ameri-
can citizens on no basis other than their Japanese heritage was consistent
with the Constitution.\textsuperscript{199} Further, it reflects a willingness by the Supreme
Court to be influenced by the urgency of the moment. Having a separate
system to deal with rights and liberties in the context of an emergency
ensures that any limitations imposed by the government and upheld by the
courts have no lasting effect or impact beyond the circumstances in which
they were created. Additionally, separating emergency rule from the nor-
mal constitutional order preserves constitutional guarantees, preventing
the type of post-hoc rationalizations seen in cases such as \textit{Korematsu}.

Third, a constitutionally-based approach to emergency powers allows
for refinements to the scheme in order to keep up with developments in
technology and modern warfare. The prerequisites for the declaration of a
state of siege, as well as the powers of the governmental branches can be
altered to combat the changing nature of the threat with which a nation is
faced.\textsuperscript{200} In contrast, martial law is more difficult to modernize. For
example, the primary American case on the imposition of martial law
remains \textit{Ex parte Milligan}.\textsuperscript{201} As discussed above, that case held that mar-
tial law could only be declared in the area of "actual war," essentially,
where opposing forces had actually invaded.\textsuperscript{202} Since this decision in
1866, warfare has obviously changed dramatically, from the use of fighter
jets and long-range missiles, to the new threats of terrorism. Under the
rationale of \textit{Milligan}, martial law could be imposed in the very unlikely
event that foreign forces invaded American territory, but could not be
imposed if there was irrefutable evidence of an imminent terrorist attack
on a massive scale within an American city. Any modernization of the

\textsuperscript{195} See supra notes 158-160.
\textsuperscript{196} Ferejohn & Pasquino, supra note 9, at 234.
\textsuperscript{197} Id.
\textsuperscript{198} 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans).
\textsuperscript{199} See Ackerman, supra note 50, at 1043.
\textsuperscript{200} See generally supra Part I.
\textsuperscript{201} 71 U.S. (4 Wall.) 2 (1866).
\textsuperscript{202} Id. at 127.
original criteria for the declaration of martial law decided in Milligan would necessarily be after the fact, forcing the executive or Congress either to act within an antiquated system, perhaps endangering the nation as a whole, or to develop a new approach outside of any existing restraints, perhaps leading to an unacceptable infringement upon individual rights.

Despite the advantages of a constitutionally-based system, it has several limitations that must be considered as well. First, it was often the case in France that the specific state of siege procedures defined in the constitution did not always withstand the emergency they were designed to combat. During the nineteenth century, despite the intention of the state of siege measures, the constitutions typically failed to fully protect the rights of individuals and ensure the separation of powers, and had to be rewritten when the crisis was over. At several points in France's history, the invocation of emergency provisions typically spelled the end of the constitution itself. It is difficult, however, to determine whether the cause of this failure was the state of siege doctrine itself or the nature of the emergency faced, especially when considering the challenges of World War II. The ability of the doctrine to withstand the difficulties of World War I, and allow a return to a democratic process following the war, certainly supports the notion that it can be effective at combating a serious threat, even if it failed to do so in the Second World War.

Second, a constitution's framers obviously cannot predict the details of the particular situations that may endanger the nation or its people before they happen. As the framers cannot fully anticipate future dangers, any effort to restrict emergency powers may deprive the government of the necessary procedures it needs to counter the threat to its survival. While it is true that if the threat is significant enough, a government will do what is necessary to protect itself regardless of what is articulated in its constitution, a constitutionally-based emergency powers doctrine is meant to guard against this eventuality. Very broad constitutional provisions, while lessening the need to adequately predict the nature of the threats a nation may face, will ultimately leave the executive with too much discretion in the exercise of his emergency powers. However, despite the fact that a constitutionally-based system will be unable to anticipate every possible emergency, it can provide a useful framework for the exercise of emergency powers, as it did in France during World War I. As a specific example, consider the censorship laws imposed by Parliament in 1914.

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204. Id.
205. See Rossiter, supra note 7, at 91–103. Not all scholars have given a favorable review of the French use of the state of siege in World War I. See Kelly & Pelletier, supra note 18, at 57.
206. See Kelly & Pelletier, supra note 18, at 47.
207. Ackerman, supra note 50, at 1038.
208. See id. at 1040.
209. Rossiter, supra note 7, at 91–103.
210. See supra note 96–97.
the law of 1849, which allowed the government to censor any publications it thought might incite or sustain disorder.\textsuperscript{211} Even though the law of 1849 did not specifically detail the acceptable amount or type of censorship, it provided the basic authority used by the later Parliament to make more specific prohibitions.\textsuperscript{212}

Finally, it should be noted that constitutionally-based systems are not invulnerable to abuse. Examples are clearly seen in French history, such as those abuses committed by Napoleon III in 1840.\textsuperscript{213} However, it is important to recognize that this occurred before the passage of the law of 1878, which more accurately defined executive and military powers during a state of siege.\textsuperscript{214} Other examples of abuse are seen in nations, primarily in Latin America, which have adopted constitutional provisions allowing for the declaration of a state of siege. In Argentina, for instance, the executive has the authority to declare a state of siege, but only with the consent of the Senate, unless it is in recess.\textsuperscript{215} Acting under this constitutional authority, states of siege have been declared by Argentinean presidents more than thirty times between 1930 and 1993.\textsuperscript{216} At least once, the senate was forcibly kept out of its chamber to prevent a vote while the President acted.\textsuperscript{217} On several occasions, a state of siege was declared as a pretext for removing disloyal provincial officials from their posts, replacing them with officials faithful to the chief executive.\textsuperscript{218} Similar abuses, including military-precipitated crises meant to effect swift political change were common in other Latin American nations with constitutionally-based emergency procedures as well, such as Brazil.\textsuperscript{219} While it is important to note these problems, it is equally important to realize that they may be more a product of the dire situations with which a state of siege is designed to deal, as well as the individual personalities of leaders, rather than the basic structure of the doctrine itself. The problems in Argentina were also due in part to a very weak judiciary that was unable or unwilling to keep the executive in check.\textsuperscript{220} Further, such limitations, especially the abuses by executives,

\begin{itemize}
\item \textsuperscript{211} Kelly & Pelletier, supra note 18, at 50.
\item \textsuperscript{212} Rossiter, supra note 7, at 99.
\item \textsuperscript{213} See supra note 31 and accompanying text.
\item \textsuperscript{214} Rossiter, supra note 7, at 81.
\item \textsuperscript{215} CONST. ARG. ch. Ill, art. 99, § 16, translated in \textit{7 Constitutions of the Countries of the World: Argentina} 21 (Gilbert H. Planz ed., 1999). The full text of Article 99, section 16, in English translation, reads as follows:

He [the chief executive] declares a state of siege in one or various parts of the Nation, in case of foreign invasion and for a limited time, with the consent of the Senate. In the event of internal disorder, he has this power only when Congress is in recess, because this is a power belonging to that body. The President exercises this power with the limitations prescribed in article 23 [providing the criteria for the state of siege, and some limitations on Presidential power].

\textit{Id.}
\item \textsuperscript{217} Kelly & Pelletier, supra note 18, at 51.
\item \textsuperscript{218} Id. at 51-52; see also Banks & Carrió, supra note 216, at 30-31.
\item \textsuperscript{219} Kelly & Pelletier, supra note 18, at 52.
\item \textsuperscript{220} Banks & Carrió, supra note 216, at 30.
\end{itemize}
are not alien to the martial law doctrine. Martial law was frequently employed in England as a tool for sovereigns to punish rebellion and to settle personal scores. Its improper usage in colonial America by British rulers resulted in its listing as a grievance in the Declaration of Independence.

2. The Role of the Courts

While both martial law and the state of siege involve the courts to some degree, due to the "case or controversy" requirement of Article III of the U. S. Constitution, the American judiciary becomes involved only once a decision has been made to declare martial law, and an assertion of abuse or other action sufficient to warrant legal recourse occurs. In contrast, the state of siege involves a quasi-judiciary, independent branch of government at an earlier stage, when the executive is exercising emergency powers under Article 16 of the 1958 Constitution. While providing no binding authority, the decision of the Conseil Constitutionnel is highly persuasive on the executive’s decision to declare a state of siege. Even if the executive ultimately chooses not to abide by the decision of the Conseil Constitutionnel, the process provides a pre-emptive check on the use of executive power, which is not found in martial law.

3. The Role of the Legislature

Despite the role of the judiciary, the declaration of a state of siege remains primarily a political one (an acte de gouvernement or acte politique). The grant of power to the legislature, which acts as the primary check on the executive for any long-term imposition of the state of siege, has several advantages over the American system, in which the role of Congress is far less clear, and in some cases altogether non-existent. First, the legislature is politically accountable for the decisions it makes in an emergency, and the legislative proceeding allows for a more comprehensive discussion of viewpoints than oral arguments before a court. Second, any extreme legislative measures taken during an emergency period, including the infringement on certain constitutional rights, can be repealed once the crisis ends, rather than being affirmed by the judiciary and becoming legal precedent. Finally, allowing for legislative consideration of the imposition and continuation of a state of siege may serve to prevent abuses of the civilian population before they occur.

221. Kelly & Pelletier, supra note 18, at 54.
222. Id.
225. Ackerman, supra note 50, at 1038 n.19; see also Bell, supra note 9, at 31.
226. Rossiter, supra note 7, at 88-89; Kelly & Pelletier, supra note 18, at 50.
228. See supra text accompanying notes 142-151.
229. See Ackerman, supra note 50, at 1043.
While some valid concerns may exist about the ability of the legislature to act with sufficient speed in the face of certain crises, the French experience during World War I demonstrates the ability of the Parliament to act quickly and decisively when necessary. Further, the political accountability of those in the Parliament will help to ensure that any response is not unduly delayed.

4. Military Tribunals

As discussed above, the use of military tribunals also differs significantly between the French and the American system. In the United States, military tribunals can only be established to try civilians when the civil courts in the territory under martial law are no longer able to function. Once established, they handle all cases, regardless of offense. In contrast, the French state of siege allows the military and civil courts to operate concurrently, with the military tribunals having jurisdiction over civilians charged with serious crimes under the civilian penal code, as well as crimes against the state, including treason, espionage, and other crimes interfering with national defense, while civilian courts retain jurisdiction over all other types of cases.

The French system again appears to have a distinct advantage over American martial law. By allowing both civilian and military courts to exist concurrently, the military can assume jurisdiction over the cases that most significantly affect national security. The civilian courts remain available to handle common offenses committed during a state of siege. This ensures both that there is greater control and more attention placed on the cases central to national security, while continuing to afford the proper protections to all other offenders accused of common crimes. Despite the fact that the military tribunals over-extended their jurisdiction over French civilians during World War I, the Parliament is able to control such jurisdiction by passing more explicit statutes, such as the one passed in 1916. Further, allowing the establishment of military tribunals before civilian courts are no longer able to function provides a greater possibility that the tribunals may help curtail the emergency before the situation becomes so extreme that the civil judiciary must suspend operations altogether.

While American constitutional limitations and concerns about the use of military tribunals regardless of context may make the adoption of the French approach difficult in the United States, it does represent an alterna-

230. See Rossiter, supra note 7, at 91-103.
231. Compare supra text accompanying notes 74-86 (French military tribunals) with supra text accompanying notes 166-167 (American military tribunals).
233. Id. at 121-22.
234. Kelly & Pelletier, supra note 18, at 49.
235. Id.
236. Rossiter, supra note 7, at 86-87.
237. See supra text accompanying notes 83-84.
tive that may be more effective in combating present-day threats, especially terrorism.

5. Individual Liberties

The central difference between the infringements on individual liberties imposed under a state of siege as compared to those imposed under martial law is not the nature of the limitations, but rather the existence of a basic structure used to prevent abuses of power. In the French system, the law of 1849 sets out the limits of military authority in a state of siege. It is clear that the military has expansive authority within these limits, as the French courts have rarely invalidated military restrictions on individual liberties during a state of siege. However, the law of 1849 still provides a basic framework not found in the American system. While World War I witnessed infringements on civil liberties by the government, such as travel limitations and restrictions on business hours, which were not based in the law of 1849, these practices were generally agreed to have been necessitated by the war itself. Though adding such restrictions without a basis in law may be counter to the concept of the state of siege, the exigencies of the circumstances justified them to the French public. Further, there were many instances during the war in which the Parliament passed statutes under the authority granted in Article 9 of the law of 1849, such as laws involving press censorship. Overall, the involvement of the Parliament in the expansion of restrictions during the war ensured that a politically accountable body, reflective of the will of the populace, considered any infringement upon civil liberties. No such assurance exists in martial law. While the Code of Federal Regulations lists very general powers of the military during a time of declared martial law, the military has extraordinary freedom to suspend many fundamental rights. Additionally, there is no real check on military authority, as the Supreme Court has historically acquiesced to violations of civil liberties during the existence of an emergency. Thus, while history demonstrates that neither the state of siege nor martial law is entirely effective at preventing all unnecessary infringements upon individual civil liberties during a crisis, the French system clearly provides better protection than the American system against unfettered military encroachment upon personal liberties during an emergency.

238. See supra text accompanying note 87.
239. See supra text accompanying notes 88–98.
240. ROSSITER, supra note 7, at 100–01.
241. Id. at 101.
242. Id. at 99.
244. See Davies, supra note 1, at 87.
245. Lobel, supra note 172, at 768.
C. An Alternative

The foregoing analysis should not be taken to imply that the French state of siege is the only possible alternative to American martial law. A variation of the French system, which has been developing in stable democracies over the last fifty years, may also be a useful model for a more structured system of emergency government. Similar in concept to the state of siege, it grants even more power to the legislature, significantly weakening the executive. Known as the "legislative model," this approach handles emergency situations by allowing the legislature to delegate special and temporary powers to the executive through ordinary statutes. This special delegation demonstrates that emergency powers granted to the executive are exceptional to the ordinary operation of the legal system and that there will be a return to ordinary legal and political processes when the emergency is over. Under this model, the legislature is responsible for recognizing an emergency, creating the powers to deal with it, monitoring the use of those powers by the executive, investigating abuses, and, when appropriate, ending their use altogether.

The primary advantage of the legislative model is that it allows the legislature to supervise the executive's exercise of emergency powers, and provides for the termination of executive powers whenever the legislature believes such powers are no longer necessary or when the executive has proven unable to appropriately handle the power delegated to him. Further, by granting such broad authority to the legislative branch, there is greater assurance that the interests of the public will be protected, as the promise of political accountability will likely keep any excessive delegation of power in check.

Despite the promise of the legislative model, several disadvantages exist as well. First, a large-scale emergency may well disable, or at least significantly impede, the functioning of the legislative branch, such that the necessary delegation of power may be too slow to meet the threat. This in turn would likely require the executive to act without any authorization, and thus, without limitation on his exercise of power. Second, even if the nature of the disaster did not impede the functioning of the legislature, the legislative process itself may simply be too slow to handle the crisis. Finally, laws created during the emergency may be difficult to repeal, thus becoming embedded in the nation's legal system, even though they were originally intended to be temporary in duration.

246. Ferejohn & Pasquino, supra note 9, at 216-17.
247. Id.
248. Id.
249. Id. at 217.
250. Id.
251. Id. at 218.
252. Id.
253. Id. at 219.
254. Id.
255. Id.
256. Id.
Despite these limitations, the legislative model provides an alternative that also warrants investigation when considering reforms to American martial law.

Conclusion

The comparison and analysis between American martial law and the French state of siege demonstrates the advantages of a well-defined, constitutionally-based structure for combating emergencies. The state of siege structures governmental action during an emergency to a degree clearly lacking in martial law. It provides the executive with the necessary power to meet the demands of the crisis, while maintaining essential checks and balances. It allows the government to adapt its emergency procedures in order to meet new or unexpected threats. Finally, and perhaps most importantly, it provides greater assurance that the government's response does not unnecessarily infringe upon basic liberties, both for those accused of criminal activity during an emergency and the population at large. While both doctrines have limitations and can be subject to abuse, the French system, by incorporating the other branches of government into the decision-making process, is better able to contend with such problems.

This comparison suggests reforms for the American system. A constitutionally-based system in the United States would be difficult to develop, given the challenges of amending the Constitution. However, increased legislative involvement in the structuring of the American emergency response may be desirable. Statutes that more clearly develop what is expected of the political branches of the U.S. government during an emergency, as well as provide a more structured response to the crisis itself, could be very beneficial in the wake of a crisis that overwhelms the ordinary powers of government. Thus, even though it is highly unlikely that the state of siege model would be adopted in the United States, it does provide useful lessons that, in conjunction with other ideas, may be helpful in shaping the future of the American emergency response.