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Law, Emergencies, and the Constitution: A Review of *Outside the Law: Emergency and Executive Power*

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Law, Emergencies, and the Constitution: A Review of *Outside the Law: Emergency and Executive Power**

Ernest B. Abbott

Abstract

This article analyzes Clement Fatovic's recent book, *Outside the Law: Emergency and Executive Power* - a scholarly examination of thinking on executive power in emergencies by delegates to our Constitutional Convention and by political writers who influenced them. Fatovic concludes that the President does and should have the "prerogative" to act outside or even contrary to the law in emergencies.

Mr. Abbott disagrees. *Outside the Law* demonstrates that the delegates to the Constitutional Convention understood the importance of executive power in emergencies - and the Constitution which emerged in 1787 did indeed bestow broad executive power on the President. But it did not authorize the President to exercise "prerogative" in emergencies in violation of law. Nor would reliance on undefined "prerogative" for authority to act foster the planning and training which is so important to successful emergency response.

KEYWORDS: emergency power, executive power, constitutional law, outside the law

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Outside the Law: Emergency and Executive Power. By Clement Fatovic. Johns Hopkins University Press, 2009, 368 pp., \$55.00 (hardcover) ISBN 978-0801893629.

Review, and additional opinion piece, by Ernest B. Abbott Esq., FEMA Law Associates, PLLC.

In Stockholm ten years ago, while serving as the General Counsel of the Federal Emergency Management Agency (FEMA), I spoke at an international conference on the role of law in disasters. The audience consisted of emergency managers for other nations – particularly nations that had previously either been part of the Soviet Union, such as Lithuania, or had recently established new governments after years of Soviet domination. I asserted that FEMA’s reputation (at that time) as a preeminent disaster response agency arose in large part because of our commitment to the rule of law in disasters. I said:

“Disaster response is one of the most visible ways in which a government works for its people and reinforces their belief in the system of government itself. . . . A crisis is not the time to jettison the principles on which a government is founded. It is a time to demonstrate the strength and enduring power of those principles. If at the moment of crisis the rulebook is thrown aside, citizens justifiably must wonder whether the rulebook is any good – since it doesn’t appear able to cope with the situation. And they must also wonder whether the government itself believes in the rulebook – and must wonder how many other situations will persuade a government to ignore its basic principles.”

The question of whether a government must abandon its Constitution or the rule of law in emergencies garnered much attention in the decade following the September 11, 2001 terrorist attacks. President Bush asserted that the war on terrorism was a different kind of war. The Geneva Convention’s protections of prisoners would not apply to the prisoners captured in this war. The Fifth Amendment right to a hearing, and the Fourth Amendment protection against warrantless search and seizure, were trumped by the President’s duty to protect the nation. The President asserted that he could detain indefinitely anyone he designated as an “unlawful enemy combatant” without any form of review. He also asserted that he was not bound by legislation that required consent from a specialized intelligence court before conducting surveillance. These positions understandably raised the ire of civil libertarians – and many others who believed in the rule of law.

Hurricane Katrina also stimulated thought about whether the federal government's efforts to comply with law interfered with the government's ability to save lives, protect property, and protect the public health and safety. The *New York Times* reported that the administration was engaged in debates with its legal staff analyzing whether military troops based near New Orleans could be deployed to assist in the disaster response, given the Posse Comitatus Act prohibiting use of the military for law enforcement.¹ The media reported scenes of lawless behavior in the New Orleans Superdome and in the New Orleans Convention Center; a Louisiana sheriff was reported to have stopped desperate refugees at gunpoint from crossing a bridge from New Orleans into the sheriff's Parish. Challenges to the rule of law after Hurricane Katrina stimulated the American Bar Association's House of Delegates to adopt formal Association policy on the Rule of Law – beginning with:

Principle 1: The rule of law must be preserved when a major disaster occurs.

The issue of whether or not, and under what circumstances, a President can act “outside the law” is not just dry fodder for political theorists, but an issue of real importance today.

Clement Fatovic's book, *Outside the Law: Emergency and Executive Power*, provides a scholarly review of the discussions about emergency power by those who debated and drafted the United States Constitution and then advocated for and against its ratification. He also gives a thorough analysis of the writings on emergency power by four key political theorists (Machiavelli, John Locke, David Hume, and William Blackstone) whose work influenced our Founding Fathers' views. Surprisingly – at least to me – he shows quite convincingly that these scholars – and at least some of our Founding Fathers – believed that there is indeed a class of emergencies that may force the President to act outside the law in order to save lives and even the state.

After demonstrating that theorists with real influence on those debating our constitution, and many participants in this debate, believed that the law could not constrain the power of an executive to act in emergencies, Mr. Fatovic then

¹ “STORM AND CRISIS: MILITARY RESPONSE; Political Issues Snarled Plans For Troop Aid,” *New York Times*, September 9, 2005, page A-22: “As New Orleans descended into chaos last week and Louisiana's governor asked for 40,000 soldiers, President Bush's senior advisers debated whether the president should speed the arrival of active-duty troops by seizing control of the hurricane relief mission from the governor. . . . Justice Department lawyers, who were receiving harrowing reports from the area, considered whether active-duty military units could be brought into relief operations even if state authorities gave their consent -- or even if they refused. The issue of federalizing the response was one of several legal issues considered in a flurry of meetings at the Justice Department, the White House and other agencies, administration officials said.”

searched in their writings to find what they believed *would* protect citizens from dictatorship. What construct would assure that when the emergency subsided, the rule of law and a balance of power between executive and legislative branches would be restored? In brief, their view was that restoration of governance by law and restoration of the prerogatives of the legislature will depend on the personal character of the executive – his personal “virtue”. And an executive would be further controlled by the people themselves, who can rise up to restore their rights as the thirteen colonies had risen against the King. As stated in the second paragraph of the Declaration of Independence:

“when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them [the people] under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.”

Mr. Fatovic demonstrates quite convincingly that the importance of contingency and emergency events was never far from the minds of either the political theorists or the creators of the United States Constitution. What he does not do as convincingly is demonstrate that the Constitution which emerged from the Constitutional Convention permits the President to ignore and even violate the law while meeting his oath to “faithfully execute the office of President of the United States,” and “to the best of my ability, preserve, protect and defend the Constitution of the United States.” Nor does Fatovic explain how and under what circumstances their views – developed in the aftermath of regicide and civil war in Britain and by the Revolution and war for independence here – might apply to the exercise of power by a president in 21st century America.

First – for the theory. Machiavelli (born 1469) was renowned for his theory on the necessity of governance by a strong executive. Machiavelli’s political theory was built from a belief in the importance of unexpected events and contingencies - what he called “*fortuna*” to states and the ability of a prince to rule them. “*Fortuna* . . . is the arbiter of half of our actions;” “often things arise and accidents come about that the heavens have not altogether wished to be provided against.”² Since emergencies could not be avoided, Machiavelli concluded that – in Mr. Fatovic’s words – “princes should not be bound by rules and prescriptions that might hamper their ability to deal with sudden events that themselves obey no rules and follow no prescriptions.”³

But John Locke (born 1639) is known for developing a political theory of government action restrained by law:

² OUTSIDE THE LAW, Page 12.

³ Id.

“freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.”⁴

Yet Fatovic finds that even John Locke “endorsed an extralegal conception of *prerogative* that would allow the executive to ‘act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it.’”⁵ This prerogative extended beyond the executive’s power, under Locke’s recommended form of constitutional government, to dismiss the legislature. Rather the term was restricted, in Locke’s writings, to “extralegal uses of power”. And prerogative was to be used only when “‘unforeseen and uncertain Occurrences’ make it impossible to follow ‘certain and unalterable Laws’ without doing further harm to the public good.”⁶

David Hume (born 1711) was considered a more conservative theorist who “favored established forms of government that had been tried and tested over long periods of time [such as the British constitutional monarchy] to those experimental innovations, which often created tumults.”⁷ Hume was well aware of the costs of “tumults,” since Britain had experienced a number of them in the previous century – including execution of the king, civil war, and government under Oliver Cromwell’s Protectorate. Britain’s constitutional monarchy included the “systematic and comprehensive application of the rule of law, ‘the salutary yoke of law and justice,’ [which was] the ideal condition because it offers the proper balance of order and liberty.”⁸ The role of law as a constraint on sovereign power was extremely important to Hume; he wrote that “no discretionary powers must ever be entrusted to him [the sovereign], by which the property or personal liberty of any subject can be affected.”⁹

But Fatovic still finds hints that in true emergencies Hume might be willing to allow flexibility to a sovereign to act beyond regular form of law:

“[A]ll politicians will allow, and most philosophers, that reasons of state may, in particular emergencies, dispense with the rules of justice, and invalidate any treaty or alliance, where the strict

⁴ Locke, *Two Treatises of Government*, II, §22, quoted in *OUTSIDE THE LAW*, Page 38.

⁵ *OUTSIDE THE LAW*, Page 39, quoting Locke, *Two Treatises*, II, §160 (emphasis added).

⁶ *OUTSIDE THE LAW*, Page 55, quoting Locke, *Two Treatises*, II, §158.

⁷ *OUTSIDE THE LAW*, Page 91.

⁸ *OUTSIDE THE LAW*, Page 95.

⁹ *OUTSIDE THE LAW*, page 116, quoting Hume’s *History of England*, Vol. V, page 126.

observance of it would be prejudicial, in a considerable degree, to either of the contracting parties.”¹⁰

William Blackstone (1723-1780) was an English judge, jurist and professor whose work influenced debate over our Constitution; Fatovic notes that Blackstone was the second most cited author at the Constitutional Convention, and was cited more than all others after ratification. He was also a strong proponent of executive power and the doctrine of what is now called sovereign immunity – the principle that “the king can do no wrong.” The king was “entrusted with the constitutional responsibility of making unilateral decisions about what is in the public or national interest”, and his “judgment on these matters should not be subject to debate.”¹¹ Indeed, Blackstone’s views on executive power are so strong, it is quite apparent that they were not incorporated into our Constitution. The following passage from Blackstone asserts that the king, in the constitutional monarchy that he lived in and advocated, had powers that our Constitution does not bestow on our President:

“The law therefore ascribes to the king, in his high political character, not only large powers and emoluments which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government.”¹²

And although Blackstone viewed the enforcement of the laws created by Parliament (with the king’s consent) as the main responsibility of the executive, he concluded (as paraphrased by Fatovic) that:

“When the danger of degeneration into a state of nature – or, worse yet, a state of war – becomes evident, the powers of the executive cannot be limited by law. [...] Indeed, the king even has the ability to grant exemptions from the law in times of war because he is ‘supposed the best judge of such emergencies’ as threaten the peace of the nation.”¹³

¹⁰ OUTSIDE THE LAW, page 116, quoting Hume’s Enquiry Concerning the Principles of Morals, page 196.

¹¹ OUTSIDE THE LAW, page 145.

¹² OUTSIDE THE LAW, page 144, quoting Commentaries on the Laws of England I, page 234.

¹³ OUTSIDE THE LAW, page 150, citing Commentaries I at 139, 157, and 252.

It is perhaps not surprising – since they were writing before the American and French Revolutions – that these English (and one Italian) political theorists were comfortable with a system in which the executive was sovereign and would, of necessity, act above or beyond the law. But the strength of Fatovic’s scholarship is in his review of the writings of participants in the American Constitutional Convention and ratification process. He demonstrates that, while there was certainly no unanimity of views on what the powers of the President should be,¹⁴ many of the most influential Founders were well aware that there could be emergency situations in which the President was called upon to act beyond the law. But he does not establish that the U.S. Constitution which emerged from these debates, and was ratified only after adoption of the Bill of Rights, provides the President with power in emergencies to act contrary to law or to the Constitution’s own provisions.

Much of the constitutional debate summarized in *OUTSIDE THE LAW* is directed not to defining the scope of executive power in emergencies, but rather to whether the powers of the executive should be specified at all – and if they were specified, what those executive powers were. Madison expressed a “strong bias in favor of an enumeration and definition of power” but concluded that it was impractical in part because political science has “yet been unable to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary.”¹⁵ And even if it was difficult to define executive power, it was even harder to obtain agreement at the Convention on what those powers should be. The result in the final Constitution is strikingly vague: The “executive Power shall be vested in a President of the United States of America;” he shall take an oath to the Constitution before entering office; he shall be “Commander in Chief of the Army and Navy.” He can “require the Opinion of the principal officer in each of the Executive Departments on any subject related to their duties,” has the power to grant “Reprieves and Pardons”, to make Treaties with the advice and consent of the Senate, and make appointments of government officers and judges.¹⁶

Thus, the Constitution stated clearly that all the Executive Power was “vested in the President” – but nowhere stated what that Executive Power was. Clearly the Executive had the power to carry out the national laws, but it was less

¹⁴ Fatovic quotes Patrick Henry at the Virginia Convention: “Among other deformities, [the Constitution] has an awful squinting; it squints towards monarchy. . . . It is on a supposition that [y]our American Governors shall be honest, that all the good qualities of this Government are founded. . . . Shew me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty? Away with your President, we shall have a King.” *OUTSIDE THE LAW*, page 157.

¹⁵ *OUTSIDE THE LAW*, page, 166, citing notes from the Constitutional Convention and the *FEDERALIST PAPERS*, XXXVII, 244.

¹⁶ Article II, Sections 1-2 (summarized).

clear what the Executive's power was where the laws were ambiguous – or completely silent.

During the ratification debates, the Federalists strongly favored a broad reading of the power of the Executive. Fatovic quotes Alexander Hamilton and then John Marshall:

“These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.”¹⁷

“[A grant of general powers is necessary and unavoidable because even in England,] “it is easier to enumerate the exceptions to the king's prerogative than to mention all the cases to which it extends.”¹⁸

Fatovic states that Hamilton appeared to permit a flexibility to the President to act beyond the “‘definite procedures and fixed rules’ of law in emergencies.”¹⁹ It is unclear to me – given the authority cited by Fatovic – that Hamilton claimed authority for a President to act *in contravention* of the law. He appears largely to be arguing that a President must be able to act in areas where the law was silent – since it would not be possible to specify in advance powers necessary in all future contingent events. Indeed, Hamilton's statements, quoted by Fatovic from the Federalist Papers, seem to be arguing more for a strong national government as a whole (including Congress as well as the President) rather than for bestowing on the President powers to act in contravention of laws enacted by Congress:

“Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a capacity to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it so impossible safely to limit that capacity.”²⁰

¹⁷ OUTSIDE THE LAW , Page 190.

¹⁸ OUTSIDE THE LAW , Page 191.

¹⁹ OUTSIDE THE LAW , Page 193.

²⁰ OUTSIDE THE LAW , Page, 193, quoting Federalist Papers XXXIV, 227.

Hamilton thus states that “no precise bounds could be set to the national exigencies, that a power equal to every possible contingency must exist somewhere in the government.”²¹

Nonetheless, it is clear that the Constitution bestows on the President far more power than many of the delegates were comfortable with. Fatovic shows in some detail that some delegates went along with the virtually undefined grant of executive power in the Constitution only because they believed that those who would exercise this great power would be virtuous men dedicated to the public good. The Presidency was designed to appeal only to “those characters renowned for their superior virtue and wisdom”,²² and the indirect form of election, through the Electoral College, would “elevate only fit characters to the presidency.”²³ In the end, many at the Constitutional Convention were won over to the strong presidency only because it was clear that the first President would be George Washington, a man renowned for his high character and public virtue.²⁴

Fatovic’s review of what his selected 16th – 18th century political theorists and our Founding Fathers said about the relationship between law and executive power in emergencies is exhaustive and scholarly. But it provides little real guidance to the appropriate exercise of such powers in “real life” 21st century situations. We can agree with Machiavelli that “*fortuna*” will subject nations and their rulers with unpredictable emergencies that could be exceptionally serious to a nation and its people. But what kind of emergency, how serious a threat to a nation, is required before even these theorists would allow the executive to throw out law and assert dictatorial powers? Fatovic concedes that the theorists’ discussions were “maddeningly vague and incompletely theorized” and reflected “the uncertain and unpredictable nature of emergencies themselves.”

He notes that Locke provided but one example of when a king must exercise “prerogative” and take action contrary to law: Locke “gave the case of an accident . . . wherein a strict and rigid observation of the Laws may do harm; (as not to pull down an innocent Man’s House to stop the Fire, when the next to it is burning).”²⁵ Our Founding Fathers provided a few more examples: Hamilton made a reference to “unexpected invasions,” while Jefferson mentioned “military siege” and “a ship at sea in distress”.²⁶ But these examples cover such a broad range of “emergencies” that they seem more to obscure than to provide

²¹ Page 194, quoting Federalist Papers XXVI, 198.

²² OUTSIDE THE LAW , Page 224.

²³ OUTSIDE THE LAW , Page 239.

²⁴ OUTSIDE THE LAW , Page 217, 223, 237, 251.

²⁵ Page 54, quoting Locke’s Two Treatises, II, § 159, and page 256.

²⁶ And Fatovic even observes (Page 256) that the Constitution itself refers to “Cases of Rebellion and Invasion” – although the specific provision states that it is the Congress which has the power “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” – this is hardly a support for extra-legal application of executive power by the president.

understanding of how significant an event would be necessary for a king or President to act contrary to law. Although military siege and invasion may well threaten the survival of the state, neither a Fire nor a foundering ship does.

Fatovic nonetheless concludes that the kinds of emergencies to which the “extra-legal” application of law should be permitted are “pressing matters of survival that require immediate attention;” one where an ongoing crisis “becomes so severe that it begins to jeopardize the life and well-being of large segments of the population.” He recognizes that there has been a “dramatic shift” in America toward Congressional grant to the executive of formal legal authority in emergencies – rather than relying on extra-legal application of “prerogative.” But Fatovic nonetheless believes that “extra-legal” application of “prerogative” is preferable to reliance on law.

First, he asserts that executives should be able to ignore or violate the law because “much of the statutory and case law that seems to be relevant to the subject of emergencies deals [in his view would cause] concerned proponents of ‘prerogative’ to act outside or beyond the law.”²⁷ Unfortunately, it appears that Fatovic reached this conclusion because he is not familiar with some of the broadest and most significant grants of legal authority for the executive to act in emergencies. And he appears to have an exceptionally constrained view of the flexibility of law, and of our Constitution, in providing ample authority for executive action to save lives and protect public safety in exigent events.

In our federal system, it is states and their Governors who have and wield the broadest executive authority to save lives and protect property when “pressing matters of survival . . . require immediate attention” and a crisis “jeopardize[s] the life and well-being of large segments of the population.” Indeed, the police power was not among the “enumerated” powers of the states that was granted to the federal government in the Constitution – and under the Tenth Amendment to the Constitution, this police power is retained by the states.²⁸ Further, under emergency statutes enacted in all states, the Governor wields extraordinary authority. Although specific language differs from state to state, Governors in all states have the power, for example, to “commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency” – although this is subject of course to the Constitutional requirement (in the Fifth Amendment) to pay compensation if the property is deemed a taking.²⁹ I cite this particular emergency power because it is one that David Hume apparently did not believe a sovereign should have: “an eternal jealousy must be preserved against the sovereign, and no discretionary powers must ever be entrusted to him, by

²⁷ OUTSIDE THE LAW , page 254.

²⁸ See, e.g., Robert Sedler, “The American Federal System and the War on Terrorism,” in E. Abbott & O. Hetzel (ed.), A LEGAL GUIDE TO HOMELAND SECURITY AND EMERGENCY MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS (ABA Press 2005), at pp. 47-50.

²⁹ Quotation is taken from Colorado statute: C.R.S.A. 24-32-2104(7).

which the property or personal liberty of any subject can be affected.”³⁰ And the quarantine/ public health emergency powers of states are also far broader than those provided to the federal government, although that gap has narrowed in the last several years. Yet while concluding that laws are inadequate and that executives must be able to ignore them in emergencies, nowhere does Fatovic mention the role of the states and the executive authority of Governors to wield the police power.

Second, the federal emergency statutes mentioned by Fatovic,³¹ while important to emergency actions in their sphere, are not the principal statutes that apply to the events that Fatovic asserts require the application of extra-legal executive prerogative. Indeed, Fatovic neither discusses nor acknowledges the principal federal statute that provides legal authority *and funding* for federal government response to catastrophic events – the Robert T. Stafford Disaster Relief and Assistance Act.³² This statute is extraordinarily broad. A President is empowered to “direct any federal agency, with or without reimbursement, to utilize its authorities and resources under Federal law in support of State and local assistance response and recovery efforts.”³³ Where there are “immediate threats to life and property”, Federal agencies may provide assistance directly to alleviate the disaster – including “*performing on private or public lands any work or services essential to saving lives and protecting and preserving property or public health and safety.*”³⁴

Indeed, in the Stafford Act and in ongoing appropriations to the Disaster Relief Fund, Congress has essentially provided to the executive branch a blank check to use federal capabilities and to spend federal moneys to save lives and to protect the public health, safety, and public and even private property when there is a major disaster event. Congress has also permitted the executive branch to waive application of laws that interfere with disaster response.³⁵ This grant (during a declared emergency or major disaster) of two of the most guarded powers of the Congress – the power to decide where public moneys can be spent and the power to enact laws – allows the executive broad flexibility to take the

³⁰ OUTSIDE THE LAW, page 116, quoting Hume’s *history of England*, Vol. V, p.128.

³¹ OUTSIDE THE LAW, Page 254-255: the National Emergencies Act of 1976, the International Emergency Economic Powers Act of 1977, the Homeland Security Act of 2002, the Emergency Banking Act of 1933, the National Security Act of 1947, the Defense Production Act of 1950, and the Economic Stabilization Act of 1970).

³² Public Law 93-288, as amended, 42 USC 5121-5207.

³³ Stafford Act § 402(1), 42 USC 5170a(1).

³⁴ Stafford Act § 403 (a), 42 USC 5170b(a), emphasis added.

³⁵ For example, Stafford Act § 301, 42 USC 5141: Waiver of administrative requirements for assistance; Section § 316, exemption from National Environmental Policy Act for emergency response actions. Note that there are significant limitations on the scope of waivers – and that these waivers apply only during the response phase of a disaster and not during the rebuilding/recovery stage.

steps needed to save lives and property. And through cross-references between the Stafford Act and the Defense Production Act,³⁶ the executive branch even has the power to require the private sector to provide any goods or services specified by the government as necessary for emergency response.

The power of the President to act in emergencies is of course not unlimited. The President must first declare publicly that a Stafford Act Emergency or major disaster exists – usually only after a governor has requested a declaration. While Congress has provided a blank check for emergency response, there are significant limitations on funding for disaster recovery: nothing for private industry, and eligibility restrictions on federal funding of reconstruction by state and local governments and non-profit organizations, among others.

Indeed, a principal challenge of the executive in administering the Stafford Act is in determining, within the broad discretion available under the statute, between “disaster related” needs and preexisting ones. Congress clearly did not intend to give a blank check to the executive to pay for all health or housing needs for years after a disaster – as is evidenced by the contentious debates that accompany efforts to reform federal health care and housing programs. Congress did authorize the executive to address unilaterally, with emergency powers and emergency funds, the immediate needs created by a disaster event and a number of “typical” requirements for reconstruction and recovery. But many other contentious issues are reserved for special programs and special appropriations enacted in the aftermath of catastrophic events.

The other reason given by Fatovic for preferring extra-legal executive “prerogative” to the application of law is his concern that disaster legislation enacted in the immediate aftermath of a disaster may well be “ill-advised . . . over-inclusive or under-inclusive, indeterminate, indiscriminate, or unenforceable.”³⁷ The legislature might “abdicate too much of its own power or oversight responsibility, confer too much power on the executive, fail to make necessary exceptions to the law, abridge liberties that actually pose no danger to public order or safety, or do some combination of these things.”³⁸ And his solution is to allow the executive to simply act altogether outside the law and presumably outside the constitution: “Because prerogative lacks the cover of law, any executive who resorts to this extraordinary power is compelled to provide a justification limited to the specific conditions at hand.”³⁹

I admit that legislatures frequently overreact to events. Overreaction appears particularly common in the wake of attacks upon our nation. The internment of citizens of Japanese ancestry during World War II and the Gulf of Tonkin Resolution may be two good examples. But I do not believe that the

³⁶ Stafford Act § 602(b), 42 USC 5195a(b).

³⁷ OUTSIDE THE LAW, Page 263.

³⁸ Id.

³⁹ OUTSIDE THE LAW , Page 264.

“solution” is to assume that the President should be deemed free to act contrary to law, to spend funds which have not been appropriated, simply by unilaterally deciding that the situation calls for it. To conclude that the President has inherent power to ignore or override laws and treaties, and to act virtually without review from courts or from the legislative branch, is to conclude that our rule book, the Constitution and the federal system operating under it, is not capable of reacting to unforeseen events.

Moreover, those well versed in emergency management know that it is usually not the law that interferes with efforts to save lives and protect public health and safety in emergencies. The laws giving emergency authority to state Governors and our President are extremely broad. Failure in emergency response generally stems not from inadequacy of law but from inadequacy of planning: failure to think of what actions might need to be taken in evacuations, sheltering, debris removal, delivery of mass care, temporary housing, transportation, restoration of communications and transportation and the like. There was ample authority in Louisiana to commandeer buses to assist in the evacuation of New Orleans – but plans to ensure that bus drivers would be available to drive the buses did not exist – and so the buses were left stranded in parking lots.⁴⁰

Successful emergency response generally requires not new law, or executives ignoring the law, but executives who understand what the law is, have considered the types of natural and non-natural hazards they might face and the impact of those hazards on their communities – and then develop emergency plans that implement their authority to save lives and to ensure the public health and safety. Development of emergency plans is a necessary precondition to an effective response; only with planning will disaster response efforts by the many different participants (federal, state, federal (including military) governments, foreign governments, private and non-profit sector, and individuals) be competent, coordinated, and provided available personnel, materiel, and logistical support.

Fatovic asserts that emergencies are so varied and unpredictable that emergency legislation cannot provide the necessary flexibility to be effective in the “next” disaster. And it is true that legislatures and executives both tend to base emergency legislating and emergency planning on the characteristics of the last disaster, and fail to consider all of the possible permutations that the “next” disaster might bring. But to suggest that under our Constitution the President has

⁴⁰ American Bar Association Hurricane Katrina Task Force Subcommittee Report, February 2006, pp. 14-18, available as of February 10, 2010 at http://www.abanet.org/natsecurity/publications/hurricane_katrina_report_2006_2.pdf.

See also, Abbott, Cohn, & Hetzel, “Emergency Management in a Federal System: Constitutional Principles and Practical Applications,” in E. Abbott & O. Hetzel (ed.) EMERGENCY MANAGEMENT AND HOMELAND SECURITY FOR STATE AND LOCAL GOVERNMENTS (ABA Press forthcoming 2010).

and should exercise the “prerogative” to ignore and violate the law during emergencies is to suggest that the President should wait for those future disasters and then assert “prerogative” to deal with those emergencies in an unplanned way. This would surely compromise our nation’s ability to respond to catastrophic events.

OUTSIDE THE LAW provides a scholarly reminder of the importance that our Founding Fathers placed on assuring that the Constitution would give their new nation and its President the flexibility to respond to emergencies – particularly emergencies (such as Shay’s rebellion of 1786-87, or the subsequent invasion by British troops during the War of 1812) that threaten its security. But it does not establish that the Constitution ratified in 1788, along with the Bill of Rights, bestowed on the President the “prerogative” to violate the Constitution and laws enacted by Congress under the Constitution. Fatovic highlights the depth of concern at the Constitutional Convention that the broad grant of the “executive Power” to the President “squints toward monarchy.” Our Founding Fathers indeed sought to assure that only virtuous men would seek and be elected to wield the broad power granted to the executive. But they did not go as far as Machiavelli and John Locke in allowing an additional “prerogative” to violate the law – in emergencies or otherwise.

Reliance on law rather than prerogative places an obligation on executive branch to know what the law is and how it can be applied flexibly in emergencies whether created by foreign attack, industrial attack, or natural hazards. I cited the American Bar Association’s formal Association policy on the Rule of Law at the beginning of this article:

Principle 1: The rule of law must be preserved when a major disaster occurs.

The second “Principle”, adopted at the same time by the American Bar Association is a necessary corollary:

Principle 2: The preservation of the rule of law requires proactive planning, preparation and training before a major disaster strikes.

Our government is effective in emergency response only when it plans for, trains for, and exercises its personnel to meet a variety of contingencies. The unplanned reliance on prerogative is not only inconsistent with the principles on which this nation is founded - it is also doomed to failure.

6 J. Lobel, 'Emergency Power and the Decline of Liberalism' (1989) 98 Yale Law Journal 1358. 232 emergencies and the limits of legality. require (immediate action'⁷ and in part because they (pose the greatest and most sustained danger to constitutional freedoms and principles'.⁸ Bruce Ackerman limits his proposal for an emergency constitution to one that will follow another terrorist attack that is the equivalent of the 9/11 attack.Â Ackerman argues that 'the emergency constitution should be focused specially on terrorist attacks, and should not be concerned with other crises. It should authorize a d~claration of emergency only when a truly devastating attack has occurred '. 10 D. Cole, *Enemy Aliens* (New York: The New Press, 2003), ch. The National Emergencies Act (NEA) (Pub.L. 94â€“412, 90 Stat. 1255, enacted September 14, 1976, codified at 50 U.S.C. Â§ 1601â€“1651) is a United States federal law passed to end all previous national emergencies and to formalize the emergency powers of the President. The Act empowers the President to activate special powers during a crisis but imposes certain procedural formalities when invoking such powers. The perceived need for the law arose from the scope and number of laws granting special powers to Like all emergency powers, the laws governing the conduct of war allow the president to engage in conduct that would be illegal during ordinary times. This conduct includes familiar incidents of war, such as the killing or indefinite detention of enemy soldiers.Â Passed in 1977, the law allows the president to declare a national emergency â€œto deal with any unusual and extraordinary threatâ€œ”to national security, foreign policy, or the economyâ€œ”that â€œhas its source in whole or substantial part outside the United States.â€œ The president can then order a range of economic actions to address the threat, including freezing assets and blocking financial transactions in which any foreign nation or foreign national has an interest. The Constitution is silent on the matter, yet from Abraham Lincoln's suspension of habeas corpus during the Civil War to George W. Bush's creation of the enemy combatants label, a number of presidents have invoked emergency executive power in defense of actions not specifically endorsed in the Constitution or granted by Congress.Â This couples nicely with former FEMA General Counsel Ernest Abbott's (2010) fine review of Clement Fatovic's (2009) book *Outside the Law*, which details the struggle between executive discretion and the rule of law during an emergency. A Legal Typology for Disaster Response Operations: Public Lawyering in the State of Emergency. Article. Sep 2010.