

# JAMES MADISON AND THE EMERGENCY POWERS OF THE LEGISLATURE

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## ABSTRACT

Prerogative, the power to take extra-legal measures in extraordinary circumstances, is generally considered to be the exclusive domain of the executive. This article shows that James Madison, who is widely regarded as hostile to discretionary power in the executive, not only endorsed exercises of prerogative by the executive but also took steps toward developing a model of prerogative that gives primacy to the legislature in times of emergency. Madison's views on "legislative prerogative" emerged in the context of congressional debates over avowedly unconstitutional proposals including a grant of military authority to seize private property during the revolutionary war, the creation of the Bank of North America under the Articles of Confederation, and the provision of financial assistance to refugees from St. Domingo. These cases reveal a strict constructionist resorting to extra-legal measures to pursue objectives not expressly authorized by the constitution then in place as a safer alternative to more permanent expansions of government power established through law.

KEYWORDS: *James Madison, Prerogative, Executive Power, Legislature, Rule of Law*

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THE EXERCISE OF PREROGATIVE, or what John Locke described as the power to take extra-legal measures in extraordinary circumstances, has generally been regarded as the exclusive domain of the executive in liberal political thought. To the extent that liberal thinkers have defended the use of this power, they have

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generally done so on the grounds that executives enjoy distinct institutional advantages that enable them to respond to emergencies with the required energy, dispatch, and decisiveness. Legislatures, in contrast, are relegated to a secondary role because, it is argued, their deliberative nature makes them ill-equipped to act in the midst of emergencies with the necessary speed and unity. Legislatures can take either prospective action by adopting enabling legislation that authorizes the executive to take measures that would not be permitted under normal circumstances or retrospective action by judging the validity of extra-legal measures taken by the executive, but they cannot take immediate action. Despite these supposed institutional disadvantages, James Madison contemplated a more direct role for the legislature in times of emergency. In contrast to the executive-centered model of prerogative that has dominated liberal political and constitutional thought, Madison's remarks in several legislative debates over admittedly unconstitutional proposals to deal with various kinds of emergencies provide the beginnings of what can be described as a model of "legislative prerogative."

The first part of this article examines Madison's views on the emergency powers of the executive against the background of more familiar accounts of executive prerogative. Madison is not generally regarded as a proponent of prerogative, but his record as a lawmaker during the early part of his political career reveals explicit—albeit reluctant and ad hoc—support for the use of executive prerogative under limited conditions. Despite his deep-seated suspicion of discretionary executive power, Madison did endorse a limited version of executive prerogative that relied on much the same sort of reasoning used by Locke and Thomas Jefferson in their more familiar justifications of prerogative. Madison's understanding of executive prerogative and the role of the legislature in serving as a check against abuses of this power was expressed most clearly in the context of a congressional debate over the legitimacy of Alexander Hamilton's legally questionable handling of funds as Secretary of the Treasury.

The second part of this article demonstrates that Madison employed many of the same arguments used to justify extra-legal action by the executive to justify unconstitutional measures taken by the national legislature. Madison developed his ideas on legislative prerogative during his time as lawmaker in the context of congressional debates over a grant of military authority to seize supplies required for the revolutionary war effort, the creation of the Bank of North America under the Articles of Confederation, and the provision of financial assistance to refugees from the Haitian Revolution. These cases reveal a strict constructionist resorting to extra-legal measures to pursue objectives that were not expressly authorized by the constitution then in place as a better alternative than more permanent expansions

of government power favored by thinkers such as Alexander Hamilton and his congressional allies. The model of emergency action that begins to emerge from Madison's remarks in these debates is one that stresses the primacy of the legislature either as a check on the prerogative powers of the executive or as a more direct and immediate actor in emergencies.

## CONCEPTIONS OF PREROGATIVE

John Locke's account of prerogative in *The Second Treatise of Government* has provided a touchstone for nearly all scholarship on the emergency powers of the executive, especially since the terrorist attacks of September 11, 2001.<sup>1</sup> Locke defined prerogative as "the Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it." Ever since that classic formulation, prerogative has been identified almost exclusively with the executive (though some of Locke's own examples suggest that *anyone* might be entitled to take extra-legal action in case of genuine emergency). Unlike the legislature, which is not always in session and may be too slow to respond to "all Accidents and Necessities" because it is a numerous and deliberative body, the executive, which is "always in being," is capable of responding to unforeseen exigencies with the requisite "dispatch" because that office operates according to a single—and presumably undivided—will (Locke 1970, 375). Though it is preferable to provide for the public good through prospective laws crafted by the legislature, argued Locke, sometimes "the good of Society requires, that several things should be left to the discretion of him, that has the Executive Power" (Locke 1970, 374). For example, if a fire threatens to grow out of control, it would be permissible to violate the otherwise inviolable right to property by tearing "down an innocent Man's House" near the source of the conflagration "to stop the Fire" from spreading. As Locke explained, "'tis fit that the Laws themselves should in some Cases give way to the Executive Power" in order to fulfill the more fundamental law of nature that "*all* the Members of the Society are to be *preserved*" (Locke 1970, 375). In recognition of the dangers that such discretionary powers pose to the rule of law, Locke insisted that no individual act of prerogative, however necessary or justifiable in the circumstances, should be cited as a legal precedent for the general expansion of executive power or as a justification for any subsequent exercise of extra-legal power. That is, each exercise

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1. This literature, which includes scholarship in law, political science, and philosophy, is vast. Some examples include Fatovic 2004a; Agamben 2005; Goldsmith 2007; Feldman 2008; Lazar 2009; and Kleinerman 2009.

of prerogative is to be judged strictly on a case-by-case basis by the people or their representatives.<sup>2</sup>

This executive-centered conception of prerogative has shaped subsequent understandings of extra-legal action in liberal constitutional thought, most notably among the American Founders (see Fatovic 2009). The most explicit statement of this doctrine among early American thinkers appears in Thomas Jefferson's response to a question from John B. Colvin about the validity of extra-legal action in extraordinary circumstances. "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen," wrote the then-former president, "but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." As illustrated by the real-world examples that Jefferson provided his correspondent, prerogative is justifiable in cases of military necessity and other existential threats, but it is available only to "officers of high trust," such as military commanders and chief executives (Jefferson 1984, 1231 and 1233). In Jefferson's view, the officer who acts outside the law is bound to do so "at his own peril, and throw himself on the justice of his country and the rectitude of his motives." Likewise, the people or their representatives who ultimately decide on the legitimacy of an extra-legal measure taken by the high officer are "bound to judge according to the circumstances under which he [*sic*] acted" (Jefferson 1984, 1233). As in Locke's model of prerogative, everything in Jefferson's conception depends on the specific concrete facts at hand and denies precedential value even to the most uncontroversial exercises of prerogative. Each exercise of prerogative must be judged on its own terms without reference to or reliance on previous examples.

Recent scholarship has uncovered support for some version of executive prerogative among important American political thinkers including not only Thomas Jefferson (Fatovic 2004b; Bailey 2004, 2007, 2013), but Alexander Hamilton (Fatovic 2004b; Thomas 2013) and Abraham Lincoln (Farber 2003; Kleinerman 2005; Curtis 2013), as well. By contrast, Madison is often presented as a critic of discretionary power who sought to curtail the powers of the executive as narrowly as possible. Scholars have noted that Madison, who arrived at the Constitutional Convention without very clear ideas about the meaning of executive power, remained

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2. On the prospects and efficacy of popular judgment of prerogative, see Kleinerman (2007).

relatively inactive in early debates about its scope (Sedgwick 1988).<sup>3</sup> According to Morton Frisch, the Virginia Plan Madison helped to devise “was characterized by a view of executive power which was simply ministerial or reactive as a check on the legislative assembly” (Frisch 1987, 281). Although Madison’s ideas, like those of many other participants in the Convention, would change over the course of the summer, there is a scholarly consensus that this framer was hostile to the expansive view of executive power favored by delegates such as Alexander Hamilton, James Wilson, and Gouverneur Morris. Even though he favored the creation of an independent executive, it is argued, the “heavy-handed” leadership style of Robert Morris as Superintendent of Finance in the early 1780s made Madison wary of allowing *any* executive officer too much latitude (Rakove and Zlomke 1987, 295).

Whatever Madison’s ideas about executive power at the Constitutional Convention, contemporary scholarship generally portrays him as the leading critic of executive power and discretionary action under the new system of government. Peter Shane describes the historical movement towards increasingly unilateral executive action as a radical departure from this framer’s vision of a constitutional system that relies on a complex structure of checks and balances to maintain accountability and encourage deliberation between different branches of government (Shane 2009). Eric Posner and Adrian Vermeule (2011) welcome the expansion of presidential power in the twentieth century, but they, too, characterize it as a shift away from the Madisonian ideal, which they identify with a system of legal constraints that prevents the executive from responding effectively to emergencies. Benjamin Kleinerman argues that as president Madison modeled a standard of presidential leadership that did not seek to maximize executive power, as has been the case with nearly all other occupants of the office, but to bring it under constitutional constraints instead, often deferring “to his cabinet, Congress, and even the states” (Kleinerman 2014, 8). Indeed, the idea that Article II confers powers on the president beyond the review of other branches might be considered antithetical to the inherently conflictual nature of Madison’s complex system of countervailing powers (Thomas 2008).

There is no question that Madison insisted on strict, and sometimes rigid, adherence to established rules of law throughout his political career, even going so far as to veto legislation on national funding for internal improvements that *he himself had proposed* because he believed that Congress lacked the authority to promote

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3. Madison conceded as much in a letter to George Washington dated April 16, 1787 (see Madison 1999, 82–83).

the construction of roads and canals without a prior constitutional amendment.<sup>4</sup> However, it would be a mistake to conclude that Madison ruled out in all cases government action that lacked clear and explicit constitutional authorization. Although he consistently refused to justify legislative or executive action by resorting to loose or elastic constructions of the Constitution, he acknowledged the necessity for extra-legal action in exigent circumstances where strict adherence to legal rules would do serious harm.<sup>5</sup>

Unlike Madison's well-known and carefully considered views on factions, religious liberty, checks and balances, and representative government, his stance on extra-legal action is not revealed in any of his published essays or presidential addresses. Instead, Madison developed his ideas on prerogative in piecemeal and rather ambivalent fashion during the course of legislative debates early in his career. Despite his repeated and emphatic insistence on the need to maintain strict fidelity to both the spirit and the letter of the law, Madison was prepared to step over legal boundaries in cases of emergency. In fact, there were several instances in his legislative career when he voted for legislation that he himself acknowledged exceeded the legal and constitutional powers of the lawmaking assembly. In his view, deviation from the letter of the law was a last resort that ought to be avoided whenever possible, but it was still preferable to emergency action that relied on expansive, or "loose," interpretations of existing legal authority that tend to expand power on a more permanent basis.

Like other liberal advocates of prerogative, Madison preferred to specify the powers and functions of government, including both its means and its ends, in advance. As he argued in support of the U.S. Constitution at the Virginia Ratifying Convention, "no government can exist, unless its powers extend to make provisions for every contingency" (Madison 1999, 364).<sup>6</sup> However, Madison was enough of a realist to acknowledge that lawmakers—himself included—were far from perfect. His views on the cognitive limitations of legislators, including their inability to foresee and plan for anything the future might bring, are illustrative of what one biographer describes as his "characteristic attitude concerning human fallibility"

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4. Compare Madison's "Seventh Annual Message to Congress" (1999, 716) and his Veto Message to Congress (1999, 718–720).

5. One of the only scholars to identify this feature of Madison's political thought is Lance Banning, who notes that the Virginian deviated from the principle of strict constructionism "when exigencies required. But he departed from the principle with obvious reluctance and concern" (1983, 239).

6. This is a sentiment that Madison would repeat more than once, remarking, "as I hope we are considering a government for a perpetual duration, we ought to provide for every future contingency" (1999, 371).

(Gutzman 2012, 141).<sup>7</sup> Try as they might to provide for every contingency, they were bound to miss something. In spite of his own preference for carefully spelling out the powers of government to minimize if not prevent their abuse, he had to admit that in drafting the Constitution, for instance, “precision was not so easily obtained as may be imagined” (Madison 1999, 393).

Because of the unavoidable imperfections of the law—which in part reflect the faulty medium in which they are expressed<sup>8</sup>—Madison cautioned against the creation of excessive rigidity and absolutist restrictions. Strict legal boundaries ordinarily provide a strong if not impregnable line of defense against abuses of power in times of emergency, but Madison recognized that excessive restrictions could end up inviting the very abuses they were intended to thwart. “Absolute restrictions” were particularly problematic because violations of them were probably inevitable. Echoing Hamilton’s blunt claims in *Federalist 23* about the limits of limitations on the powers of national defense, Madison asserted in *Federalist 41* that “the means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions” (Madison 1999, 228). Sooner or later, an unconditional prohibition on government would run up against real-world conditions that necessitate their suspension. As Madison explained in *Federalist 38*, the Articles of Confederation imposed so many limits on Congress that legislators were often forced to “overleap[] their constitutional limits” in cases of “necessity” (Madison 1999, 210).

In cases of genuine necessity, Madison warned, the people would ultimately approve the violation and begin to lose respect for a law that proved to be inadequate or even obstructive to the achievement of important ends. Madison explained his thinking on this matter most explicitly in a letter to Jefferson on the habeas corpus clause in the Constitution:

Supposing a bill of rights to be proper the articles which ought to compose it, admit of much discussion. I am inclined to think that absolute restrictions in cases

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7. Garrett Ward Sheldon (2003) attributes Madison’s views on human frailty to a deep-seated Calvinist worldview.

8. See Madison’s remarks on the inherent limitations of human language, which render even God’s intended meaning “dim and doubtful” when “the Almighty himself condescends to address mankind in their own language” (1999, 198).

that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure. (Madison 1999, 422)

Madison would make a similar point in the debate over the constitutional amendments that would ultimately comprise the Bill of Rights. Although he would later insist that the federal government possesses only those powers “expressly” granted to it in the Constitution, Madison rejected a proposal to insert that word into the text of what would become the Tenth Amendment because “it was impossible to confine a Government to the exercise of express powers” (*Annals of Congress* 1789, 790). The very same line of reasoning found its way into Madison’s draft of a constitution for Virginia in the same month as his letter to Jefferson. In the final paragraph of that draft, Madison wrote: “The extension of the Habs. Corps. to the cases in which it has been usually suspended, merits consideration at least. If there be emergencies which call for such a suspension, it can have no effect to prohibit it, because the prohibition will assuredly give way to the impulse of the moment; or rather it will have the bad effect of facilitating other violations that may be less necessary” (Madison 1999, 417).

One possibility was to seek justification for extraordinary action in one of the Constitution’s many open-ended clauses (e.g., by exploiting the indeterminacy of language that Madison analyzed in *Federalist 37* to expand the powers of government). Leading Federalists in Congress and in the executive branch often discovered all the constitutional authority they needed for both ordinary and extraordinary legislation in elastic readings of the necessary and proper clause and the general welfare clause. However, Madison refused to stretch the powers of Congress by resorting to loose constructions of these and other clauses.<sup>9</sup> Nor was he willing to “discover” powers that were “implied” in the notion of sovereignty or in the overall structure or purpose of the Constitution as Federalists such as Fisher Ames and Alexander Hamilton were wont to do.<sup>10</sup> To find powers through either

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9. Banning (1983, 234–235) demonstrates that Madison had actually defended congressional use of coercive powers against the states through implication in the Articles of Confederation.

10. See, e.g., Alexander Hamilton’s “Opinion on the Constitutionality of a National Bank” and Fisher Ames’s defense of the Bank in House debates (*Annals of Congress* 1791, 1953–1959).

of these strategies where none were expressly granted would allow for precisely the kind of discretion that Madison believed the law is meant to curtail.<sup>11</sup> It was one thing to make explicit allowance for exceptions in extraordinary circumstances (as the suspension clause does in the case of the writ of habeas corpus), but it was quite another to make the Constitution fit circumstances that had not been foreseen because that would undermine the very purpose of a constitution. That left Madison with only one other option in dealing with an emergency: extra-legal action. Although he would not use the term himself, the position that Madison took on indispensable legislative action in the absence of an express grant of power could fairly be characterized as one in support of “legislative prerogative.”

When Madison did use the term “prerogative,” he did so in much the same way that his contemporaries did: to refer to the powers and privileges of the executive in a monarchy. Its association with the British monarchy was perhaps the most important reason that this Anglophobic thinker usually expressed such a dim view of prerogative. As he understood the constitutional history of England, royal prerogative was antithetical to republican ideals of the rule of law and popular sovereignty because it allowed the monarch to exercise discretionary powers without approval of or accountability to either the people or their representatives. In fact, its association with royal power was Madison’s stated reason for rejecting Locke’s more philosophical account of executive power. In a footnote to the first installment of *Helvidius*, Madison’s pseudonymous response to Hamilton’s vindication of Washington’s proclamation of neutrality in the war between England and France, the Virginia congressman dismissed Locke’s reflections on the subject of executive power because “the chapter on prerogative, shews how much the reason of the philosopher was clouded by the royalism of the Englishman” (Madison 1999, 540).

During the critical period just before the creation of the Constitution, Madison was more apt to express concerns about an overweening legislature than an overpowerful executive. As he put it at the Constitutional Convention, “Experience has proved a tendency in our governments to throw all power into the Legislative vortex” (Madison 1999, 127). However, once the Constitution was in place and Hamilton’s energetic leadership of the Treasury Department made manifest the full potential of the executive branch under the new system, Madison would come to view the executive as the far more dangerous threat to liberty. Much of Madison’s hostility stemmed from the tendency of executive power to expand in times

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11. Despite his previous claims that a bill of rights was unnecessary, Madison ended up justifying the proposed amendments that would comprise the Bill of Rights on the grounds that they would provide additional security against just this sort of loose constructionism (see Madison 1999, 447).

of war. Reflecting on the sobering lessons of history, he noted that “the testimony of all ages forces us to admit, that war is among the most dangerous of all enemies to liberty; and that the executive is the most favored by it, of all the branches of power” (Madison 1999, 605). In a letter to Jefferson he confided that “the constitution supposes, what the History of all Govts. demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it” (Madison 1999, 586).

In light of the dangers posed by executive power, Madison considered it necessary to establish clear legal boundaries that minimize the executive’s room to maneuver: “details should leave as little as possible to the discretion of those who are to apply and to execute the law” (Madison 1999, 630). If the powers of the executive were to be expanded, even on an ad hoc basis, that could not be done through construction or implication. Instead, it would have to follow the model of prerogative.

Madison provided his most explicit and fully developed statement on executive prerogative in a case where he actually denied its applicability. Like all of his positive statements in favor of extra-legal action, Madison articulated his views on the validity of executive prerogative only when he was compelled to do so in the heat of political controversy. The context was a highly partisan House investigation near the end of the Second Congress over the way Hamilton had handled funds designated for the repayment of debts.<sup>12</sup> Suspecting the Treasury Secretary of corruption and abuse of power, William Branch Giles of Virginia, one of the Washington administration’s most vehement and implacable critics, introduced a motion requiring Hamilton to provide a full accounting of the sources, uses, and balance of loans taken out to repay the country’s debts. With characteristic speed and efficiency, Hamilton complied with this demand, but the information he provided failed to satisfy Giles, so the arch-Republican introduced a number of resolutions that accused Hamilton of using funds in a manner that had not been authorized by law.

The Treasury Secretary was ultimately exonerated by substantial margins on all counts, but his actions did raise important questions about the ability of executive officers to circumvent legal instructions in the pursuit of otherwise legitimate ends. Giles’s resolutions charged Hamilton with using funds in a manner not approved by Congress (specifically, by using funds designated for the repayment of a loan to France for the repayment of domestic loans instead) and with borrowing more money from Holland than he had been authorized to do. Hamilton was able

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12. One of the few scholarly accounts of this episode that focuses on Madison’s articulation of executive power and emergency action is Kleinerman (2009, 140–145).

to account for every cent that passed through the Treasury, but he acknowledged that he had shifted funds specifically designated for the repayment of one set of loans to the repayment of an entirely different set of loans.<sup>13</sup> Many of Hamilton's supporters believed that his actions fell squarely within the discretionary powers of the Treasury Secretary, but not everyone was convinced that he had acted lawfully.

Some of Hamilton's defenders in the House invoked the idea of prerogative to justify his actions. Noting that there are cases "which cannot be foreseen by the Legislature nor guarded against," pro-administration representative William Smith of South Carolina echoed Locke in arguing that "a discretionary authority must be deemed to reside in the President, or some other Executive officer, to be exercised for the public good" (*Annals of Congress* 1793, 901). Because Hamilton's actions served the public good (shifting funds around the way he did saved the financially-strapped country money on its interest payments), Smith concluded that he should be indemnified against punishment.

There was no question in Madison's mind that Hamilton had violated the law and ignored the instructions of the president by treating funds interchangeably (*Annals of Congress* 1793, 938). Madison conceded that the Treasury Secretary enjoys some "important discretion" in the management of "ordinary revenues arising from taxation," but he contended that the laws specifying the terms of loans denied Hamilton the latitude that was being claimed by administration allies such as Smith (*Annals of Congress* 1793, 942). The question was whether Hamilton's actions were justified on other than legal grounds. At first, Madison seemed to stake out an absolutist position on the sanctity of law, suggesting that the violation of any particular law is never acceptable because it erodes respect for the rule of law in general. The Virginian expressed concern about maintaining "a proper respect for the authority of the laws" even if a good outcome results from violating them (*Annals of Congress* 1793, 939). In spite of this seemingly categorical stance against public officials ever defying the law, Madison acknowledged that there were exceptions that justified an executive officer in stepping outside the law.

Madison took a position very similar to the one that Jefferson would later articulate in his letter to John B. Colvin. Just as his mentor would argue that "officers of high trust" have a "higher obligation" to uphold natural laws of "self-preservation" than to follow positive laws when they interfere with vital ends (Jefferson 1984,

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13. For details on the investigation into Hamilton's activities and his ultimate exoneration, see Elkins and McKittrick (1993, 295–302). On the constitutional questions raised by this episode, see Currie (1997, 164–168).

1231), Madison acknowledged that certain kinds of emergencies take precedence over strict obedience to law:

Much has been said on the necessity of sometimes departing from the strictness of legal appropriations, as a plea for any freedoms that may have been taken with them by the Secretary. He would not deny that there might be emergencies, in the course of human affairs, of so extraordinary and pressing a nature, as to absolve the Executive from an inflexible conformity to the injunctions of the law.

Having conceded that emergencies of a sufficiently exigent nature (which he never specified in further detail) justify departures from absolute adherence to the law, Madison then enumerated several principles that the executive ought to observe in taking extra-legal measures:

It was, nevertheless, as essential to remember, as it was obvious to remark, that in all such cases, the necessity should be palpable; that the Executive sanction should flow from the supreme source; and that the first opportunity should be seized for communicating to the Legislature the measure pursued, with the reasons explaining the necessity of them. This early communication was equally enforced by prudence and by duty. It was the best evidence of the motives for assuming the extraordinary power; it was a respect manifestly due to the Legislative authority; and it was more particularly indispensable, as that alone would enable the Legislature, by a provident amendment of the law, to accommodate it to like emergencies in the future (*Annals of Congress* 1793, 941).

In Madison's view, none of these principles were followed in this instance. Not only had Hamilton failed to inform Congress of his actions until he was forced to do so, but he had not provided a satisfactory account of his actions when he finally issued his response. To top it all off, the subordinate had not even sought the prior approval of "the supreme source" of executive authority (i.e., the president). But none of this really mattered because Hamilton had violated the first, and perhaps most crucial, criterion in Madison's guidelines: his actions were not taken in response to a genuine and "palpable" necessity. Much like other supporters of prerogative, Madison's position presupposed a categorical divide between states of emergency and states of normalcy, with different sets of rules governing each.<sup>14</sup>

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14. Unfortunately, Madison also resembled other proponents of prerogative in failing to explain here or anywhere else exactly what qualifies as an emergency.

However, it was evident to him, at least, that the situation faced by Hamilton did not rise to the level of an “extraordinary and pressing” emergency. Because there was no real emergency, Hamilton’s actions fell well short of the standards required to justify an exercise of prerogative. This helps explain why Madison was one of only five members of the House to vote for all of the resolutions against Hamilton.

The significance of Madison’s remarks go well beyond this particular episode. They highlight the primacy of the legislature in cases of emergency. Even though the executive is usually the part of government that takes the initiative in responding to emergencies, Madison reminds us that the legislature is expected to pass judgment on the legitimacy of extra-legal action. As Madison explained, the executive is obligated to inform the legislature as soon as possible of the actions taken and the reasons behind them. This sort of inter-branch communication is critical to Madison’s republican conception of constitutional government.<sup>15</sup> Without a full and immediate accounting to the legislature, the executive threatens to upset the entire constitutional order and system of republican government. A full and immediate report to the legislature is required not only to maintain the system of checks and balances but also to enable the legislature to determine if there is a defect or shortcoming in existing law that it ought to rectify.

The kind of legislative involvement Madison contemplated in this instance is basically identical to the role that Locke (and later Jefferson) envisioned. However, the legislature’s role in emergencies was not limited to giving retrospective approval (or disapproval) of extraordinary actions for Madison. The legislature could act in two other ways, as well. One would be to enact legislation that obviated the need for extra-legal executive action in the future, as Madison explained in his speech in the House. That is, it could act prospectively by creating laws that provide for emergencies that may arise in the future. The other would be for the legislature itself to take action in the present through more direct measures—including those that exceed its own legal or constitutional authority. That is a possibility that Madison pursued in other contexts. In doing so, he articulated the thinking of many of his contemporaries. Although Madison’s statements were occasioned by events that forced him to take positions he would clearly have preferred to avoid, these tentative remarks still represent the most fully developed articulation of legislative prerogative at that time.

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15. Cf. Thomas (2008), who emphasizes the adversarial relation between the branches in Madison’s constitutional vision.

## MADISON'S SUPPORT FOR LEGISLATIVE PREROGATIVE

### The Seizure of Property in Wartime

As a member of the Confederation Congress during the later years of the American Revolution, Madison supported a wartime measure to allow Brigadier General Anthony Wayne to seize private property necessary to supply the army under his command in Pennsylvania. In fact, it was Madison who made the motion to authorize Wayne to “impress” supplies that “cannot be otherwise obtained” (Madison 1963, 124). The proposal was unanimously approved by all the delegates then in attendance—except for those representing Pennsylvania, whose residents would be directly impacted by any seizures undertaken by Wayne. The proposal to allow a general to seize private property by force was undoubtedly an extraordinary measure. Members of Congress knew they were exceeding their authority in permitting Wayne to impress supplies. As South Carolina delegate John Mathews, an attorney from Charleston, explained in a letter to Major General Nathanael Greene dated May 20, 1781, “there is no such power *literally* given to Congress by Confederation and to act up to the spirit of it, is a doctrine supposed to be big with many evils, therefore reprobated. I conceive it to be a great point gained, to drive them [the strict constructionists] from this ground; it looks like conceding the point, & that necessity will oblige them, to interpret the powers given by the Confederation in their utmost extent” (Smith 1990–91, 253).

Madison’s exact reasons for supporting this wartime measure are unknown, but the circumstances leading up to his motion and the restrictive nature of the authorization itself are both telling. Like the rest of the revolutionary army, the soldiers under Wayne’s command had been forced to contend with inadequate supplies and a lack of pay, owing in no small part to Congress’ inability to raise revenue on its own authority under the restrictive terms of the Articles of Confederation.<sup>16</sup> But the conditions faced by the Pennsylvania Line under Wayne’s command were particularly deplorable even by the low standards of military life at the time. Many of the soldiers in the Pennsylvania Line had gone years without any compensation and received no reenlistment bonuses beyond an initial—and rather paltry—\$20 enlistment bounty (compared to enlistment bounties valued at hundreds of dollars in neighboring states). Frustration with their situation eventually boiled over into a mutiny that began on January 1, 1781. As Madison understood the situation, “The grievances complained of were principally, the detention of many in service beyond the term of enlistment, and the sufferings of all from a deficient supply

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16. On the supply problems and other rough conditions faced by patriot forces, see Carp (1984).

of clothing and subsistence, and the long arrearage of pay” (Madison 1900, 120). The mutiny forced Congress to act. Despite the “humiliation” involved in sending a congressional committee to negotiate a settlement with the mutineers, Madison endorsed the use of “every expedient for putting a speedy end to the discontents” (Madison 1900, 121). The crisis sparked by the Pennsylvania Line Mutiny was resolved by January 8, when it was agreed that discontented soldiers would be discharged but given the opportunity to reenlist for a new bounty.

Two things are noteworthy about Madison’s motion on impressments of supplies. The first is that it arose in direct response to a very concrete problem that had become quite “palpable,” to use the term Madison would later employ in his comments during the debate over Hamilton’s use of funds. The delegates were not dealing with a hypothetical scenario, but an actual case of mutiny that threatened to derail the war effort. The stakes could not have been higher: many members of Congress feared that disgruntled soldiers in the Pennsylvania Line would defect to the British if the crisis were not resolved.

The other thing that is noteworthy about Madison’s motion is its specificity. It was a narrowly drawn measure limited in its application to General Wayne alone. Even though armies under the command of other officers faced similar supply problems, Madison opted against authorizing similarly situated commanders to seize necessary supplies. By restricting this extra-legal grant of authority to Wayne, Madison and the other delegates to the Confederation Congress minimized the damage to the law and the likelihood that the example would be cited as a precedent to justify seizures of private property in other places by other officers. The congressional measure was narrowly circumscribed to the immediate crisis at hand. Particularism of this sort would become a hallmark of Madison’s approach to emergency and extra-legal power, as evidenced in the next two examples.

### The Bank of North America

The establishment of the Bank of North America presented another instance in which Madison used a rationale typically associated with executive prerogative to justify a constitutionally dubious action taken by the legislature. Although he initially opposed the creation of this bank, Madison would later defend its establishment as a matter of wartime necessity.

Madison’s eventual position on the Bank of North America, which had been proposed by Superintendent of Finance Robert Morris and chartered by the Confederation Congress in 1781, stands in stark contrast to the position he took on Alexander Hamilton’s proposal to establish a similar institution shortly after the

U.S. Constitution took effect. When the House of Representatives began its deliberations on Hamilton's proposal for a Bank of the United States, Madison forcefully led the opposition. He and other critics objected to the bank on a number of economic and political grounds, but the decisive objection concerned its constitutionality. In fact, it was in the course of the protracted and often testy debates over the Bank of the United States that Madison most systematically articulated his theory of constitutional interpretation. Responding to suggestions by Federalist Fisher Ames and others that Congress had the authority to erect a bank thanks to the general grants of power contained in the necessary and proper clause, the general welfare clause, and even the common defense clause, Madison asserted that the Constitution established a limited government restricted to powers that were expressly enumerated. In his view, the interpretive approach adopted by supporters of the Bank was so loose that it made the very idea of a constitution utterly meaningless: "The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if instead of direct and incidental means, any means could be used which, in the language of the preamble to the bill, 'might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining loans'" (*Annals of Congress* 1791, 1947–1948). To read the Constitution in the way Hamilton and his allies were doing "would give Congress an unlimited power; would render nugatory the enumeration of particular powers; [and] would supercede all the powers reserved to the State Governments" (*Annals of Congress* 1791, 1946).<sup>17</sup>

Supporters of the proposed Bank of the United States replied to Madison's strict reading of the Constitution by citing the Bank of North America as a precedent. The first bank, which went into operation while Madison was representing Virginia in the Confederation Congress, was established within the framework of the far more restrictive Articles of Confederation. If the Confederation Congress had the authority to charter that bank, then surely a Congress strengthened by the powers granted under the Constitution was authorized to charter a new bank now, reasoned champions of Hamilton's bank. John Laurance of New York reminded his colleagues that the Constitution was created to remedy the defects of the Articles of Confederation by making government more powerful, so denying that it

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17. Madison would reiterate these points on numerous occasions in subsequent debates. During a prolonged discussion over bounties for cod fisheries, Madison reminded his colleagues "that this is not an indefinite Government, deriving its powers from the general terms prefixed to the specified powers, but a limited Government, tied down to the specified powers which explain and define the general terms" (*Annals of Congress* 1792, 386).

has “the powers for which the Constitution was adopted involves the grossest absurdity” (*Annals of Congress* 1791, 1965). New Jersey Representative Elias Boudinot noted that the first two years of legislative activity by the First Congress were full of exercises of power by implication and observed that even under the Articles of Confederation the government acted from implied powers (*Annals of Congress* 1791, 1975–1976).

Madison stuck to his guns and maintained that expanding the powers of government through implication was constitutionally invalid. However, he also insisted that each use of extraordinary power was one of a kind and established no precedent for the future. Responding to arguments that Congress had already adopted a liberal interpretation of the Constitution in dealing with the Western Territory, Madison essentially conceded the point but explained that Congress’s departure from proper constitutional principles in that instance was justifiable because that “was a case *sui generis*, and therefore cannot be cited with propriety” (*Annals of Congress* 1791, 2011). His reply to those who cited the establishment of the Bank of North America as a precedent was to admit that the Confederation Congress had exceeded its authority under the Articles of Confederation. However, rather than attack the creation of the first bank as an illegitimate and indefensible exercise of power that should be repudiated, he now defended the establishment of that institution as a necessary wartime measure. It was justified by the extraordinary and pressing circumstances created by the war for independence. Precisely because it could be construed as a matter of necessity within the context of an underfunded war, it should not be used as a precedent in peacetime. Madison was essentially making the Lockean point that extra-legal actions are extra-legal in terms of both their provenance and their effects: they neither arise from existing law nor create new law.<sup>18</sup>

Characterizing the Bank of North America as an extra-legal but necessary measure was not a politically expedient rationalization that Madison conjured up as a way to deprive supporters of Hamilton’s bank of a potentially useful precedent. The evidence indicates that Madison viewed Morris’s bank as an extraordinary wartime measure at the time it went into effect. In fact, it was precisely because

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18. Madison would eventually reconcile himself to Hamilton’s bank, too, but his reasoning this time around would be very different. While the Bank of North America was justified as a wartime expedient, and therefore a temporary measure that should last only as long as the necessity did, the Bank of the United States *eventually* became an acceptable institution because it had been ratified by public opinion. Because the public had acquiesced in the existence of the Bank after two decades, Madison was willing to recharter it as president. On the role of public opinion in reshaping Madison’s attitude toward Hamilton’s bank, see Sheehan (2004, 414).

Madison believed the Bank of North America exceeded Congress's powers under the Articles of Confederation that he was one of only four members of the national legislature to vote against the initial resolution on incorporation. Madison eventually relented, in part because Congress urged each state government—which unquestionably had the power to incorporate a bank—to pass all legislation required to put the bank into operation. However, he never strayed from his position that Morris' bank was a strictly wartime expedient (see Gutzman 2012, 29–30; Banning 1983, 236). As he and other delegates from the Old Dominion state explained in a letter to Virginia Governor Benjamin Harrison dated January 8, 1782, some members of Congress assented to the bank out of a sense of “absolute necessity” (Smith 1990–91, 276).

Shortly after the Bank of North America went into operation, Madison wrote a letter to Edmund Pendleton in which he acknowledged that the “competency of Congress to such an act had been called in question in the first instance.” Indeed, he observed that “the general opinion” among members of Congress themselves “was, that the Confederation gave no such power, and that the exercise of it would not bear the test of a forensic disquisition, and consequently would not avail the Institution” (Madison 1900, 168). However, Madison explained, Congress pursued a “middle way” that gave “tacit admission of a defect of power” under the Articles of Confederation. The charter of incorporation was accompanied by “a recommendation to the States to give it all the necessary validity within their respective jurisdictions.” At the time, Madison expressed his hope that this tacit acknowledgment that Congress had acted extra-legally “will be an antidote against the poisonous tendency of precedents of usurpation” (Madison 1900, 169). In a follow-up letter to Pendleton a few weeks later, Madison clarified that the Bank “is to be considered only during the present war” (Madison 1900, 179), implying that its privileged functions would come to an end when the war did. Despite his own opposition to the establishment of the Bank of North America, Madison suggested it was possible to justify this extra-legal measure by the legislature in much the same way that executive prerogative could be justified.

### **Financial Assistance for Refugees from St. Domingo**

Perhaps the most revealing example of Madison's understanding of the legislature's power to act outside the law occurred during a debate on whether or not to provide financial assistance to refugees from a slave uprising in the French West Indian colony of Saint-Domingue (also called St. Domingo). This congressional debate is important not just because it reveals Madison's thinking on the role of the

legislature in times of emergency, but because it shows that other lawmakers grappled with the idea of extra-legal legislative action, as well. The question legislators struggled to answer was not so much *whether* to provide aid to the Saint Dominguan refugees but *how* to justify it: as an exercise of one of Congress's implied or inherent constitutional powers, or as an exercise of extra-legal powers.

The refugee crisis Congress faced in 1794 originated in the summer of 1791 when residents fleeing the violence resulting from a slave uprising in the French possession began arriving in major seaport cities throughout the United States. From the very beginning, the mostly white and aristocratic refugees from what became the Haitian Revolution relied on various forms of public and private assistance. Moved by the horrific tales of mayhem and carnage told by these refugees and graphically described in lurid newspaper accounts, the citizens of cities that offered asylum organized relief committees and held fundraisers to assist these “unfortunate” exiles. Although local communities were managing well enough when the refugees first started arriving on American shores, the situation changed drastically after the fall of Cap Français in the summer of 1793. As many as twenty-five thousand Saint Dominguans sought refuge in the United States after the fall of the former capital city. Overwhelmed by the numbers pouring in and unable to get support from the revolutionary French government, cities that offered asylum appealed to the states and to the federal government for financial help.<sup>19</sup>

Congress took up the matter in response to petitions it received from financially burdened communities such as Baltimore, which alone took in approximately 3,000 refugees. The debate in the House of Representatives took place over nearly two full days in January 1794. Thanks to the successful use of an emotionally charged “disaster narrative” to cast the Saint Dominguan refugees as helpless victims of sudden and unforeseeable forces beyond their control,<sup>20</sup> Madison and his colleagues agreed that the situation was an unquestionable emergency that demanded congressional action. The strong racial and cultural identification of southern slave-owners with the white exiles undoubtedly gave representatives from states with large slave populations added motivation to overcome whatever resistance they ordinarily harbored toward broad readings of the government's powers.<sup>21</sup> However, even radical

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19. On the reception, treatment, and activities of the St. Dominguan refugees in the United States, see Hunt (1988, 1–83) and White (2012).

20. On the use and development of “disaster narratives” to justify federal assistance to those who could be portrayed as blameless victims, see Dauber (2013).

21. On the role of racial and class solidarity in reinforcing sympathy toward white refugees—but not the blacks they had enslaved—see Hunt (1988, 30–31) and White (2012, 52–61). I am grateful to an

egalitarians such as Abraham Clark of New Jersey were moved by the plight of these refugees to overlook the fact that many of them were aristocrats and slave-owners (*Annals of Congress* 1794, 170).<sup>22</sup> Despite this consensus on the need to assist the Saint Dominguan refugees, members of the House could not agree on the legal justification for this aid. Proponents of loose constructionism cited the general welfare clause and other all-purpose clauses in the Constitution as well as recent precedents on unrelated matters to justify congressional action in this instance. However, the advocates of strict constructionism—including Madison—resorted to a variety of extra-constitutional reasons to justify giving financial assistance.

Federalists such as Elias Boudinot believed the Constitution empowered Congress to provide financial aid. Although he appealed to his colleagues' sense of humanity and morality (*Annals of Congress* 1794, 172), Boudinot cited the general welfare clause and a number of recent congressional precedents in the hopes of overcoming any doubts they had concerning the constitutionality of spending federal funds to aid victims of disaster. Boudinot proclaimed that a refusal to provide assistance to the refugees

would be to act in direct opposition both to the theory and practice of the Constitution. In the first place, as to the practice, it had been said that nothing of this kind had ever occurred before under the Federal Constitution. He was astonished at such an affirmation. Did not the Indians frequently come down to this city, on embassies respecting the regulating of trade, and other business—and did not the Executive, without consulting Congress at all, pay their lodgings for weeks, nay for whole months together? and was not this merely because Indians were unable to pay for themselves? Nobody ever questioned the propriety of that act of charity. Again; when prisoners of war were taken, there was no clause in the Constitution authorizing Congress to provide for their subsistence: yet it was well known that they would not be suffered to starve. Provision was instantly made for them, before we could tell whether the nation to whom they belonged would pay such expenses, or would not pay them. It was very true that an instalment [sic] would soon be due to France, nor did he object to reimbursement in that way, if it could be so obtained. But, in the mean time, relief must be given, for he was convinced that we had still stronger obligations to support the citizens of our allies than either Indians or prisoners of war. In the second place, as to the theory of the Constitution,

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anonymous reviewer for encouraging me to highlight the way that racial and class forms of identity contributed to the construction of the condition of exiles in the United States as an emergency.

22. On Clark's ordinary hostility to various forms of hierarchy and privilege, see Bogin (1982).

he referred gentlemen to the first clause of the eighth section of it. By that clause Congress were warranted to provide for exigencies regarding *the general welfare*, and he was sure this case came under that description (*Annals of Congress* 1794, 172).

It is not surprising that loose constructionists such as Boudinot were ready to vote for the funds necessary to assist the refugees. What is surprising is that many strict constructionists were searching for excuses to set aside their constitutional scruples in this instance. For instance, John Nicholas of Virginia maintained that “an act of charity, though it would be extremely laudable, was yet beyond their authority,” but he did not want to act on that conviction. Instead, he asked for more time “to form a deliberate opinion on the subject” in the hopes that someone could provide a constitutional justification that would satisfy him (*Annals of Congress* 1794, 170). Recognizing that such a justification might not be forthcoming, Nicholas left open the possibility of using legislative prerogative to take the action he believed was so desperately needed. Echoing the ideas that Madison had expressed in the debate over the resolutions censuring Hamilton for his handling of public funds, Nicholas indicated that he was prepared to vote for financial assistance for the refugees, but that he would admit that he had “exceeded his powers” and let his constituents judge the propriety of his actions (*Annals of Congress* 1794, 172).

Madison, like Nicholas, “wished to relieve the sufferers,” but he was unwilling to stretch the meaning of the Constitution to do so. In his view, there was nothing in that document that expressly authorized the federal government to spend funds for such a purpose. As much as Madison wanted to help the refugees, he

was afraid of establishing a dangerous precedent, which might hereafter be perverted to the countenance of purposes very different from those of charity. He acknowledged that he could not undertake to lay his finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents. And if once they broke down the line laid down before them, for the direction of their conduct, it was impossible to say to what lengths they might go, or to what extremities this practice might be carried (*Annals of Congress*, 1794, 170).

In response to those who cited some of President Washington’s actions as a precedent in this case, Madison denied that any exercise of prerogative in the past could justify an extra-legal action in the future. One of the major factors that distinguished this case from ones in which Washington provided assistance to those in need was that those cases qualified as genuine instances of “emergency,” because

“a delay would have been equivalent to a total denial” (*Annals of Congress* 1794, 171). The situation faced by the Saint Dominguans was certainly dire, but it did not rise to the level of an emergency—yet.

But rather than stick to his constitutional scruples and vote to deny federal aid to the refugees, Madison stated that he needed more time to decide “what line of conduct to pursue” (*Annals of Congress* 1794, 171). Enough congressmen agreed that more time was needed—and could be spared—that they put off the matter for another two weeks.

When the House took up the issue again on January 28, those who favored a narrow reading of the Constitution were still unable to identify a specific provision that would authorize Congress to spend money to aid the refugees. Still wracked by serious doubts about Congress’s powers, Nicholas reiterated his suggestion that representatives approve the funds “as an act of charity,” but admit that they were exceeding their constitutional authority in doing so (*Annals of Congress* 1794, 351).

Clark also used the legislative prerogative framework to help reluctant colleagues overcome any constitutional barriers to action. The Garden State representative explained that matters of life and death, which is exactly what the refugees were now facing, override ordinary limits on government. “In a case of this kind,” he pled, “we were not to be tied up by the Constitution” (*Annals of Congress* 1794, 350). Clark stressed the urgency of action because the funds the state of Maryland had appropriated for the relief of the refugees was about to expire on February 2, which was less than a week away. Now the situation was beginning to look a lot more like the kind of “extraordinary and pressing” emergency that Madison had indicated was required to justify departures from ordinary grants of power. Although Boudinot believed the Constitution gave Congress the right to spend money in this way, he understood that many of his colleagues still nursed doubts so he followed Clark’s cue. Many refugees would have perished if not for some private charity, the New Jersey Federalist maintained, but their situation was clearly a matter of necessity because they would “perish[] from cold and want” without further assistance (*Annals of Congress* 1794, 350). Time was beginning to erase the distinction that Madison drew on the first day of debate between the situation facing the refugees in mid-January and a case cited as precedent in which Washington advanced money on his own authority. As Madison explained the difference, “in that emergency, a delay would have been equivalent to a total denial” (*Annals of Congress* 1794, 171). That was the situation facing the refugees in late January.

From that point on, the arguments in favor of providing assistance began to proliferate. One line of reasoning relied on recent precedents, while three others resorted to a bit of legislative legerdemain. Jeffersonian representative Samuel Smith

of Maryland suggested that the question of Congress' powers had already been settled when it approved the expenditure of funds to repay both a British Consul who aided American captives held in Algiers and a private individual who assisted the crew of an American vessel that "shipwrecked on the coast of Portugal" (*Annals of Congress* 1794, 351). Others proposed reclassifying the assistance in order to circumvent constitutional hurdles. Thomas Scott, a Federalist from Pennsylvania, proposed that any funds approved could be construed as aid to the citizens of Baltimore rather than the refugees they were hosting if the former were also understood to be victims of emergency. If the federal government could provide financial aid to an America city facing "an army of fighters," then it could also assist an American city facing "an army of eaters" (*Annals of Congress* 1794, 351). Samuel Smith, following a suggestion Madison had offered on the first day of debate, proposed instead that any money approved could be classified not as charity but as a loan that would eventually be repaid by the French government (*Annals of Congress* 1794, 350). Madison offered yet a third way to reclassify the funds. Instead of describing funds for the refugees as a loan to the French, it could be characterized as partial payment of the loans made by the French during the revolutionary war (see Currie 1997, 189).

In the end, the House directed a committee to draft a bill appropriating money to aid the exiles. On February 12, 1794, without any debate the House approved a bill that authorized the president to spend up to \$15,000 to provide relief to the refugees, with the money provisionally charged to the government of France (*Annals of Congress* 1794, 1417–1418). Whichever argument ultimately persuaded strict constructionists such as Madison and Nicholas to vote for the bill, they never deviated from their position that providing financial assistance to the exiled Saint Domingans exceeded the legal and constitutional authority of Congress. As Madison explained in the context of a completely unrelated debate over free trade around the same time that Congress was deciding what to do about the refugees from the French colony, in "all general rules, there might be exceptions" (*Annals of Congress* 1794, 209). As far as Madison was concerned, it was better to allow for an exception than to change a rule based on sound principles. What that meant as far as emergencies were concerned is that it would be better to resort to extra-legal action in "extraordinary and pressing" cases than to make a more permanent alteration to the powers of government.

## CONCLUSION

Madison does not appear to have returned to the idea of legislative prerogative after his career as a lawmaker ended. This should come as no surprise because Madison's views on prerogative—much like particular exercises of prerogative

themselves—emerged only when demanded by pressing and unavoidable circumstances. As indicated by his reluctance to take action during the first day of debate over providing assistance to the St. Domingo refugees, Madison avoided taking a position on this dangerous exercise of power whenever he could. But when avoidance was no longer possible without risk of serious harm to discrete individuals or to public safety in general, this strict constructionist opted for ad hoc extra-legal action as a safer alternative to actions and arguments that would result in more permanent expansions of government power, whether through elastic construction of constitutional authority or the enactment of legislation that conferred new authority on military or executive officers.

The choice facing Madison as a legislator in the early years of the republic was not between action and inaction, but between action grounded in a permanent enlargement of power and action grounded in a temporary expansion of power. Like Hamilton, that consummate champion of energetic government, Madison recognized the need for flexibility in government. But unlike the man who became his political opponent, Madison believed that flexibility was most safely achieved not through broad constructions of open-ended clauses that resulted in permanent expansions of government authority but through limited and highly targeted exercises of extra-legal power. Madison's statements on emergency action suggest that occasional departures from the strict letter of the law are actually more compatible with the purposes and aims of a constitution than loose constructions that stretch and bend the constitution to fit every conceivable situation and meet every desired outcome. Indeed, Madison supported the use of prerogative in limited circumstances not in spite of but precisely because of his insistence on strict adherence to the law in ordinary circumstances. If an exercise of extraordinary power was justifiable, it had to be because the country was facing a genuine emergency of an "extraordinary and pressing" nature, not because any measures taken in the past served as valid precedents. In this insistence on the singularity of emergencies and the measures taken to address them, Madison may be the purest proponent of prerogative in the history of liberal political thought.

It is precisely in the purity (or perhaps absolutism) of Madison's demand that extraordinary measures be forthrightly acknowledged as extra-legal that certain shortcomings of prerogative come to light. In spite of his refusal to allow any past governmental action to serve as a precedent in the debate over aid to the Saint Dominguan exiles, it did not take long for his fear "of establishing a dangerous precedent, which might hereafter be perverted to the countenance of purposes very different from those of charity" to materialize. The assistance that was offered to the refugees from Santo Domingo in 1794 would become a precedent

cited again and again in future debates over relief to victims of various kinds of disaster.<sup>23</sup> Although the vote to assist these refugees did not move the majority in Congress to provide aid to the residents of Savannah, Georgia, after a catastrophic fire in late 1796 destroyed well over half the houses in this port city and left roughly 400 families homeless, that decision would get cited repeatedly—and with far more success—in debates over assistance to other victims of numerous other kinds of disaster throughout the nineteenth century. And despite Madison’s insistence that the Bank of North America should be viewed strictly as a wartime expedient, there is little doubt that the establishment of this bank under the severely limited powers Congress possessed under the Articles of Confederation persuaded at least some members of the Federal Congress that it had the authority to create the Bank of the United States.

But in politics (as in all areas of life) nothing comes without trade-offs. If the government is confronted with a genuine emergency so “extraordinary and pressing” that lives are at stake, the question Madison compels us to consider is not *whether* it should act but on what grounds and through which means it should act. If the use of emergency powers is justified through loose construction of the kind championed by Hamilton and his congressional allies or through the formal adoption of new legislation that survives long after the emergency that precipitated its adoption has passed, the threshold for their use is likely to be far lower than emergency action that has to be justified on a case-by-case basis without the support of the law. For Madison it boiled down to a question of which of two imperfect approaches better upholds respect for the rule of law as a meaningful and enduring limit on government power and which allows for more abuse and misuse in the long run. But whatever approach is selected, Madison reminds us that the legislature always has a crucial role to play. Whether it is overseeing the actions of the executive or acting in a more direct capacity, legislative involvement in emergency is critical to preventing the concentration of power in the executive that Madison came to see as one of the gravest threats to limited government.

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23. On the immediate aftermath of the relief bill, see White (2012, 73–78).

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