Back to Good: Restoring the National Emergencies Act

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As amended after the Supreme Court's decision in Immigration & Nationality Services v. Chadha*, the National Emergencies Act (NEA) vests the President with crisis powers that cannot be terminated or taken away even by majorities in both Houses of Congress. President Donald Trump's 2019 declaration of a "national emergency" at the southern border of the United States as a pretext to secure funding for his border wall with Mexico threw into sharp relief the perils and shortcomings of this imbalanced arrangement. This Note argues first that the President lacks any inherent emergency powers; any such powers that might exist belong to Congress and are within Congress' discretion to delegate to the President. In turn, this Note contends that the post-*Chadha *change to the emergency termination procedure undermined the statute's basic efficacy in service of formalist constitutional theory. Under a revisionist, functionalist reading of* Chadha*, the original emergency termination procedure was constitutionally permissible as a political legislative veto. Alternatively, the recently proposed ARTICLE ONE Act would help to return the NEA to its original role of constraining executive use of emergency authorities.*

I. INTRODUCTION[1]

On February 15, 2019, President Donald Trump issued Proclamation 9844, declaring a national emergency in response to a "border security and humanitarian crisis that threatens core national

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1. Regarding the title of this Note, cf. Faiz Siddiqui, *Is Metro Back2Good? A Year Later, The Answer Seems to Be: "Stand By.,"* WASH. POST (Dec. 16, 2017), https://www.washingtonpost.com/local/trafficandcommuting/is-metro-back2good-a-year-later-the-answer-seems-to-be-stand-by/2017/12/16/fca6565c-dec8-11e7-8679-a9728984779c_story.html [https://perma.cc/T2VP-LJ7A] ("The goal was modest: 'First, we will get back to good.[']").

security interests."[2] The written announcement made no reference to the precipitating political events, including the longest government shutdown in United States history and Congress' repeated refusals to fund the President's long-promised wall along the border with Mexico.[3] Speaking to the press in the Rose Garden, however, President Trump was more candid: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster."[4] The emergency declaration proved highly controversial and provoked a surge of litigation challenging its legality on various grounds.[5]

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2. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019).

3. *Compare id.* at 4949–50 (making no mention of the government shutdown or Congress' deliberate non-acquiescence), *with* Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/88GG-957E] (providing contextual information), *and* Damian Paletta et al., *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019, 8:28 PM), https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html [https://perma.cc/JCY8-QBRY] (same).

4. President Donald Trump, Remarks on the National Security and Humanitarian Crisis on Our Southern Border (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border.html [https://perma.cc/7Q86-C8N8].

5. Several national polls conducted in the days and weeks after President Trump's emergency declaration found that the action was unpopular with a majority of Americans. *See, e.g.*, Ariel Edwards-Levy, *Most Americans Disapprove of Trump's National Emergency Declaration: Poll*, HUFFPOST (Feb. 18, 2019, 5:47 PM), https://www.huffpost.com/entry/national-emergency-border-wall-poll_n_5c6af9fde4b01757c36ea872 [https://perma.cc/P9AB-2GYU] (37 percent approve; 55 percent disapprove); Domenico Montanaro, *Poll: 6-in-10 Disapprove of Trump's Declaration of a National Emergency*, NPR (Feb. 19, 2019, 5:14 AM), https://www.npr.org/2019/02/19/695720851/poll-6-in-10-disapprove-of-trumps-declaration-of-a-national-emergency [https://perma.cc/X5EL-VS8K] (36 percent approve; 61 percent disapprove); Steven Shepard, *Poll: Majority Still Opposes Trump Emergency Declaration*, POLITICO (Mar. 13, 2019, 5:11 AM), https://www.politico.com/story/2019/03/13/trump-national-emergency-poll-1218483 [https://perma.cc/T3EP-TXPP] (38 percent support; 52 percent oppose); Gary Langer, *64% Oppose Trump's Move to Build a Wall; On Asylum, Just 30% Support Stricter Rules*, ABC NEWS (Apr. 30, 2019, 7:00 AM), https://abcnews.go.com/Politics/64-oppose-trumps-move-build-wall-asylum-30/story?id=62702683 [https://perma.cc/7XX2-QJMK] (34 percent support; 64 percent oppose). For a partial list of lawsuits challenging the declaration's legality, see Priscilla Alvarez & Joyce Tseng, *Tracking the Legal Challenges to Trump's Emergency Declaration*, CNN (June 5, 2019, 11:05 AM), https://www.cnn.com/2019/02/20/politics/national-emergency-declaration-lawsuit-tracker/index.html [https://perma.cc/RV54-67XY]. On October 19, 2020, the Supreme Court granted the Trump administration's petition for a writ of certiorari to review a decision by the Ninth Circuit in one of these cases. *See* Sierra Club v. Trump, 963 F.3d 874 (9th Cir. 2020), *cert. granted sub nom.* Trump v. Sierra Club, 141 S. Ct. 618 (2020). Following President Joe Biden's entry into office, arguments in the case were canceled. *See* Pete Williams, *Supreme Court Cancels Arguments on Trump's Border Wall, "Remain in Mexico" Policy*, NBC NEWS (Feb. 3, 2021, 10:40 AM), https://www.nbcnews.com/politics/supreme-court/

Proclamation 9844's legal force derived from three statutes.[6] One was the National Emergencies Act (NEA), which "authorize[s] [the President] to declare [a] national emergency."[7] The other two statutes were what this Note calls "secondary emergency statutes": provisions "authorizing the exercise, during the period of a national emergency, of special or extraordinary power[s]."[8] One allowed the Secretary of Defense to call up members of the Ready Reserve into active service for up to two years.[9] The other enabled the Secretary of Defense to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces" using funds that Congress had appropriated for military construction.[10]

Twice, majorities of both Houses of Congress voted to terminate the emergency.[11] Yet President Trump vetoed both terminations, and opponents of the border wall emergency declaration failed to muster two-thirds majorities to override those vetoes.[12] In 2019, President Trump diverted $3.6 billion from 127 other planned and appropriated military construction programs to begin wall construction.[13] In 2020, he siphoned twice that amount — another $7.2 billion — from the Pentagon budget, of which $3.8 billion originally was appropriated "to build fighter jets, ships, vehicles[,] and

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supreme-court-cancels-arguments-trump-s-border-wall-remain-mexico-n1256593 [https://perma.cc/A3GZ-AMDG].

6. *See* Proclamation No. 9844, 84 Fed. Reg. at 4949.

7. National Emergencies Act, Pub. L. No. 94-412, § 201(a), 90 Stat. 1255, 1255 (1976) (codified as amended at 50 U.S.C. § 1621(a)).

8. *Id.*

9. 10 U.S.C. § 12302(a).

10. 10 U.S.C. § 2808(a).

11. *See* Sarah Binder, *The Senate Voted to Block Trump's National Emergency Declaration. Now What?*, WASH. POST (Mar. 15, 2019, 6:00 AM), https://www.washingtonpost.com/politics/2019/03/15/senate-voted-block-trumps-national-emergency-declaration-now-what/ [https://perma.cc/HR5W-ZNEN]; Emily Cochrane, *Senate Again Rejects Trump's Border Emergency, but Falls Short of a Veto-Proof Majority*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/us/politics/senate-vote-trump-national-emergency.html [https://perma.cc/KZE4-H4CR]. The respective joint resolutions were H.R.J. Res. 46, 116th Cong. (2019) and S.J. Res. 54, 116th Cong. (2019).

12. *See* Melanie Zanona, *House Fails to Override Trump Veto on Border Emergency*, POLITICO (Mar. 26, 2019, 2:56 PM), https://www.politico.com/story/2019/03/26/house-veto-override-border-emergency-1235896 [https://perma.cc/M3SK-3NN5]; Emily Cochrane, *Senate Fails to Override Trump's Veto, Keeping Border Emergency in Place*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/us/politics/senate-veto-override-border.html [https://perma.cc/2DUD-ECE3].

13. *See* Helene Cooper & Emily Cochrane, *Pentagon to Divert Money From 127 Projects to Pay for Trump's Border Wall*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/us/politics/pentagon-border-wall.html [https://perma.cc/YH5F-8YNR].

National Guard equipment."[14] At $20 million per mile, President Trump's border wall is estimated to be "the most expensive wall of its kind anywhere in the world."[15] Although President Joe Biden terminated his predecessor's emergency declaration on his first day in office (a move that is estimated to save $2.6 billion),[16] questions have arisen regarding the new administration's ability to cancel existing contracts,[17] and long-term maintenance costs will continue to draw resources from the federal fisc.[18] Various ecological harms will persist as well,[19] unless quick action is taken to

14. *See* Nick Miroff, *Trump Planning to Divert Additional $7.2 Billion in Pentagon Funds for Border Wall*, WASH. POST (Jan. 13, 2020, 7:35 PM), https://www.washingtonpost.com/immigration/trump-planning-to-divert-additional-72-billion-in-pentagon-funds-for-border-wall/2020/01/13/59080a3a-363d-11ea-bb7b-265f4554af6d_story.html [https://perma.cc/9BTK-9ELB]; Connor O'Brien & Caitlin Emma, *Pentagon to Shift $3.8B for Fighter Planes, Ships Toward Border Wall*, POLITICO (Feb. 13, 2020, 12:46 PM), https://www.politico.com/news/2020/02/13/pentagon-to-shift-money-for-fighter-planes-ships-toward-border-wall-114891 [https://perma.cc/99QE-CLEC].

15. John Burnett, *$11 Billion and Counting: Trump's Border Wall Would Be the World's Most Costly*, NPR (Jan. 19, 2020, 7:25 AM), https://www.npr.org/2020/01/19/797319968/-11-billion-and-counting-trumps-border-wall-would-be-the-world-s-most-costly [https://perma.cc/7KBW-KN6J]; *see also* Perla Trevizo & Jeremy Schwartz, *Records Show Trump's Border Wall is Costing Taxpayers Billions More Than Initial Contracts*, PROPUBLICA (Oct. 27, 2020, 12:00 PM), https://www.propublica.org/article/records-show-trumps-border-wall-is-costing-taxpayers-billions-more-than-initial-contracts [https://perma.cc/76CS-58PQ] (detailing cost overruns); Ryan Summers, *"Insecurity": How the Trump Administration is Placing Border Wall Speed Before the Law*, PROJECT ON GOV'T OVERSIGHT (June 5, 2020), https://www.pogo.org/analysis/2020/06/insecurity-how-the-trump-administration-is-placing-border-wall-speed-before-the-law/ [https://perma.cc/WTK3-VPGM] (discussing concerns about procurement process).

16. *See* Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021); Josh Dawsey & Nick Miroff, *Biden Order to Halt Border Wall Project Would Save U.S. $2.6 Billion, Pentagon Estimates Show*, WASH. POST (Dec. 16, 2020, 6:07 PM), https://www.washingtonpost.com/immigration/stopping-border-wall-save-billions/2020/12/16/fa096958-3fd1-11eb-a402-fba110db3b42_story.html [https://perma.cc/8U26-ANEE].

17. *See* Priscilla Alvarez, *Trump Administration Locks Down Border Wall Contracts, Complicating Biden's Pledge to Stop Construction*, CNN (Jan. 5, 2021, 6:55 PM), https://www.cnn.com/2021/01/05/politics/border-wall-trump/index.html [https://perma.cc/W9BM-Q7VM]; Perla Trevizo & Jeremy Schwartz, *The Trump Administration Keeps Awarding Border Wall Contracts But Doesn't Own the Land to Build On*, PROPUBLICA (Dec. 23, 2020, 5:00 AM), https://www.propublica.org/article/texas-border-wall-contracts-land-trump-administration [https://perma.cc/PZG8-VPFN].

18. *See* Nick Miroff, *Long-Term Maintenance for Trump's Border Wall Could Cost Billions, But Government Isn't Saying*, WASH. POST (Feb. 5, 2020, 11:34 AM), https://www.washingtonpost.com/national/long-term-maintenance-for-trumps-border-wall-could-cost-billions-but-government-isnt-saying/2020/02/05/8c9f3cfc-2e49-11ea-bcd4-24597950008f_story.html [https://perma.cc/3H6W-E897] (noting multiple sources of long-run upkeep costs).

19. *See, e.g.*, Eliza Barclay & Sarah Frostenson, *The Ecological Disaster That is Trump's Border Wall: A Visual Guide*, VOX (Feb. 5, 2019, 11:22 AM), https://www.vox.com/energy-and-environment/2017/4/10/14471304/trump-border-wall-animals [https://perma.cc/Y3BE-9AH7]; William deBuys, *Trump's Border Wall is an Environmental Disaster*, NATION (Jan. 17, 2020), https://www.thenation.com/article/environment/trump-

remove those portions of the wall that are especially damaging to the environment.[20]

This aberrant series of events is the product of an amendment to the NEA enacted nine years after the law's initial passage that changed the congressional procedure required to terminate an emergency declaration by the President from a concurrent resolution — which takes only simple majorities in the House and the Senate — to a joint resolution — which requires either presidential acquiescence or veto-proof majorities in both chambers.[21] At the time of the amendment, many assumed that this switch to joint resolutions was necessary to ensure the NEA's constitutionality in the wake of *Immigration & Nationality Services v. Chadha*.[22] This Note argues that this reading of *Chadha* — while likely accurate as a prediction of how the Court (given its membership, both then and now) would rule on the NEA's constitutionality — is neither the only nor the best reading of the opinion.[23] Under a narrower, revisionist reading of *Chadha*, the original NEA's emergency termination procedure was constitutionally permissible because it was a political (rather than regulatory) legislative veto.

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border-wall-climate/ [https://web.archive.org/web/20210217172707/https://www.thenation.com/article/environment/trump-border-wall-climate/].

20. *See, e.g.*, Erik Ortiz, *Trump's Border Wall Endangered Ecosystems and Sacred Sites. Could It Come Down Under Biden?*, NBC NEWS (Nov. 11, 2020, 6:00 AM), https://www.nbcnews.com/science/environment/trump-s-border-wall-endangered-ecosystems-sacred-sites-could-it-n1247248 [https://perma.cc/452Q-NVWT]; April Reese, *Some Ecological Damage from Trump's Rushed Border Wall Could Be Repaired*, SCI. AM. (Jan. 25, 2021), https://www.scientificamerican.com/article/some-ecological-damage-from-trumps-rushed-border-wall-could-be-repaired1/ [https://perma.cc/23Z8-9AM7].

21. Regarding the distinction between concurrent resolutions and joint resolutions, see *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm [perma.cc/MLB5-E7VT].

22. 462 U.S. 919 (1983). For evidence of contemporary belief that the NEA's legislative veto likely would be held unconstitutional and inseverable post-*Chadha*, see, e.g., *Legislative Veto After* Chadha: *The Impact of the Supreme Court Decision in the Case of* Immigration and Naturalization Service v. Chadha *Which Found the Legislative Veto Unconstitutional: Hearings Before the H. Comm. on Rules*, 98th Cong. 347 (1983–84) [hereinafter *Legislative Veto After* Chadha] (statement of Rep. Fish) ("Three of the vetoes invalidated by the *Chadha* ruling are contained in laws directly under [the] jurisdiction [of the House Judiciary Committee]. These are the National Emergencies Act — Public Law 94-412 — and two distinct provisions in the Immigration and Nationality Act. . . ."); Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 929 (1985); Michla Pomerance, *United States Foreign Relations Law After* Chadha, 15 CAL. W. INT'L L.J. 201, 287 (1985); William Alan Shirley, Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808, 1830 n.2 (1985).

23. *But see* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

Part II explains that the President has no inherent ability to declare the existence of a national emergency or take emergency actions unauthorized by existing law. Instead, those powers — to the extent that they exist — belong to Congress alone. Accordingly, only by virtue of a statute like the NEA can the President exercise emergency powers. Part III describes the NEA's origins, procedures, and subsequent history. Part IV contends that, contrary to the traditional (and formalist) reading of *Chadha*, one straightforward way of improving the NEA — restoring the concurrent resolution termination procedure — conforms with the Constitution under a revisionist (and functionalist) reading of *Chadha*'s ramifications for legislative vetoes.[24] Alternatively, adopting a version of the recently proposed ARTICLE ONE Act would help restore to Congress some semblance of control over emergency powers.

II. "NO ONE MAN SHOULD HAVE ALL THAT POWER"[25]

Within the American federal government, inherent emergency powers — if they exist at all — theoretically could be distributed in one of three ways: vested in Congress alone, vested in the President alone, or vested in both.[26] This Part shall demonstrate that

24. For a useful summary of the basic contours of the divide between formalist and functionalist approaches to constitutional analysis, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–52, 1958–61 (2011). Briefly put, "separation-of-powers formalism evinces [a] commitment to categorical lines, with the relevant lines here being constitutional distinctions among legislative, executive, and judicial power, each of which is viewed as formally vested in one branch of government with intermixing limited to those instances expressly sanctioned in the Constitution. By contrast, a more functionalist analysis views powers as overlapping, emphasizes the overall balance among the branches, and focuses on the benefits of a particular governmental structure and that structure's impact on a branch's ability to perform its core functions." Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 44. By "revisionist" is meant something along the lines of the observation that "any later court can always reexamine a prior case, and under the principle that the court could decide only what was before it, and that the older case must now be read with that in view, can arrive at the conclusion that the dispute before the earlier court was much narrower than that court thought it was, call[ing] therefore for the application of a much narrower rule." KARL N. LLEWELYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 47 (1930); *see also id.* at 66 (distinguishing between the maximum and minimum values of a precedent).

25. KANYE WEST, *Power*, *on* MY BEAUTIFUL DARK TWISTED FANTASY (Def Jam Recs. & Roc-A-Fella Recs. 2010).

26. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 157 (2004) ("The Framers understood that there would be occasions requiring resort to extraordinary measures that they themselves could not fully delineate. The crucial issue was in which branch they would vest this critical discretion."). This Note presumes that the power to declare an emergency would not have been given to the judiciary.

only the first possibility — vesting Congress alone with emergency powers, including the power to declare the existence of an emergency — comports with the Constitution.

Why make such a claim? Because it establishes that *without* the NEA, the President would lack the inherent constitutional authority to declare an emergency and/or wield emergency powers. This initial point is crucial for at least two reasons. First, when evaluating the legality of specific presidential uses of power in any instance, it matters greatly whether the President is relying solely on his own authority in the absence of congressional action or instead is acting with "all [the authority] that he possesses in his own right plus all that Congress can delegate."[27] Second, if the President has at least some share of constitutional emergency powers, then one's baseline expectations about what arrangements do or do not violate the separation of powers would have to adjust accordingly. Put another way, a statute that strengthens the President's role in a domain in which we expect at least some executive branch involvement or control (such as foreign affairs) is more palatable than one that invites the President to involve herself in a domain typically considered to belong exclusively to the legislature (such as appropriations). Certain congressional attempts to limit or constrain inherent presidential crisis authorities through legislation might even be regarded as unconstitutional interferences with the President's authority to exercise a power committed to her and her alone.[28]

For purposes of this Note, an emergency power is an authority to take an action, in response to a crisis, which falls outside and/or

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27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

28. *Cf.* Transcript of Oral Argument, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), *reprinted in* 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 988 (Philip B. Kurland & Gerhard Casper eds., 1975) (statement of Jackson, J.) (remarking that if the President "has the inherent power to seize, Congress cannot take it away from him"). Regarding the broader debate about the defeasibility of presidential powers, compare Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 217 (2005) (book review) (arguing that Congress "generally cannot regulate the President's constitutional powers"), with Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383 (2006) (responding to Professor Prakash), and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 727 n.108 (2008) (same); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 32 (1993) ("Whatever the extent of congressional authority to regulate in the few areas in which the President has 'specific' authority, no doubt should exist that the congressional will must prevail when the President possesses only concurrent authority.").

contravenes normal constitutional and statutory procedures. This definition consciously mirrors similar descriptions offered by a number of prominent Western political theorists.[29] These conceptualizations share a focus on an actor's ability, right, and/or duty to act in otherwise impermissible ways in response to a calamity. Often overlooked is that — before a political actor can take an action which has the effect of creating, modifying, and/or suspending laws — some individual or entity has to determine that there *is* an emergency happening. Given the indeterminacy of what constitutes an "emergency" in all but the most extreme cases, the ability to declare an emergency is not a normal factfinding authority; it is primarily a political judgment, not a legal one.

Based on considerations of constitutional text, history, and doctrine,[30] the answer is clear: apart from a limited power to protect federal personnel, property, and instrumentalities,[31] the President has no inherent authority to determine that emergency action is required or take such action without legislative authorization. Any statute that suggests, in one way or another, that the President has any emergency declaration authority can only be understood as a delegation of some or all of that authority from Congress to the President.

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29. *See, e.g.*, JOHN LOCKE, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT AND *A LETTER CONCERNING TOLERATION* 100, 172 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) ("This power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative[.]"); NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 71 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press 1996) (1531) ("[I]n urgent dangers, the Romans turned to creating the dictator — that is, to giving power to one man who could decide without any consultation and execute his decisions without any appeal."); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., Univ. of Chi. Press 1986) (1922) ("Sovereign is he who decides on the exception.").

30. These areas of consideration constitute three of the six modalities of constitutional argumentation identified by Professor Philip Bobbitt; the other three are structure, prudence, and ethos. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). This Note is not alone in using the modalities as a guide. "Literally hundreds of law review articles have referenced Bobbitt's taxonomy over the years, and two recent cites confirm its enduring influence." Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1348 n.1 (2016). Independent discussions of structure, prudence, and ethos have been omitted from this Note for reasons of space (especially since the latter two modalities purportedly lack salience among a majority of current members of the Supreme Court, *see infra* note 248 and accompanying text). Nevertheless, on balance they also point towards the same conclusion: the President lacks inherent emergency powers.

31. *See* Monaghan, *supra* note 28, at 61.

A. TEXT

Textual arguments focus on the meaning of specific words and phrases in particular clauses of the Constitution. They "may consider either the historical or the contemporary meaning of constitutional language."[32] Given the absence of explicit language in the Constitution vesting any political actor or entity with something akin to plenary emergency declaration powers, this modality sheds little affirmative light on which branch may wield the prerogative. However, oft-touted clauses in Article II — under both original-textualist and contemporary-textualist lenses — serve only to undermine claims that the Constitution grants the President any inherent powers during emergencies.

At first blush, textual arguments appear unavailing due to the simple fact that there is no general emergency powers clause.[33] The closest candidate — the Suspension Clause — certainly is *an* emergency power, albeit one confined to the writ of habeas corpus.[34] It is not as though the Framers never contemplated the

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32. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1425 (2013). With its focus on contemporary meaning, Professor Bobbitt's definition of textualism, *see* BOBBITT, *supra* note 30, at 25–38, differs from Justice Antonin Scalia's originalist-textualist theory of constitutional interpretation, which has an exclusive interest in "the original meaning of the text," ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997). As Professor Greene has explained, however, both approaches are possible methods of textual constitutional argument, and thus this Note shall consider both of them. *See* Greene, *supra*, at 1425.

33. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 29 (2020) ("But our Constitution makes no provision for extraconstitutional powers in time of emergency. The pros and cons of those arguments lie in the field of political theory, not constitutional interpretation."); Monaghan, *supra* note 28, at 33 ("The American Constitution contains no general provision authorizing suspension of the normal governmental processes when an emergency is declared by an appropriate governmental authority.").

34. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* David Cole, *The Priority of Morality: The Constitution's Blind Spot*, 113 YALE L.J. 1753, 1796 (2004) (describing the Suspension Clause as "the Constitution's only explicit 'emergency' provision"). The Founders understood the writ of habeas corpus as "nothing less than 'essential to freedom.'" AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 6 (2017) (citation omitted); *see also* Boumediene v. Bush, 553 U.S. 723, 739 (2008) (similar). To the extent that the Suspension Clause provides more general guidance about emergency powers, it indicates that such authorities reside with Congress, not the President. The Framers wrote the Suspension Clause using the passive voice, thereby failing to make it absolutely clear by whom the writ may "be suspended." U.S. CONST. art. I, § 9, cl. 2. However, structural analysis elucidates the matter. The Suspension Clause falls in Article I, Section 9, which covers limitations on Congress' powers. Insofar as the word "unless" creates a limitation on a limitation — allowing for suspension only in certain circumstances — that power can only be Congress' to

possibility of special authorities in times of exigency; as discussed more thoroughly below, the founding generation had quite sophisticated and nuanced views about how governments should respond to crises.[35] The absence of a general emergency powers clause from the constitutional text was not an accident.[36] Concededly, the lack of an explicit textual hook does not preclude the existence of an authority: U.S. constitutional law readily recognizes the existence of implied powers even though they are not rooted in discrete and unambiguous text.[37] Rather, the textual silence cautions against aggressively reading expansive emergency powers into other, more general textual provisions without due reference to other factors.

Nevertheless, at various times in American history, Presidents have pointed to several broadly-phrased clauses in Article II — namely the Executive Vesting Clause, the Oath of Office Clause, the Commander-in-Chief Clause, and the Take Care Clause — as

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exercise. *See Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 71 (2006). As Chief Justice John Marshall wrote in an early case, albeit in dicta: "If at any time the public safety should require the suspension" of the writ of habeas corpus, "it is for the legislature to say so." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807); *see* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 687 n.412 (2009) (classifying this passage as dicta). Likewise, as Justice Joseph Story wrote in his *Commentaries*: "It would seem, as the power is given to [C]ongress to suspend the writ of habeas corpus in cases of rebellion or invasion, that *the right to judge, whether exigency had arisen, must exclusively belong to that body*." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 27 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

35. *See infra* Part II.B.

36. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring) ("[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis."); *National Emergency: Hearings Before the S. Spec. Comm. on the Termination of the Nat'l Emergency*, 93rd Cong. 75–77 (1973) [hereinafter *Special Committee Hearings*] (statement of Prof. Gerhard Casper) ("[T]he refusal to arrange for institutional changes during emergencies expresses the confidence of the Founding Fathers that the ordinary institutions were so designed as to be capable of coping with extraordinary events."); CLINTON J. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 215 (1948) ("The Constitution looks to the maintenance of the pattern of regular government in even the most stringent of crises."). Nor is it difficult to imagine what such a clause might look like in a democratic constitution. *See, e.g.*, 1958 CONST. arts. 16, 36 (Fr.); INDIA CONST. arts. 352–60; C.E., B.O.E. n. 311, art. 116, Dec. 29, 1978 (Spain); Art. 23, CONSTITUCIÓN NACIONAL (Arg.); 2019 SYNTAGMA [SYN.] [CONSTITUTION] 48 (Greece).

37. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 705–06 (1974) (executive privilege); McGrain v. Daugherty, 273 U.S. 135, 173–75 (1927) (congressional contempt).

sources, either individually or conjointly, of presidential emergency powers.[38] This proclivity spans both political parties: the administrations of (among others) Presidents Abraham Lincoln,[39] Franklin Roosevelt,[40] Harry Truman,[41] and George W. Bush[42] have asserted broad crisis powers under one or more clauses in Article II.[43] Some academics have advanced similar arguments in favor of

38. U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 1, cl. 8; *id.* art. II, § 2, cl. 1; *id.* art. II, § 3.

39. President Abraham Lincoln invoked the Take Care and Oath of Office Clauses as the sources of his purported authority to suspend habeas corpus unilaterally. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler et al. eds., 1953).

40. During World War II, President Roosevelt advanced aggressive claims of prerogative authority under the Commander-in-Chief and Take Care Clauses. *See, e.g.*, Robert H. Jackson, Training of British Flying Students in the U.S., 40 Op. Att'y Gen. 58, 61–63 (1941); Franklin D. Roosevelt, Message to the Congress Asking for Quick Action to Stabilize the Economy (Sept. 7, 1942), *in* 11 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 356, 364–65 (Samuel I. Rosenman ed., 1950); Francis Biddle, Powers of the President Under the War Labor Disputes Act to Seize Props. Affected by Strikes, 40 Op. Att'y Gen. 312, 319–20 (1944); *see also* ROSSITER, *supra* note 36, at 266–69 (describing how President Roosevelt — in justifying actions he took during the lead-up to, and conduct of, World War II — relied in large part on "his own broad reading of his constitutional powers"); Matthew Waxman & Samuel Weitzman, *Remembering the Montgomery Ward Seizure: FDR and War Production Powers*, LAWFARE (Apr. 25, 2020, 8:33 AM), https://www.lawfareblog.com/remembering-montgomery-ward-seizure-fdr-and-war-production-powers [https://perma.cc/3KNL-48GE] (examining the historical context of the Biddle opinion).

41. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1849 (2016) (President Truman "defended his [seizure of the steel mills] based on his inherent powers under Article II's Vesting Clause, the Commander-in-Chief Power, and (you guessed it) the Take Care Clause."). Years later, President Truman maintained this view of the presidency. *See* Harry S. Truman, On the Constitution, Lecture at Columbia University (Apr. 28, 1959), *in* TRUMAN SPEAKS 31, 53 (1960) ("Whenever the country is in an emergency and it's necessary to meet the emergency, nobody can meet it but the President of the United States.").

42. In the wake of 9/11, members of the Bush administration located the purported authority to torture detainees — even in contravention of express legislative prohibitions — in the Commander-in-Chief and Take Care Clauses. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes, Jr., Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003), at 19, 79–80, https://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf [https://perma.cc/A7TK-9HJ8]; *see also* Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 238–39 (2008) (discussing the Torture Memos' references to Article II). The Torture Memos "deliberately ignored adverse precedent, misrepresented legal authority, and were written to support a pre-ordained result, namely to 'eliminate any hurdles posed by the torture law.'" Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 389 (2010) (citation omitted). They were revoked within two years of their issuance. *See* David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES (Apr. 3, 2008), https://www.nytimes.com/2008/04/03/washington/03intel.html [https://perma.cc/HM44-LZD6].

43. *See also* THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388–90 (1913) (outlining his stewardship theory of presidential power). "Although [President] Roosevelt did not specifically relate this stewardship theory to the Take Care Clause, it, along with the Vesting and Oath Clauses, would be the most likely sources." Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 811 (1999). For

executive authority to act outside or beyond the law, with a few even claiming that the potent brew of Article II confers a prerogative power akin to that possessed by a sovereign monarch.[44]

However, an original-textualist reading of Article II does not support this description of presidential emergency powers. Beginning with the Executive Vesting Clause: the Founders — as devoted students of Sir William Blackstone — understood the "executive power" as just one of over three dozen royal authorities.[45] For them, the "executive power" consisted of "the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power."[46] This power "extended only to the implementation of substantive legal requirements and authorities that were created somewhere else."[47] Even in the realms of national security and foreign affairs, the wielder of the executive power could not "ignore the law."[48] Likewise, the Founders would not have understood the Take Care or Oath of Office Clauses — which share a focus on "faithful execution" — as granting a prerogative power to the President.[49] To the contrary, the Clauses were linked "by a common historical purpose: to limit the discretion of public

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President Trump's views, see, e.g., President Donald Trump, Remarks at Coronavirus Task Force Press Briefing (Apr. 14, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-25/ [https://perma.cc/XXY3-JX2M] ("[W]hen somebody is the President of the United States, the authority is total, and that's the way it's got to be."); President Donald Trump, Remarks at Turning Point USA's Teen Student Action Summit 2019 (July 23, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/ [https://perma.cc/BJG7-92LZ] ("Then I have an Article 2 [sic], where I have the right to do whatever I want as President.").

44. *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 143–81 (2005); Candidus Dougherty, *"Necessity Hath No Law": Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 22–26 (2008); Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 303–08, 311–12 (2007); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258–67, 1272–74 (2004); *see also* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 69–72 (2015) (collecting sources); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1171–73 & nn.5–10 (2019) (same); Thomas S. Langston & Michael E. Lind, *John Locke & the Limits of Presidential Prerogative*, 24 POLITY 49, 50 n.2 (1991) (same).

45. *See* Mortenson, *supra* note 44, at 1223–30 (cataloguing royal prerogatives discussed by Blackstone). For Blackstone's influence on the Founders, see Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killings of Civilians*, 2011 UTAH L. REV. 1203, 1221–29.

46. Mortenson, *supra* note 44, at 1173.

47. *Id.* at 1174, 1234–43.

48. *Id.* at 1174, 1177.

49. Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2113 n.3, 2118 (2019).

officials."[50] Notably, the Framers "did not borrow the language of the English coronation oaths (which did not include the word 'faithful' or its synonyms), but instead borrowed from the 'faithfulness' oaths of midlevel or lower offices."[51] The difference is crucial: while English monarchs might have had the power to act *ultra vires* (i.e., "beyond the scope of one's office"), lower level officers never did.[52] The implication, in turn, is that the President — though possessing ample "discretion in cases where Congress does not provide adequate funding or guidance" or otherwise "has not clearly spoken on the matter"[53] — "must diligently and steadily execute Congress'[ ] commands."[54] Finally, "the Commander in Chief power was historically subordinate to legislative instructions on military policy, strategy, and tactics alike."[55] Nor does any sort of domestic authority during peacetime necessarily follow from having the power to command troops on the battlefield.[56] Thus,

50. *Id.* at 2117.

51. *Id.* at 2118, 2159.

52. *Id.* at 2118, 2141–59, 2178, 2181–83.

53. *Id.* at 2186 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)). Regarding the difference between permissible discretion in implementation and impermissible lawmaking by the executive, see Monaghan, *supra* note 28, at 39–43.

54. Kent et al., *supra* note 49, at 2192. In turn, "these conclusions tend to undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the Take Care and Presidential Oath Clauses." *Id.* at 2120.

55. Mortenson, *supra* note 44, at 1178 n.29 (citing Barron & Lederman, *supra* note 28, at 696; Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 65–66 (2007)).

56. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."); *id.* at 643–44 (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants. . . . That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."). Even a potential carveout for situations of actual armed attack on U.S. soil before Congress can convene, *see* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1863), hardly admits of broader presidential crisis authorities, given that recognizing the existence of — and responding to — a foreign military invasion does not entail the range of discretion implicit within general grants of emergency powers (including the power to declare emergencies). Regarding the significance of inference-stacking in the emergency context, see Monaghan, *supra* note 28, at 72 ("[S]ome line between direct and indirect interference with the functions of the national government should be maintained, at least presumptively."). It may also be notable that as early as 1789, President George Washington sought and received congressional authorization for the

excavations of the original public meaning of the major Article II clauses indicate that the Framers did not intend to grant an emergency declaration power to the President.

As for a contemporary-textualist reading, the current definitions of words within the broad Article II clauses do not imply a presidential prerogative power. Definitions from legal and popular dictionaries alike classify the executive power as the authority to carry out and enforce legislative commands — not the authority to invent laws of one's own.[57] In the words of Justice Hugo Black (Professor Philip Bobbitt's archetypal textualist)[58]: "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[59]

Overall, the text provides few affirmative clues as to whether Congress, the President, or some combination of the two possesses emergency powers. The Suspension Clause, read in isolation, does not admit of any broader power to create or suspend laws or rights beyond the privilege of the writ of habeas corpus. And the various clauses of Article II, understood either in their original or contemporary senses, argue against a presidential emergency declaration

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use of military force in clashes with Native American tribes. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1826 (2019). "Likewise, President [Thomas] Jefferson requested congressional authorization to take offensive measures against Tripolitan pirates even after the schooner *Enterprise* had repelled an attack." Alford, *supra* note 45, at 1218–19. This early historical practice suggests a founding-era understanding that — apart from purely defensive measures against currently transpiring attacks — the Commander-in-Chief Clause does not import an independent substantive authority to act without Congress' approval.

57. *See, e.g.*, *Executive*, BLACK'S LAW DICTIONARY (11th ed. 2019) (n.: "The branch of government responsible for effecting and enforcing laws; the person or persons who constitute this branch."); *Executive Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) (n.: "The power to see that the laws are duly executed and enforced."); *Executive*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (adj.: "of or relating to the execution of the laws and the conduct of public and national affairs; belonging to the branch of government that is charged with such powers as diplomatic representation, superintendence of the execution of the laws, and appointment of officials and that usu[ally] has some power over legislation (as through veto)"); *Executive*, NEW OXFORD AM. DICTIONARY (3d ed. 2010) (adj.: "having the power to put plans, actions, or laws into effect").

58. *See* BOBBITT, *supra* note 30, at 26.

59. *Youngstown*, 343 U.S. at 587; *see also* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1878 (2015) ("General agreement exists, however, that the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power."); Monaghan, *supra* note 28, at 55 ("[N]o such implied law-making authority can inhere in the general grants of the executive power contained in the Vesting and Take Care clauses. Otherwise, the fundamental premises of the constitutional order would be overturned.").

power. Any analogy to the prerogatives of absolute monarchs errs by conflating offices with functions.[60]

B. HISTORY

Historical arguments seek to adduce "the intent of the draftsmen of the Constitution and the people who adopted the Constitution" by considering "the controversies, the attitudes, and [the] decisions of the period during which the particular constitutional provision to be construed was proposed and ratified."[61] In drafting and ratifying the Constitution, the Founders drew on a number of sources — including classical history, English law, political philosophy, and their own experiences — which collectively weigh against attributing a founding intent to vest the President with emergency powers.

A starting point for many of the Framers — and thus for this analysis — was classical history, with which the most prominent and influential members of the Constitutional Convention were deeply familiar.[62] During the Roman Republic, the Senate could respond to a crisis by permitting the consuls to select a dictator. For a limited period of time, the dictator could wield almost unlimited power in service of the Republic.[63] There is no doubt that the Framers were aware of the Roman example when drafting the Constitution — Alexander Hamilton even praised it in *Federalist* No. 70 — which makes the absence of any comparable position,

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60. For the office-function distinction, see Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 643–44 (2018); *see also Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.").

61. BOBBITT, *supra* note 30, at 7.

62. *See* Jack M. Balkin & Sanford Levinson, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1792 (2010) ("Every republic known to the Framers — many of whom were steeped in ancient history — had eventually broken down and led to government by a strongman such as Julius Caesar."); R. A. Ames & H. C. Montgomery, *The Influence of Rome on the American Constitution*, 30 CLASSICAL J. 19, 20–21 (1934) ("The men most active in framing the [C]onstitution were well trained by virtue of an education that we know was almost entirely classical in subject matter and inspiration. . . . [T]he Convention as a whole and its leaders in particular were thoroughly conversant with ancient civilizations and could surely have drawn upon them for political theory. Their classical backgrounds were definitely revealed and exercised in the Convention."); *see also generally* DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM (2008).

63. *See* ROSSITER, *supra* note 36, at 19–26; Balkin & Levinson, *supra* note 62, at 1790.

power, or procedure all the more notable.[64] At the very least, this decision by the Framers *not* to duplicate a notable feature of classical republican government weighs against *any* branch of the federal government having inherent emergency powers, let alone the President.

Many of the Founders were also lawyers in the English tradition.[65] They surely knew that the monarch, at least at some previous point in history, had asserted prerogative powers.[66] They were also loyal students of Sir Edmund Coke,[67] whose Petition of Right "stated [in 1628 that] the king or his commissions had no prerogative to violate the boundaries of the ancient liberties of

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64. THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009). Before reading too much into Hamilton's comment here, one must remember that: (1) praising Rome for having the office of the dictatorship is different from averring that the United States should have it, too; and (2) the procedure of empowering the Senate (rather than the consuls) to decide whether a dictator should be appointed weighs in favor of Congress (rather than the President) having the power to declare the existence of an emergency.

65. "[M]ost of the important drafters of the Constitution were lawyers or at least literate in law and government." Kent et al., *supra* note 49, at 2117 n.30. By one count, 34 of the 55 delegates to the Constitutional Convention were lawyers or "had at least made a study of the law." Sol Bloom, *Constitutional Questions and Answers*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution-q-and-a [https://perma.cc/5V5L-8PD7] (last reviewed Sept. 25, 2018). These lawyers, of course, practiced English common law. *See* Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIBR. J. 13, 20 (1989) ("[T]he English common law, or some parts of it, [was] *the* major influence in the early legal history of this country. Every jurisdiction, except Connecticut, expressly received the common law by charter, subsequent legislation, or constitutional provision.").

66. In 1637, for example, the Court of Exchequer Chamber decided the *Case of Ship-Money*, which stemmed from King Charles I's flouting of the Petition of Right. *See* R v Hampden (The Case of Ship-Money) (1637) 3 St. Tr. 825. "Accounts of the [*Case of Ship-Money*], from the opinions of the judges and contemporary pamphlets down to the assessments of twentieth-century historians, leave little doubt that the [*Case of Ship-Money*] generated a great deal of controversy, and that despite the wide range of possible legal technicalities that one could concentrate on, the central issue was who should decide whether there was an emergency and what should be done about it." IOANNIS D. EVRIGENIS, FEAR OF ENEMIES AND COLLECTIVE ACTION 95–96 (2007). Charles I, "through intimidation, obtained the Justices' approval of his argument that he had the power to raise taxes without parliamentary approval, based on his declaration of a national emergency — of which the Crown was allegedly the sole judge." Alford, *supra* note 45, at 1239–40. Of course, Charles I was not very long for the job: after a protracted dispute with Parliament over the distribution of power, he was tried and executed for treason in January 1649. *See* DAVID STARKEY, CROWN & COUNTRY: THE KINGS & QUEENS OF ENGLAND 330–47 (2010).

67. Coke "had an unparalleled popularity among jurists" during the founding era, and he "figured prominently in [the Founders'] ideas of what a constitution did, and more particularly, in their ideas on the rule of law and its role in curbing the dangers of arbitrary power." Alford, *supra* note 45, at 1236, 1240–41; *see also* Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938) ("[I]t is upon the methods and constitutional views of Coke that the colonial lawyers were nurtured."); *The Uses of History*, ECONOMIST, Dec. 20, 2014, at 34, 35 (similar).

English subjects, most particularly, freedom from arbitrary arrest, imprisonment, forced billeting of troops, martial law, [ ] the suspension of habeas corpus, and taxation without consent from parliament."[68] Following the English Civil War, the Restoration, and the Glorious Revolution, the Petition of Right "was accepted by the consensus of the legal profession (as reflected by Blackstone's *Commentaries*) as being part of the fundamental laws of England."[69] One would imagine that, having put their own lives at risk to fight back against arbitrary power, the Founders would hold similar views about subjecting the executive to the rule of law.

Meanwhile, the political theorists whom the Founders read were divided on the need for, and the mechanisms of controlling, executive powers.[70] Although advocates for presidential prerogative often make recourse to the writings of John Locke,[71] such arguments rely upon assumptions about Locke's influence on the U.S. Constitution which remain hotly contested.[72] But regardless of Locke's value for understanding the Constitution in other respects, the Framers emphatically did *not* import a Lockean conception of the prerogative.[73] To the contrary, the founding generation

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68. Alford, *supra* note 45, at 1240–41.

69. *Id.* at 1241.

70. *See* BEDERMAN, *supra* note 62, at 149 ("The Framers thus had a diverse set of ancient models and theories of executive power, combined with the intelligent commentaries of later political thinkers."); Manning, *supra* note 24, at 1993–94 ("[F]ounding-era separation of powers theory supplied no single formula for the details of a properly composed government. . . . [W]hile theorists may have agreed in broad terms about the need to separate the major branches of governmental power, there was significant divergence, even among the most prominent theorists (Blackstone, Locke, and Montesquieu), about how to characterize and classify the powers to be divided."); Mortenson, *supra* note 44, at 1190 (noting that the books which the Founders read contained "wildly varying visions of political legitimacy and good government").

71. *See, e.g.*, YOO, *supra* note 44, at 37–38; William P. Barr, *The Role of the Executive*, 43 HARV. J.L. & PUB. POL'Y 605, 609 (2020); Dougherty, *supra* note 44, at 20–21, 23, 46; Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely? Part I: A Theoretical Review of Presidential War Powers*, 24 OKLA. CITY U. L. REV. 233, 285–90 (1999).

72. *See* Richard Primus, *John Locke, Justice Gorsuch, and* Gundy v. United States, BALKINIZATION (July 22, 2019, 11:27 AM), https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html [https://perma.cc/8ATL-DEQB] ("For several decades now, leading scholars have cast considerable doubt on the idea that Locke's political writing was particularly influential for the Founders. . . . In short, even if Locke was influential in the 1770s, he does not seem to have been a major influence in the formation of the Constitution."); MARK GOLDIE, *Introduction* to 1 THE RECEPTION OF LOCKE'S POLITICS, at xvii, xlix–lix (Mark Goldie ed., 1999) (laying out some strands of the debate).

73. *See* EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 11 (1982); David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 PRESIDENTIAL STUD. Q. 376, 388 (2012); Steilen, *supra* note 60, at 562–67, 617.

"regularly distinguished executive power from prerogative" — thereby confirming the disutility of appeals to the Vesting Clause.[74]

Of course, the Framers were not lacking in firsthand experience with politics. Between one-third and one-half of the Framers had previously attended state constitutional conventions,[75] at least one of which — Virginia's — expressly rejected a provision granting emergency powers to the governor.[76] Nor were they unaware of the dangers or emergencies which a government might confront. Indeed, one might describe the early history of the United States as a series of successive crises, from the American Revolution itself to Shays' Rebellion, the latter ending just months before fifty-five men met in the old Pennsylvania State House during the hot Philadelphia summer of 1787.[77] They were not neophytes.

With all this knowledge in mind, the Framers in Philadelphia took the significant step of *not* imbuing their nascent Constitution with explicit grants of emergency powers. They evidently believed that "[t]he provisions of the document and the government which they ordained were to be adequate for war as well as peace, for rebellion as well as internal calm[.]"[78] Moreover, the founding generation had a "collective fear, if not paranoia, of an unscrupulous leader who sought power by any means."[79] The Framers thus

74. Steilen, *supra* note 60, at 562–65; *see supra* Part II.A.

75. Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405 n.9 (1988).

76. Steilen, *supra* note 60, at 609.

77. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934) ("The Constitution was adopted in a period of grave emergency."); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 584–601 (1982) (summarizing the crises which enveloped the early republic under the Articles of Confederation); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 265–67 (1988) (same); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 463–67 (1969) (same).

78. ROSSITER, *supra* note 36, at 212; *see also id.* ("It never seems to have been seriously considered in the Convention of 1787, the *Federalist*, or the debates in the state ratifying conventions that the men who were to govern in future years would ever have to go outside the words of the Constitution to find the means to meet any crisis."); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 94 (2015) ("With respect to the Constitution, everything that we know about its creation and implementation suggests that it was not read to authorize suspensions or dispensations.").

79. BEDERMAN, *supra* note 62, at 153.

aspired "to create a presidency that would control such impulses toward despotism."[80]

Without a doubt, the Framers — having learned their lesson from the failed Articles of Confederation — sought to create a strong executive with a sufficient degree of independence from Congress.[81] For this reason, Justice Story wrote with confidence in 1833 that "[a]ll America have at length concurred in the propriety of establishing a distinct executive department."[82] But "there is no evidence" that a Lockean conception of executive prerogative power "had any positive influence whatsoever at the Constitutional Convention of 1787."[83] To the contrary, Article I gives "most of the traditional royal prerogatives" to the House, the Senate, or both.[84] And as previously noted, the Constitution which the Framers devised lacks any expressly defined mechanism for suspension of the laws and/or vesting of the executive with emergency authorities. When the possibility of granting the President a power of suspension came up for a vote in Philadelphia, the delegates rejected it.[85]

The Framers' anxiety about an overpowered executive leaked into the post-Philadelphia ratification debates, which "were replete with references to members of the classical rogues gallery of Roman tyrants," as well as "contemporary tyrants" such as Oliver Cromwell.[86] Even Hamilton — who, among the Founders, held one

80. *Id.* at 154; *see also Special Committee Hearings*, *supra* note 36, at 76 (statement of Prof. Gerhard Casper) ("In view of the attitudes prevailing at the Constitutional Convention, it should come as no surprise that no drastic structural changes for coping with national emergencies were contemplated. To confer upon the President extraordinary constitutional authority to deal independently with emergencies, would have only further heightened the widespread fear that the Presidency might be turned into a temporary monarchy or might fall into the hands of a Cataline or Cromwell, and would have jeopardized the adoption of the Constitution.").

81. *See* MCCONNELL, *supra* note 33, at 19; Kent et al., *supra* note 49, at 2121–23.

82. 3 STORY, *supra* note 34, at 279.

83. DONALD L. ROBINSON, *Presidential Prerogative and the Spirit of American Constitutionalism*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 114, 115 (David Gray Adler & Larry N. George eds., 1996); *see also* Steilen, *supra* note 60, at 613–29 (detailing how the Framers at the Constitutional Convention deliberately and repeatedly eschewed investing the President with anything approaching a monarchical and/or Lockean prerogative).

84. FORREST MCDONALD, *Forward* to THE CONSTITUTION AND THE AMERICAN PRESIDENCY, at ix, ix (Martin L. Fausold & Alan Shank eds., 1991).

85. Steilen, *supra* note 60, at 624; *accord* The Confiscation Cases, 87 U.S. (20 Wall.) 92, 112–13 (1874) ("No power was ever vested in the President to repeal an act of Congress.").

86. BEDERMAN, *supra* note 62, at 153–54.

of the strongest positions in support of executive authority[87] — "expressly disclaimed the Crown's powers as a model for the American presidency" in his contributions to the *Federalist* (itself written to rally support in New York for ratification).[88] Nor were scholars of a different mind: none of the era's major legal treatises "even hint that the founding generation envisaged any independent presidential law-making power."[89]

This overview of the Framers' historical influences and contemporary context — taking account of "the controversies, the attitudes, and [the] decisions"[90] of the founding period — provides yet further reason to doubt that the President has any power to declare emergencies.

C. DOCTRINE

Doctrinal arguments center on "principles derived from precedent or from judicial or academic commentary on precedent."[91] Those who employ this modality focus on how case law has introduced, clarified, and/or eliminated various legal doctrines over time, in the typical method of the common law tradition.[92] However, most of the precedent about presidential emergency powers is confounded by Presidents having acted, in those cases, under

87. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 26 n.119 (1994).

88. Monaghan, *supra* note 28, at 17. For example, *Federalist* No. 69 consists primarily of Hamilton contrasting the powers of the President with those of the king. *See* THE FEDERALIST NO. 69, *supra* note 64, at 347–53 (Alexander Hamilton). Regarding the *Federalist*'s role in the New York ratification debates, see IAN SHAPIRO, *Introduction* to THE FEDERALIST, *supra* note 64, at ix, x.

89. Monaghan, *supra* note 28, at 18 & n.80 (reviewing major works by St. George Tucker, Chancellor James Kent, Justice Story, and William Rawle). At most, some of the Founders preferred an arrangement in which Congress would ratify any illegal-yet-necessary crisis-time behavior afterwards. Simply put, the President would "act extraconstitutionally and thereafter publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public"; if the President's actions were judged to have been justifiable, Congress would indemnify him. Barron & Lederman, *supra* note 28, at 746; *see* David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 174–80 (2002) (discussing the use of retroactive ratification in the early republic). Although post-hoc ratification by Congress is no longer a common practice, *see* Steilen, *supra* note 60, at 661, its contemplation by the Founders illuminates their view of emergency powers. Importantly, the indemnification — rather than normalization — of illegal executive actions during crises preserves Congress' role in determining whether, indeed, there actually was a crisis worthy of extralegal behavior. *See id.* at 663–64; Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 329 (1952).

90. BOBBITT, *supra* note 30, at 7.

91. *Id.*

92. *Id.* at 7, 41–44.

congressional authorizations and/or delegations.[93] Such instances of concurrent action — residing in Zone 1 of Justice Robert Jackson's *Youngstown* framework — tell us very little about the extent of the President's emergency power in isolation, because in those instances the President's authority is at its zenith: it "includes all that he possesses in his own right *plus* all that Congress can delegate."[94] Accordingly, some of the most emphatic assertions of executive power and discretion in the U.S. Reports — including *Martin v. Mott*,[95] *Luther v. Borden*,[96] *United States v. Curtiss-Wright Export Corp.*,[97] *Ex parte Quirin*,[98] *Hirabayashi v. United States*,[99] *Korematsu v. United States*,[100] and *Trump v. Hawaii*[101] — are

93. There are a number of useful surveys of the development of emergency powers across time in the American politico-legal system; this Note will seek neither to upend nor outdo them. *See, e.g.*, S. REP. NO. 93-549, at 2–14 (1973); CHRIS EDELSON, EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR (2013); ROSSITER, *supra* note 36, at 209–87.

94. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (emphasis added).

95. 25 U.S. (12 Wheat.) 19, 29 (1827) ("The power *thus confided by Congress to the President*, is, doubtless, of a very high and delicate nature." (emphasis added)).

96. 48 U.S. (7 How.) 1, 41–45 (1849) ("*By [the Militia Act of 1795], the power* of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, *is given to the President*." (emphasis added)); *see* Vladeck, *supra* note 26, at 174 ("Just as in *Mott*, the Court [in *Luther*] began and ended its discussion of executive authority by invoking the 1795 statute. For both Courts, it was the Militia Acts, and not any other authority, that had given Presidents [James] Madison and [John] Tyler the authority to act as they d*id*.").

97. 299 U.S. 304, 319–20 (1936) ("[W]e are here dealing not alone with *an authority vested in the President by an exertion of legislative power*, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations. . . ." (emphasis added)); *see also* Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1208 n.141 (2018) (collecting sources criticizing *Curtiss-Wright*).

98. 317 U.S. 1, 29 (1942) ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For *here Congress has authorized* trial of offenses against the law of war before such commissions." (emphasis added)).

99. 320 U.S. 81, 92 (1943) ("We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For *the President's action has the support of the Act of Congress*, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the *joint action of Congress and the Executive*, to impose this restriction as an emergency war measure." (emphasis added)).

100. 323 U.S. 214, 217–18 (1944) ("[W]e are unable to conclude that it was beyond *the war power of Congress and the Executive* to exclude those of Japanese ancestry from the West Coast war area at the time they did." (emphasis added)).

101. 138 S. Ct. 2392, 2403 (2018) ("We now decide *whether the President had authority under the Act* to issue the Proclamation. . . ." (emphasis added)).

unilluminating,[102] even though many of them continue to influence constitutional thinking in certain areas.[103]

In the closest case on point, *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court affirmed a congressional-centric view of constitutional emergency powers. In 1952, at the height of the Korean War, a labor dispute between steel companies and steelworkers led the United Steelworkers of America to call for a national strike.[104] The Truman administration feared that sudden disruption of production would not only exacerbate inflation but also deprive the military of an indispensable resource.[105] Mere hours before the strike was set to begin, President Truman directed his Secretary of Commerce, Charles Sawyer, to seize 86 steel mills and operate them in the name of the United States until the labor dispute could be resolved.[106] In a message sent to Congress the following day, President Truman — though asserting a broad executive prerogative — allowed that Congress could choose a different course of action if it passed legislation to address the situation; otherwise, he would have Sawyer continue to hold the mills.[107] The steel companies swiftly sued to enjoin the seizure, and within weeks, the case reached the U.S. Supreme Court.[108]

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102. Additionally, *In re* Neagle, 135 U.S. 1 (1890), *In re* Debs, 158 U.S. 564 (1895), and United States v. Midwest Oil Co., 236 U.S. 459 (1915) — three other cases cited by those asserting the existence of a presidential prerogative, *see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 687–93, 702–03 (1952) (Vinson, C.J., dissenting) (citing all three cases to support President Truman's attempted seizure of the steel mills) — are better understood as standing for the far more limited proposition that the President has the "narrow authority . . . to preserve, protect, and defend personnel, property, and instrumentalities of the national government," Monaghan, *supra* note 28, at 61. As Professor Henry Monaghan has defined it, this protective power — though it "will often arise in emergencies" — "is, strictly speaking, *not* a doctrine of emergency power" or of "presidential law-making." *Id.* at 11, 69.

103. *See, e.g.*, Jack Goldsmith, Zivotovsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 128 (2015) ("Scholars have excoriated *Curtiss-Wright* since it was decided. Its historical claims and extraconstitutional theory of the U.S. foreign relations power are clearly wrong, and its dicta about presidential exclusivity threaten to swallow up Congress'[] Article I foreign relations powers. And yet the dicta remain influential."); Memorandum from John C. Yoo to William J. Haynes, Jr., *supra* note 42, at 80 (citing *Neagle* to rationalize the torturing of detainees in the aftermath of the 9/11 attacks).

104. *See* DAVID G. MCCULLOUGH, TRUMAN 897 (1992).

105. *See* ROBERT H. FERRELL, HARRY S. TRUMAN: A LIFE 370–71 (1994); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 74–75 (1994).

106. *See* Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952); MARCUS, *supra* note 105, at 80, 84; MCCULLOUGH, *supra* note 104, at 898–99.

107. *See* 98 CONG. REC. 3912 (1952); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 142 (1973).

108. MCCULLOUGH, *supra* note 104, at 900.

Crucially, the notion of emergency seizures of private enterprises was not unfamiliar or unimaginable to Americans in 1952. In fact, during World War II, Congress expressly authorized immediate presidential seizure of industrial plants during labor disputes under the War Labor Disputes Act.[109] However, once the war was over, Congress opted to reduce this unilateral executive authority by allowing the War Labor Disputes Act to expire.[110] To replace it, Congress enacted the Taft-Hartley Act of 1947 over President Truman's veto.[111] During the drafting process, Congress deliberately "chose not to lodge this power [of immediate industrial seizure] in the President."[112] Instead, the Act merely allowed the President to "enjoin a strike for eighty days pending an impartial study."[113] Believing that such delay would be unfair to the unions, President Truman declined to follow the procedures prescribed by the Taft-Hartley Act.[114] He also considered two other statutory bases for seizure but rejected them for the same reason, relying instead on his inherent powers.[115]

In a 6-3 decision in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court struck down the steel seizure as beyond the President's constitutional authority.[116] Five of the six members of the majority joined Justice Black's opinion for the Court in full, while a sixth — Justice Tom Clark — concurred in the judgment. Each member of the majority wrote his own opinion in order to — in Justice Felix

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109. *See* War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, § 3, 57 Stat. 163, 164–65 (1943). Between the declaration of a defense emergency on May 27, 1941 and the formal surrender by Japan on September 2, 1945, the U.S. government seized companies during labor disputes 55 times. *See* JOHN L. BLACKMAN, JR., PRESIDENTIAL SEIZURE IN LABOR DISPUTES 259–75 (1967) (listing seizures). For a discussion of one such seizure, see Waxman & Weitzman, *supra* note 40.

110. *See* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 60 n.53 (1951).

111. *See* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947); MCCULLOUGH, *supra* note 104, at 566.

112. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 601 (1952) (Frankfurter, J., concurring).

113. MCCULLOUGH, *supra* note 104, at 898; *see* Taft-Hartley Act §§ 206–10.

114. MARCUS, *supra* note 105, at 75–76.

115. *Id.* at 75–82. The significance of the choice not to use statutorily prescribed procedures was confirmed not only by the various opinions in *Youngstown* but also by the fact that when President Dwight Eisenhower, less than a decade later, used the Taft-Hartley Act to enjoin a strike by steelworkers on grounds of "national safety," the Court upheld the injunction. *See* United Steelworkers of Am. v. United States, 361 U.S. 39, 40–44 (1959) (per curiam).

116. *Youngstown*, 343 U.S. at 589.

Frankfurter's words — express "differences in attitude,"[117] while Chief Justice Fred Vinson authored an opinion for the three dissenters.[118]

Justice Jackson's solo concurrence, notwithstanding the fact that it garnered no other Justice's vote, has since become the "canonical" statement of the law associated with *Youngstown*.[119] Most famously, the concurrence outlines a tripartite framework laying out the "practical situations in which a President may doubt, or others may challenge, his powers," depending on whether Congress has spoken on a particular issue and on the respective allotment of inherent powers between the political branches.[120] In Zone 1, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power."[121] In Zone 2, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[122] In Zone 3, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he

117. *Id.* (Frankfurter, J., concurring). Incidentally, Justice Clark was the only member of the Court to make any mention of an old case that seemed somewhat on point: Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). *See Youngstown*, 343 U.S. at 660, 662 (Clark, J., concurring in the judgment) (relying on *Little*); Katharine A. Wagner, Note, Little v. Barreme*: The Little Case Caught in the Middle of a Big War Powers Debate*, 10 J. L. SOC'Y 77, 107–12 (2008) (discussing the relationship between *Little* and *Youngstown*).

118. *See Youngstown*, 343 U.S. at 667–710 (Vinson, C.J., dissenting).

119. Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1105 (2008); *see also Special Committee Hearings*, *supra* note 36, at 23 (statement of Prof. Cornelius P. Cotter) ("[W]e have reached a point at which most people seem to assume that Justice Jackson wrote the majority opinion in [*Youngstown*] rather than a concurring opinion."). The Supreme Court subsequently has adopted Justice Jackson's framework to resolve inter-branch disputes. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083–84 (2015); Medellín v. Texas, 552 U.S. 491, 524–25 (2008); Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part).

120. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

121. *Id.* at 635–37.

122. *Id.* at 637.

can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[123] With respect to the steel mills, "Congress ha[d] not left seizure of private property an open field but ha[d] covered it by three statutory policies inconsistent with this seizure" — statutes which President Truman had ignored.[124] Accordingly, the President's power was "at its lowest ebb."[125] In turn, Justice Jackson denied President Truman's request that the Court "declare the existence of inherent powers *ex necessitate* to meet an emergency."[126] To the contrary, he inveighed against the vesting of the executive branch with a vast prerogative authority: "[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula."[127]

In *Youngstown*, the United States faced a genuine crisis, and President Truman acted with no malintent. In other words, this should have been one of the *easiest* scenarios cases in which to justify a presidential determination of the necessity of extralegal action. Yet President Truman's actions were held unconstitutional and invalid. One can hardly reconcile *Youngstown* with an inherent presidential power to declare emergencies.

D. CONCLUSION OF PART II

In light of text, history, and doctrine, the President lacks any inherent power to declare emergencies or take particular emergency actions not authorized by statute. Accordingly, the only possible arrangement is that Congress has the inherent power to declare an emergency and define the means taken to respond to that crisis. Yet, as a matter of past practice, Congress has been "more than likely to delegate to the President the power to determine

123. *Id.* at 637–38.
124. *Id.* at 639.
125. *Id.* at 637, 640.
126. *Id.* at 649.
127. *Id.* at 652.

whether emergency conditions exist."[128] The question then becomes how best to do so. The NEA was an attempt to provide an answer.

III. DISARMING THE "LOADED GUNS"[129]

Congress did not draft the NEA on a blank slate. To the contrary, the statute was an attempt to bring an end to decades of executive overuse of broadly phrased, badly managed statutory authorities.[130] Resulting from negotiations between both chambers as well as between Congress and the President, the NEA was the imperfect child of compromise.[131] Still, in its original form, the statute was a defensible approach to the problem of emergency powers. However, the Supreme Court's opinion in *Chadha* prompted Congress to hamstring the law.[132]

A. PASSAGE OF THE NEA

1. *Origin and Route through Congress*

In the early 1970s, the state of U.S. emergency powers was one of "disarray."[133] There were four prevailing national emergencies declared by Presidents that had yet to be terminated, dating from 1933, 1950, 1970, and 1971.[134] Meanwhile, from 1933 to 1973, Congress "passed or recodified over 470 significant statutes delegating to the President" powers that could be used during national

128. *Special Committee Hearings*, *supra* note 36, at 25 (statement of Prof. Cornelius P. Cotter); *see also id.* (statement of Sen. Church) ("[O]verall, the common practice has been for the President to declare the national emergency[.]").

129. *Id.* at 65 (statement of Sen. Mathias) ("It seems to me this is a perfect illustration of the kind of danger which exists in a Government like ours when you have loaded guns lying around. They may have been originally loaded in order to fire a salute, but end up being charged with shot and used for other business."); *see also* Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

130. *See infra* Part III.A.1.

131. *See infra* Part III.A.2.

132. *See infra* Part III.A.3.

133. S. REP. NO. 94-1168, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2295.

134. *Id.*; *see also* S. REP. NO. 93-549, at 594–97 (1973) (texts of the four declarations).

emergencies.[135] Most of these statutes did "not provide for congressional oversight or termination."[136] When employed, they allowed the executive branch to "seize properties, mobilize production, seize commodities, institute martial law, seize control of all transportation and communications, regulate private capital, and . . . [thereby] control the activities of all American citizens."[137] By virtue of these statutes, the President "had at his disposal virtually dictatorial power, ready for use as he desire[d]."[138] Moreover, there was no requirement that the President demonstrate any reasonable (let alone close) relationship between an asserted crisis and the statutory authority invoked to address it. If there were an existing national emergency with respect to *anything*, then *every* statute containing the magic words "national emergency" could be used.[139] Just as troubling was the lack of a formal requirement that the President publicize emergency declarations — or alert citizens about use of particular secondary emergency statutory authorities — in any regular or reliable way.[140]

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135. S. REP. NO. 93-549, at 6.

136. *Id.* at 7, 10.

137. *See Special Committee Hearings*, *supra* note 36, at 1. For example, the statutory provision used to intern Japanese-Americans during World War II remained on the books for decades after the war had ended. *See* S. REP. NO. 93-549, at 9–10 (discussing 18 U.S.C. § 1383 (1952) (repealed 1976)).

138. 122 CONG. REC. 28,226 (1976) (statement of Sen. Church). Or, to borrow from the Bard of Avon, a President ensconced in pre-NEA secondary emergency statutes could credibly threaten to "bestride the narrow world / Like a colossus." WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ll. 135–36 (Arthur Humphreys ed., Oxford Univ. Press 1984) (1599).

139. For instance, President Truman's 1950 proclamation of a national emergency during the Korean War, Proclamation No. 2914, 15 Fed. Reg. 9029 (1950), was used in 1970 to justify the embargo of Cuba. *See Special Committee Hearings*, *supra* note 36, at 85 (statement of Prof. Gerhard Casper) (discussing Nielsen v. Sec'y of Treasury, 424 F.2d 833 (D.C. Cir. 1970)). That same declaration served as the basis for promoting Air Force astronauts — never mind the fact that the U.S. had no astronauts in 1950. *See National Emergencies Act: Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary on H.R. 3884*, 94th Cong. 60 (1975) [hereinafter *Judiciary Subcommittee Hearings*] (statement of Rep. Danielson); *cf.* COLIN BURGESS, SELECTING THE MERCURY SEVEN: THE SEARCH FOR AMERICA'S FIRST ASTRONAUTS 25–40 (2011) (describing how the Eisenhower administration oversaw the recruitment of the first American astronauts beginning in late 1958). The executive branch also used the Korea declaration for even more remotely related policies, such as negotiating contractual set-asides for small businesses and obtaining passports for people who lost them while traveling in Europe. *See Judiciary Subcommittee Hearings*, *supra*, at 74 (statement of Rep. Danielson); *id.* at 76 (statement of Phillip G. Read, Office of Federal Management Policy, United States General Services Administration); *id.* at 83 (statement of Rep. Flowers).

140. *See Special Committee Hearings*, *supra* note 36, at 725–27 (statement of Sen. Mathias); *id.* at 748 (statement of Erwin N. Griswold, former Solicitor General of the United States).

Though more directly implicating constitutional war powers than national emergency powers, the country's harrowing experiences during the Vietnam War spurred Congress to reconsider more generally its broad delegations of authority to the President.[141] Accordingly, on January 6, 1973, the Senate established a Special Committee on the Termination of the National Emergency, later renamed the Special Committee on National Emergencies and Delegated Emergency Powers (collectively, the "Special Committee").[142] Its organization was consciously bipartisan: the committee had two coequal co-chairmen (Democratic Senator Frank Church and Republican Senator Charles Mathias) and the same number of members from each party.[143] After collating the various secondary emergency statutes scattered throughout the U.S. Code,[144] the Special Committee sought to "devise a regular procedure to be followed in all emergency powers legislation" — and, the Senators hoped, thereby bring an end to decades of emergency government.[145] In addition to consulting informally with various scholars and stakeholders, the Special Committee convened a number of hearings featuring venerable and experienced witnesses, including professors of law and political science, former

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141. *See id.* at 16 (statement of Sen. Church) ("Certainly, if the last 10 years of warfare in Indo-China demonstrate anything at all, they demonstrate that Presidents can make very big mistakes too. That there is no degree of infallibility vested in the Chief Executive of this country, or his advisers."); *National Emergencies Act: Hearing Before the S. Comm. on Gov't Operations on H.R. 3884*, 94th Cong. 14 (1976) [hereinafter *SCGO Hearing*] (statement of Sen. Mathias) ("My own interest in the question of emergency powers developed out of our experience in the Vietnam War and the incursion into Cambodia."). Watergate can only have accentuated concerns about overly powerful executives.

142. S. REP. NO. 94-1168, at 8–9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2294–95; S. REP. NO. 93-1193, at 3 (1974) (citing S. Res. 9, 93rd Cong. (1973) (enacted)).

143. *See Special Committee Hearings*, *supra* note 36, at 1; *id.* at 4 (statement of Sen. Mathias). Senators Church and Mathias took such care to preclude any appearance (let alone actuality) of partisanship that they alternated which co-chairman spoke first at each hearing. *See, e.g.*, *id.* at 497 (statement of Sen. Church) (allowing Senator Mathias to read the first half of the jointly prepared opening statement because it was "his birthday — and his turn").

144. *See* S. REP. NO. 93-549, at 15–16 (1973).

145. *Special Committee Hearings*, *supra* note 36, at 5 (statement of Sen. Mathias); *see also Judiciary Subcommittee Hearings*, *supra* note 139, at 26 (statement of Sen. Mathias) ("This is not trying to wrest any powers away from the President, but to work cooperatively with the President in returning this country to a peaceful state. Both at law and in fact."); *id.* at 35 (statement of Sen. Church) ("The committee intentionally chose language which would make clear that the authority of the Act was to be reserved for matters which are 'essential' to the protection of the Constitution and the people. This authority will not be available for frivolous or partisan matters nor, for that matter, in cases where important but not 'essential' problems are at stake. Only in the most unusual circumstances can the Constitutionally ordained role of the Congress be bypassed.").

attorney and solicitor generals, and even (by then retired) Justice Clark.[146] The Senators and their witnesses recognized that Congress had "abdicated" its responsibility to restrain and oversee the use of emergency powers.[147] It now had the obligation to restore control.

The road to enactment was not without some bumps. Consideration and passage of the bill which the Special Committee ultimately produced — S. 3957 — was delayed by Watergate and the confirmation process for Vice President Nelson Rockefeller. Although an amended version of S. 3957 passed the Senate, the House ran out of time to consider the bill before the end of the 93rd Congress.[148] Nevertheless, the next Congress' House took up the cause with the introduction of H.R. 3884, which was "substantially similar" to S. 3957.[149] While the Special Committee hearings had concentrated more on scholarly views of emergency powers, the House Committee on the Judiciary's Subcommittee on Administrative Law and Governmental Relations (the "Judiciary Subcommittee") focused its energies on receiving input from public officials.[150] Representatives from various executive departments came in front of the Judiciary Subcommittee, both to offer their agencies' views on the NEA's structure and to lobby in favor of retaining particular authorities as necessary to their day-to-day operations.[151] The House Judiciary Committee reported out a marked up version of

146. *See* S. REP. NO. 93-1193, at 3–4 (1973) (listing witnesses who testified in front of the Special Committee).

147. *Special Committee Hearings*, *supra* note 36, at 26 (statement of Prof. Cornelius P. Cotter); *see also, e.g.*, *id.* at 27 ("So, first of all, Congress does not systematically enough and continuously enough reserve for itself such a role. Then, secondly, when Congress has reserved such a role it does not play that role."); *id.* at 28 (statement of Sen. Mathias) ("We indulge in flagellation on the subject ourselves."); *id.* at 53 ("It is a part of what Senator [Sam] Ervin has described, in his own way, as 'being not all homicide, there is a good deal of suicide.'").

148. *See SCGO Hearing*, *supra* note 141, at 17 (statement of Sen. Mathias); S. REP. NO. 93-1193, at 2.

149. *SCGO Hearing*, *supra* note 141, at 1 (statement of Sen. Ribicoff).

150. *Compare* S. REP. NO. 93-1193, at 3–4 (1973) (listing witnesses who testified in front of the Special Committee), *with Judiciary Subcommittee Hearings*, *supra* note 139, at iii (listing witnesses who testified in front of the Judiciary Subcommittee).

151. *See Judiciary Subcommittee Hearings*, *supra* note 139, at 37–39 (statement of Elting Arnold, Senior Counselor to the General Counsel, United States Department of the Treasury); *id.* at 49–53 (statement of Leonard Niederlehner, Deputy General Counsel, United States Department of Defense); *id.* at 71–74 (statement of Phillip G. Read, Office of Federal Management Policy, United States General Services Administration); *id.* at 81–83 (statement of Mark B. Feldman, Deputy Legal Advisor, United States Department of State); *id.* at 88–94 (statement of Antonin Scalia, Assistant General Counsel, Office of Legal Counsel, United States Department of Justice).

H.R. 3884 on May 21, 1975.[152] After the full House amended and passed the bill, the Senate added its own changes, all of which the House accepted.[153] President Gerald Ford finally signed the NEA into law on September 14, 1976.[154]

2. *Give and Take*

The NEA's core mechanism has remained relatively consistent from the start of the drafting process.[155] The statute delegates to the President the authority to declare a national emergency, although the statute — by design — never specifies what exactly constitutes a "national emergency."[156] In that same emergency declaration — or in a contemporaneous executive order, either of which must be "published in the Federal Register and transmitted to the Congress" — the President must also name the specific statutory authorities scattered throughout the U.S. Code upon which she intends to rely in addressing the emergency.[157] The NEA is like an electrical switch sending a current of emergency power throughout the U.S. Code, but that current only "turns on" secondary emergency statutes specifically named in the declaration. Thus, every time the President uses the NEA, she assumes additional statutory powers; all that changes are *which* powers the President unlocks on any given occasion. If the President later wants to use additional secondary emergency statutes to address the same emergency, she must specify them in a subsequent executive order.[158]

Although these elements of the NEA were consistent throughout the drafting process, many other aspects were subject to

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152. *See* H.R. REP. NO. 94-238 (1975).
153. *See* 122 CONG. REC. 28,227, 28,466 (1976); 121 CONG. REC. 27,646 (1975).
154. *See* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).
155. *Compare* National Emergencies Act, S. 3957, 93rd Cong. §§ 201, 401 (1974) (as reported by S. Comm. on Gov't Operations, Sept. 30, 1974), *with* 50 U.S.C. §§ 1621, 1631.
156. *See* 50 U.S.C. § 1621(a) ("With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency."); S. REP. NO. 94-1168, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2289 ("The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.").
157. 50 U.S.C. § 1631.
158. *Id.*

negotiation and revision. After all, regardless of what Congress might have preferred the NEA to look like in the abstract, the bill actually needed to pass. That goal required drafters to make compromises in exchange for support from the White House and influential heads of executive agencies.[159] For example, S. 3957 originally provided that an emergency would only last beyond six months if Congress affirmatively agreed to continue it until a specific sunset date.[160] Yet the executive branch "took exception to this" arrangement,[161] and so the final version of S. 3957 reversed the presumption: instead of emergencies ending unless Congress extended them, they would *continue* unless terminated by either Congress or the President.[162] The only consolation was a requirement that each House of Congress would meet every six months to consider a vote to terminate the emergency; such a vote would enjoy certain expedited procedures.[163] Similarly, the original version of S. 3957 would have terminated all four existing states of emergencies nine months after the NEA took effect. During this "grace period," the executive branch could review the emergency powers upon which it relied and communicate to Congress which ones should be enacted into regular law.[164] However, by the time the Judiciary Subcommittee began consideration of H.R. 3884, the grace period had been extended to one year.[165] The Judiciary Subcommittee then doubled that time to two years.[166] Furthermore, some laws were exempted entirely: at the prodding of the executive branch, the final version of S. 3957 included a list of secondary emergency statutes whose powers would remain accessible to the

159. *See, e.g.*, *Special Committee Hearings*, *supra* note 36, at 69 (statement of Sen. Church) ("The only thing we can pass over a Presidential veto is an increase in Social Security — something of that nature. I doubt very much whether it is possible, as a practical political matter, to reclaim any of these powers except as the President is willing to relinquish them."); *id.* at 70 ("I am saying we have to solicit and obtain the cooperation of the President to get this job done."); *id.* at 518–19 (similar).

160. *See* National Emergencies Act, S. 3957, 93rd Cong. § 402(2) (1974) (as reported by S. Comm. on Gov't Operations, Sept. 30, 1974); S. REP. NO. 93-1193, at 1–2 (1974).

161. *Judiciary Subcommittee Hearings*, *supra* note 139, at 30 (statement of Sen. Church).

162. *See* National Emergencies Act, S. 3957, 93rd Cong. § 202 (1974) (as passed by Senate, Oct. 7, 1974).

163. *See id.*

164. *See* S. REP. NO. 93-1193, at 2.

165. *See Judiciary Subcommittee Hearings*, *supra* note 139, at 34–35 (statement of Sen. Church).

166. *See* H.R. REP. NO. 94-238, at 14 (1975).

President even after two years had passed.[167] This list of exemptions grew as the process continued with amendments to H.R. 3884.[168]

In return for these various concessions, the executive branch offered an important one of its own: it would sign a version of the NEA which provided that Congress could terminate emergencies through concurrent resolutions. (The President, of course, could terminate an emergency at any time of her own accord.[169]) To be sure, the executive branch repeatedly insisted that such "legislative vetoes"[170] were unconstitutional.[171] But these protestations did not prove fatal. As Senator Church explained, "the opposition of [the Office of Management and Budget] to the use of the concurrent resolution is long standing and well understood. We knew of it in October of 1974 and *we worked out various compromises with the Administration*. That having been accomplished, we were given to understand by the President that *he would accept this legislation*; he recognized the need for legislation in this field."[172] The concurrent resolution provision was the bargain that the two sides struck to pass the law, and it was included in the final version signed by President Ford.[173]

The drafters of the NEA understood the concurrent resolution provision to be essential to balancing two objectives in tension with

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167. *See Judiciary Subcommittee Hearings*, *supra* note 139, at 28 (statement of Sen. Church) ("But in order to reach an accommodation that would permit unanimous action in the Senate and give the promise of a Presidential signature, we did make these exceptions."); *id.* at 29 (statement of Sen. Mathias) ("We only did it, as Senator Church said, out of our concern that the bill be passed in a posture the President would approve.").

168. *See, e.g.*, *SCGO Hearing*, *supra* note 141, at 17 (statement of Sen. Mathias) ("The [House Judiciary] Committee also increased the number of statutes which would be exempt from the force of the legislation."). For the final list, see National Emergencies Act, Pub. L. No. 94-412, § 502(a), 90 Stat. 1255, 1258 (1976). There were also several statutes which were widely seen as obsolete and/or problematic (and thus were repealed entirely). *See id.* § 501.

169. *See* 50 U.S.C. § 1622(a)(2) ("Any national emergency declared by the President in accordance with this subchapter shall terminate if . . . the President issues a proclamation terminating the emergency.").

170. I.e., congressional actions that countermand or annul executive actions without complying with bicameralism and presentment. *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540 (1992).

171. *See, e.g.*, *Judiciary Subcommittee Hearings*, *supra* note 139, at 92 (statement of Antonin Scalia, Assistant General Counsel, Office of Legal Counsel, United States Department of Justice); Letter from James M. Frey, Assistant Dir. for Legis. Reference, Comptroller Gen. of the U.S., to Abraham Ribicoff, Chairman, Comm. on Gov't Operations, U.S. Senate (Sept. 15, 1975), *in* S. REP. NO. 94-1168, at 22 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2288, 2299–2300.

172. *SCGO Hearing*, *supra* note 141, at 3 (statement of Sen. Church) (emphasis added).

173. *See* 90 Stat. at 1255.

one another: (1) granting adequate flexibility to the President to respond to a crisis while also (2) preventing the executive from declaring emergencies for personal or partisan purposes. In view of these objectives, it is unsurprising that Justice Jackson's concurrence in *Youngstown* repeatedly was mentioned, quoted, and/or praised throughout the process as the drafters' "basic guideline."[174] After all, the concurrent resolution provision allowed Congress to make it clear when "the President [had] take[n] measures incompatible with the expressed or implied will of Congress."[175] As Senator Mathias stated, "the President in the exercise of his [e]xecutive function could proclaim a national emergency, and the Congress would then review the facts upon which the proclamation was predicated; and if in effect the facts did not justify the continuation of emergency powers, would not agree to prolong the existence of the emergency."[176] Or, as Senator Church put it, the concurrent resolution provision (and other limitations on the President's ability to declare an emergency) would guarantee "Congress a continuing role to play in determining how long the emergency should last."[177] As such, the NEA balanced presidential flexibility in response to crises with congressional supremacy in legislation.

3. Chadha *and its Aftermath*

This balance shifted dramatically in 1983, when the Supreme Court invalidated a legislative veto provision in *Immigration & Naturalization Services v. Chadha*.[178] *Chadha* centered on a provision of the Immigration and Nationality Act (the "INA"), which — while delegating to the Attorney General the initial authority "to allow a particular deportable alien to remain in the United States" — allowed a single chamber of Congress to override that decision through a simple majority vote.[179] In an opinion by Chief

174. *See, e.g.*, *SCGO Hearing*, *supra* note 141, at 7 (statement of Sen. Church); S. REP. NO. 93-1193, at 4–5 (1974); S. REP. NO. 93-549, at 12 (1973).

175. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

176. *Judiciary Subcommittee Hearings*, *supra* note 139, at 26 (statement of Sen. Mathias); *see also Special Committee Hearings*, *supra* note 36, at 32 (statement of Prof. Cornelius P. Cotter) ("[T]he historical precedent is that Congress does and may incorporate in a generic statute a provision whereby Congress may, by concurrent resolution, declare circumstances to be.").

177. *Special Committee Hearings*, *supra* note 36, at 70–71 (statement of Sen. Church).

178. 462 U.S. 919 (1983).

179. *Id.* at 923–25.

Justice Warren Burger, the Court invalidated that provision of the INA as violative of the Constitution's "finely wrought and exhaustively considered" process of bicameralism and presentment.[180] According to the majority, Congress had attempted to engage in a legislative act when it overruled a decision already delegated to the Attorney General via the INA. Like any other time Congress sought to legislate, it had to comport with the procedural restrictions on its legislative power embedded in the Constitution.[181] Allowing otherwise would undermine the Framers' deliberate choices in designing a system that would not "permit[ ] arbitrary governmental acts to go unchecked."[182]

Three justices did not join the majority opinion. In a solo concurrence in the judgment, Justice Lewis Powell argued that the case *could* have been decided on far narrower grounds: namely, that the deportation procedure impermissibly allowed Congress to "assume[ ] a judicial function in violation of the principle of separation of powers."[183] Meanwhile, Justice Byron White (joined by Justice William Rehnquist) dissented, maligning the majority's formalistic approach for "invalidat[ing] all legislative vetoes irrespective of form or subject."[184] This across-the-board ban eliminated "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[185] Taking into consideration "the purposes of Art[icle] I and the principles of separation of powers which are reflected in that Article and throughout the Constitution," Justice White contended that — given the emergence of the modern administrative state — the legislative veto was "a necessary check on the unavoidably expanding power of the agencies, both [e]xecutive and independent, as they engage in exercising authority delegated by Congress."[186]

In response to *Chadha*, Congress in 1985 modified the NEA's emergency termination procedure by replacing concurrent

180. *Id.* at 951; *see* U.S. CONST. art. I, § 7, cl. 2.
181. *Chadha*, 462 U.S. at 944–59.
182. *Id.* at 959.
183. *Id.* at 960 (Powell, J., concurring in the judgment).
184. *Id.* at 974 (White, J., dissenting). Justice Rehnquist also authored a brief opinion (joined by Justice White) criticizing the majority's severability analysis. *See id.* at 1013–16 (Rehnquist, J., dissenting).
185. *Id.* at 972–73 (White, J., dissenting).
186. *Id.* at 976–77, 984–89, 999–1002.

resolutions with joint resolutions.[187] After all, numerous legal observers feared that — were a court to apply *Chadha*'s formalist logic to invalidate the NEA's emergency termination provision — the entire law could be struck down on grounds of inseverability.[188] The alteration came in a provision of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (the "FRAA").[189] The FRAA's legislative history makes clear that amending the NEA was far from the forefront of most lawmakers' minds at the time.[190] Not until the second day of Senate debate did Senator Mathias introduce Amendment 299, which proposed (1) adding a sentence to the NEA providing that a joint resolution would terminate a national emergency and (2) replacing every use of the word "concurrent" in the NEA with the word "joint."[191] Senator Mathias spoke

187. For the distinction between concurrent and joint resolutions, see *supra* note 21 and accompanying text.

188. *See* sources collected *supra* note 22. The NEA was not the only statute amended in this way and for this reason. *See* Anthony M. Bottenfield, Comment, *Congressional Creativity: The Post-*Chadha *Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 PENN ST. L. REV. 1125, 1137 (2008) (listing other examples).

189. *See* Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801, 93 Stat. 405, 448 (1985) [hereinafter Finalized FRAA].

190. Neither the original text of H.R. 1931 — the House's first version of the FRAA — nor the House Committee on Foreign Affairs ("HCFA") report accompanying H.R. 1931 when reported out of committee made any mention of the NEA. *See* Department of State Authorization Act, Fiscal Years 1986 and 1987, H.R. 1931, 99th Cong. (1985); H.R. REP. NO. 99-40 (1985). The House's second, and ultimately successful, version of the FRAA was H.R. 2068, which was identical to H.R. 1931 with respect to all but two sections (neither of which remotely pertained to the NEA). *See* STAFF OF H. COMM. ON FOREIGN AFFAIRS, 99TH CONG., SURVEY OF ACTIVITIES 30 (Comm. Print 1987). The NEA did not come up once during the eight days of HCFA hearings on the FRAA. *See Authorizing Appropriations for Fiscal Years 1986–87 for the Department of State, the U.S. Information Agency, the Board for International Broadcasting and for Other Purposes: Hearings on H.R. 2068 Before the H. Comm. on Foreign Affairs*, 99th Cong. (1985). The House considered dozens of floor amendments to H.R. 2068; not a single one made any mention of the NEA. *See All Actions H.R. 2068 — 99th Congress (1985–1986)*, CONGRESS.GOV, https://www.congress.gov/bill/99th-congress/house-bill/2068/all-actions [https://perma.cc/9FFD-U9PW] (listing all floor amendments to H.R. 2068). The Senate's original versions of what became the FRAA — S. 496, S. 659, S. 785, and S. 1003 — contained no references to the NEA, either. *See* Board for International Broadcasting Authorization Act, Fiscal Years 1986 and 1987, S. 496, 99th Cong. (1985); Department of State Authorization Act for fiscal years 1986 and 1987, S. 659, 99th Cong. (1985); United States Information Agency Authorization Act, Fiscal Years 1986 and 1987, S. 785, 99th Cong. (1985); Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, S. 1003, S. REP. NO. 99-39, 99th Cong. (1985). The Senate later struck all of H.R. 2068's text after the enacting clause, inserted the language of S. 1003 as amended, and then passed H.R. 2068. *See* 131 CONG. REC. 15,113 (1985). However, the relative absence of emphasis on amending the NEA in passing the FRAA does *not* mean that Congress was unaware of the significance of *Chadha*, as evidenced by, *inter alia*, the eight hearings conducted by the House Rules Committee of the 98th Congress beginning several months after *Chadha* was decided. *See generally Legislative Veto After* Chadha, *supra* note 22.

191. *See* 131 CONG. REC. 14,861–62 (1985).

briefly about how *Chadha* motivated the change from concurrent to joint resolutions, and then the amendment passed by voice vote.[192] The conference report — which barely mentioned the NEA amendment — sailed through both chambers, and President Ronald Reagan signed the FRAA into law on August 16, 1985.[193]

Although the NEA now was secure from invalidation via inseverability,[194] the 1985 amendment "decimated the policy scheme Congress had created for overseeing the [P]resident's declaration of emergency powers."[195] Because the President can veto any joint resolution terminating an emergency, two thirds of both Houses of Congress must come together to oppose her.[196] Accordingly, it is now "virtually impossible" to "garner the votes needed to block the declaration."[197] A President supported by just one-third plus one

192. *See id.* at 14,947–48. In his floor speech, Senator Mathias stated that he had been "persuaded by the opinion of the Court that the use of a concurrent resolution is constitutionally inappropriate in this case in matters so grave or serious as a national emergency." *Id.* at 14,948 (statement of Sen. Mathias). This claim is not obviously true. Senator Mathias' statements and actions throughout the NEA drafting process suggest that he had a very strong view of the role Congress should play "in matters so grave or serious as a national emergency." *Id.* Maybe Chief Justice Burger's opinion really did "persuade[]" Senator Mathias and change his mind. *Id.* A more likely explanation is that Senator Mathias wanted to save at least part of the law to which he had dedicated years of time and energy (and no small share of political capital), and thus he was willing to briefly praise *Chadha* from the Senate floor in order to ensure the passage of the amendment. *See id.* ("There is no question in my mind that we need to maintain the procedures we have so carefully developed to deal with national emergencies. . . . [The change to joint resolutions] is not a perfect solution to the *Chadha* problems, but it at least brings the emergency powers legislation into line with current law.").

193. *See* H.R. REP. NO. 99-240, at 86 (1985) (Conf. Rep.); 131 CONG. REC. 21,676 (1985) (Senate agreement with conference report); *id.* at 22,540–41 (House roll call vote in favor of conference report); Finalized FRAA, *supra* note 189, at 457 (noting date of presidential approval).

194. It turns out that a group of merchants *did* argue that the legislative veto was inseverable from the rest of the NEA. However, upon the enactment of the FRAA, the First Circuit affirmed the dismissal of the claim as moot in an opinion authored by then-Circuit Judge Stephen Breyer. *See* Beacon Prods. Corp. v. Reagan, 814 F.2d 1, 3 (1st Cir. 1987).

195. Richard H. Pildes, *The Supreme Court's Contribution to the Confrontation Over Emergency Powers*, LAWFARE (Feb. 19, 2019, 11:20 AM), https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers [https://perma.cc/KMC4-3CFV].

196. *See* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J.F. 610, 611 (2020).

197. Geoffrey Manne & Seth Weinberger, *Time to Rehabilitate the Legislative Veto: How Congress Should Rein in Presidents' "National Emergency" Powers*, JUST SECURITY (Mar. 13, 2019), https://www.justsecurity.org/63201/congress-rein-presidents-national-emergency-power-rehabilitating-legislative-veto/ [https://perma.cc/YB5E-STJK]; *see also* Vladeck, *supra* note 196, at 611–12 (recognizing that heightened partisanship has made veto overrides of emergency declarations "practically impossible").

member of one House of Congress has carte blanche to declare emergencies — and thereby "bypass Congress."[198]

Although President Trump was far from the first resident of the Oval Office to invoke the NEA,[199] the border wall controversy is a perfect example of the precise danger of an overly constrained Congress. Throughout the budget negotiation process, Congress repeatedly chose not to bend to President Trump's demand for border wall funding.[200] As is true of every negotiation, each side had to give up some ground: Democrats passed up the opportunity to secure permanent legal status for undocumented immigrants who came to the U.S. as children in exchange for Republicans acceding to a spending bill without border wall funding.[201] And then — shortly after signing that bill into law — President Trump declared an emergency to get his wall funding anyway.[202] Subsequently, simple majorities in both the House and the Senate voted to terminate the emergency on two separate occasions, which was particularly notable given that Republicans held a majority of seats in the Senate.[203] In response, President Trump vetoed both joint resolutions, and an already polarized Congress could not corral two-thirds majorities in both chambers to override those vetoes.[204] If the NEA had been meant to embody *Youngstown*, then one would think that the political branches were in a strong Zone 3 situation: Congress had directly and repeatedly spoken on an issue over which it has sole authority (appropriations), not only by passing spending bills without wall funding but also by voting twice to terminate the emergency declaration. But President Trump still got

198. Manne & Weinberger, *supra* note 197.

199. *See* Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution — And What to Do About It*, 44 HARBINGER 95, 95–96 (2020) ("Including Trump's border wall emergency declaration and four subsequent emergency declarations, Presidents going back to Jimmy Carter have declared a total of 57 emergencies under the NEA. Thirty-four of these are still active.").

200. *See* Linda Sheryl Greene, *Up Against the Wall: Congressional Retention of the Spending Power in Times of "Emergency,"* 51 LOY. U. CHI. L.J. 431, 461–62 (2019); Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 590, 594 (2020); Baker, *supra* note 3; Paletta et al., *supra* note 3.

201. *See* Dean DeChiaro & Camila DeChalus, *Border Wall Funds Elusive Without a Deal on "Dreamers,"* ROLL CALL (Mar. 2, 2018, 5:04 AM), https://www.rollcall.com/news/politics/border-wall-funds-elusive-without-deal-dreamers [https://perma.cc/E53H-4JL8].

202. *Compare* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, §§ 230–31, 113 Stat. 13, 28 (2020), *with* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

203. *See* Binder, *supra* note 11; Cochrane, *supra* note 11.

204. *See* Cochrane, *supra* note 12; Zanona, *supra* note 12.

his way, and the national emergency declaration only came to an end upon President Biden's ascension to the Oval Office.[205]

The change from a concurrent resolution to a joint resolution has thus undermined a crucial check on presidential emergency power, insofar as Congress' "provision for defense" is not "commensurate to the danger of attack" by the President.[206] The amended NEA allows the President unilaterally to upset legislative compromises and impose policymaking preferences without the meaningful possibility of oversight by Congress or the courts.[207] As several commentators have noted, this arrangement is far from ideal[208] — and, as explained in the next Part of this Note, resulted from a misapprehension of the nature of legislative vetoes.

IV. TWO PATHS FORWARD: REREADING *CHADHA* AND REVISITING THE NEA'S FRAMEWORK

As Parts II and III of this Note establish, the NEA delegates emergency declaration power to the President. Typically, delegations must conform with the intelligible principle test, with the conditions imposed by Congress being "supervised by the courts."[209] This test provides that "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the

205. *See* Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

206. THE FEDERALIST NO. 51, *supra* note 64, at 264 (James Madison).

207. *See* BRENNAN CTR. FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE 3–43 (2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf [https://perma.cc/K6L5-QJDV] (list of 136 statutes available upon declaration of a national emergency). These examples do not include the many *other* statutory authorities of which a President may avail herself "in time of war." *See, e.g.*, 10 U.S.C. §§ 2538, 2644.

208. *See, e.g.*, Michael J. Pastrick, *Reality Check: The Need to Repair the Broken System of Delegating Legislative Power Under the National Emergencies Act*, 2019 CARDOZO L. REV. DE NOVO 20, 31–40; Patrick A. Thronson, Note, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 MICH. L. REV. 737, 777–85 (2013); Editorial, *Fix America's National Emergencies Law. And Not Just Because of Trump.*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/trump-national-emergency.html [https://perma.cc/WA38-3JWN].

209. Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 796; *accord* Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.").

principle of separation of powers has occurred."[210] On its face, however, the NEA has no obvious intelligible principle for determining whether the President has properly identified a situation as constituting an emergency.[211] Even if the NEA *did* have an intelligible principle — or to the extent that the phrase "national emergency" and/or phrase(s) within particular secondary emergency statutes could serve as one — the existence of an emergency is one of those questions which are "in their nature political."[212] More specifically, emergency declarations suffer from a "lack of judicially discoverable and manageable standards for resolving" their propriety, as well as from the need for an "initial policy determination of a kind clearly for nonjudicial discretion."[213] Put otherwise, courts often are unwilling and/or unable to entertain challenges to these sorts of decisions by the political branches.[214]

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210. Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218 (1989) (quoting Mistretta v. United States, 488 U.S. 361, 379 (1989)); *see also, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2129–30 (2019) (plurality); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–76 (2001); Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 104–06 (1946); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1926).

211. *See* Pildes, *supra* note 195 (explaining that "[a]ttempting to define 'emergencies' in advance" was not a "pressing" concern for the NEA's drafters because "Congress could decide, after a presidential declaration of emergency, whether it agreed" by passing a concurrent resolution); *see also* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1888 (2019) ("Neither [the NEA nor the Military Construction Codification Act] provides any decision making criterion to determine when an emergency should be declared and hence to establish a basis for the Secretary[] [of Defense's] exercise of discretion.").

212. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

213. Baker v. Carr, 369 U.S. 186, 216 (1962); *see also* Curran v. Laird, 420 F.2d 122, 129 (D.C. Cir. 1969) (en banc) ("The case involves decisions relating to the conduct of national defense; the President has a key role; the national interest contemplates and requires flexibility in management of defense resources; and the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility.").

214. *See Special Committee Hearings*, *supra* note 36, at 84 (statement of Prof. Gerhard Casper) ("[C]ourts have been treating emergencies essentially as political questions and have often yielded to the higher wisdom of the Executive or the Congress in evaluating them constitutionally."); Tsai, *supra* note 200, at 593, 599 ("Presidents today realize that open-ended grants of authority, coupled with judicial acquiescence, mean their assertions of emergency power nearly always prevail. . . . [T]oday [the Supreme Court] will rarely, if ever, scrutinize a President's motives or the evidence underlying a crisis claim."); Pildes, *supra* note 195 ("Courts are traditionally reluctant to second-guess presidential judgments in areas such as foreign affairs, national security and emergencies[.]"); *see also, e.g.*, Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today*, 107 CALIF. L. REV. 789, 839 (2019) ("Just as it had one year earlier in *Hirabayashi*, the Court [in *Korematsu*] deferred to the military and declined yet again to 'reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.'" (quoting Korematsu v. United States, 323 U.S. 214, 218 (1944))); Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J.F. 629, 638 (2019) (highlighting "[t]he parallel between [the Court's] deferential posture [in Trump v. Hawaii, 138

If courts will not police these sorts of delegations, then the best alternative constraint on executive emergency declarations is a political check. Hence the NEA's original procedure for termination by concurrent resolution: Congress could serve as a check to the President when the courts would not.[215] After *Chadha*, Congress — seeking to avoid total invalidation — amended the NEA to remove this tool. The question is whether they needed to do this. The answer is no, at least under a revisionist reading of *Chadha* enabled by a more functionalist reading of legislative vetoes under the Constitution. As Professor Peter Strauss has explained, "[l]egislative vetoes have been used in a variety of settings," yet both the majority and dissenting opinions in *Chadha* assumed that "the issues [that they] presented were always the same" regardless of context.[216] But not all legislative vetoes are alike. While one type — the regulatory legislative veto — is constitutionally untenable and prudentially unwise, the other — the political legislative veto — can serve as a valuable element of power-sharing arrangements.

These two types of legislative vetoes are distinguishable along three axes. The first point of differentiation is the actor subject to

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S. Ct. 2392 (2018)] and the Court's performance in *Korematsu*"); United States v. Amirnazmi, 645 F.3d 564, 579 (3d Cir. 2011) ("Mindful of the heightened deference accorded the Executive in this field, we decline to interpret the legislative grant of authority [by the International Emergency Economic Powers Act] parsimoniously."); United States v. Spawr Optical Rsch., Inc., 685 F.2d 1076, 1080 (9th Cir. 1982) ("Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed 'the essentially political questions surrounding the declaration or continuance of a national emergency' under [the Trading With the Enemy Act]." (quoting United States v. Yoshida Int'l, Inc., 526 F.2d 560, 579 (C.C.P.A. 1975))). This posture reappeared in litigation challenging President Trump's border wall emergency declaration. *See, e.g.*, Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 30–34 (D.D.C. 2020) (holding that challenge to border emergency declaration presented a nonjusticiable political question); Washington v. Trump, 441 F. Supp. 3d 1101, 1124–25 (W.D. Wash. 2020) (rejecting invocation of the political question doctrine since the plaintiffs were "not challenging the President's determination that an emergency exists at the southern border that requires the use of armed forces," but instead were "questioning whether the eleven border barrier projects me[t] the definition of 'military construction' set forth in § 2801"). For arguments against "broadly deferential judicial review" during crises, see, e.g., Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 138 HARV. L. REV. F. 179, 182–98 (2020); Tsai, *supra* note 200, at 599–608. The implications of the four Bush-era detainee cases — Rasul v. Bush, 542 U.S. 466 (2004), Hamdi v. Rumsfeld, 542 U.S. 507 (2004), Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene v. Bush, 553 U.S. 723 (2008) — for assessments of judicial willingness to defer to the political branches during wartime are beyond the scope of this Note.

215. *See* Pildes, *supra* note 195 ("Through this legislative veto, Congress — not the courts — was designed to be the institutional forum to determine whether the president was right in declaring an emergency.").

216. Strauss, *supra* note 209, at 790–91.

the veto. Regulatory legislative vetoes are often — but not always — attached to statutes which delegate power to someone who is *not* the President (e.g., a department head or an independent agency).[217] In contrast, political legislative vetoes involve situations in which "the President himself takes or directs the action subject to the legislative veto."[218] This distinction is important for at least two reasons. First, regulatory legislative vetoes effectively "operate as a device for evasion of the President's participation in governance" by assigning authority to someone within the executive branch who is *not* the President and then subjecting that assignment to congressional override without any direct executive participation in the process.[219] This problem is avoided if the President is the subject of the veto. Second, the need for a post-enactment congressional check is less pertinent in the context of administrative agencies because many agency actions are subject to judicial review in one form or another.[220] By contrast, the President enjoys a much broader range of discretion, including, but not limited to, exemption from the scope of the Administrative Procedure Act.[221] Therefore, from the outset, the judicial checks on presidential activity are far less robust than they are for other members of (or entities within) the executive branches or for independent agencies.

The second difference between regulatory and political legislative vetoes is their subject matter. Regulatory legislative vetoes "have as their principal purpose and effect 'altering the legal rights, duties[,] and relations of persons' outside government."[222] In such situations, there is a genuine risk that Congress will act arbitrarily to oppress individuals, contrary to "both the separation of powers notion generally and the [Constitution's] attainder prohibition in particular."[223] Additionally, judicial review "is readily available" when individual interests or obligations are at stake

217. *Id.* at 807, 817.
218. *Id.* at 817.
219. *Id.* at 808.
220. *See* Administrative Procedure Act, Pub. L. No. 79-404, § 10, 60 Stat. 237, 243–44 (1946) (codified as amended at 5 U.S.C. §§ 701–06).
221. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).
222. Strauss, *supra* note 209, at 819 (emphasis deleted) (quoting Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983)).
223. *Id.* at 804; *see* U.S. CONST. art. I, § 9, cl. 3.

because it is relatively easy to establish a plaintiff's standing.[224] By contrast, for political legislative vetoes, "the subject matter principally concerns the internal arrangements of government rather than rules of conduct applicable to the public, and judicial consideration at any stage is unlikely."[225]

The third point of differentiation between regulatory and political legislative vetoes is their pertinence to maintaining interbranch checks and balances. Political legislative vetoes are used in situations in which Congress and the President reach "an accommodation . . . often mutually desired . . . on matters of legitimate interest to each."[226] Particularly in areas of "national security and foreign affairs" where courts are reluctant to tread, these political legislative vetoes allow Congress to "transfer greater authority to the President . . . while preserving its own constitutional role."[227] As part of the "horse-trading" inherent in the "continuing political dialogue between [the] President and Congress, on matters having high and legitimate political interest to both," Congress may grant a greater amount of power to the President while still "preserving balance" between the branches.[228] Such balance is essential to the health of the American constitutional system. By design, no one branch is made supreme over, or entirely dependent upon, another. Each has the "necessary constitutional means and personal motives to resist encroachments of the others."[229] By "pitt[ing the branches] against [one] another in a continuous struggle," the Constitution denies each "the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of

224. Strauss, *supra* note 209, at 817; *see* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992))).

225. Strauss, *supra* note 209, at 817.

226. *Id.* at 806.

227. *Chadha*, 462 U.S. at 969 (White, J., dissenting); *see* Strauss, *supra* note 209, at 806 (explaining that political legislative vetoes are apt in situations where judicial review is unlikely).

228. Strauss, *supra* note 209, at 791–92, 806; *see also* Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 380 n.134 (1994) ("[F]rom almost the beginning, the veto facilitated efforts by both Congress and the President to create flexibility in executive-legislative relations."); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 598 (1990) (cataloguing insertions of concurrent resolution termination provisions into statutes during 1970s as part of a broader congressional effort to rein in presidential power); Gerhard Casper, *The Constitutional Organization of Government*, 26 WM. & MARY L. REV. 177, 187–89 (1985) (classifying these statutes as "framework legislation").

229. THE FEDERALIST NO. 51, *supra* note 64, at 264 (James Madison).

government."[230] This concern about checks and balances is all the more acute because during times of potential danger, judges sit "with intrepid Oedipus eyes and sealed Odysseus ears," unwilling and/or unable to entertain legal challenges to assertions of necessity.[231] In the emergency context more than almost any other, a political check is the *only* means of constraining a congressional delegation.

However, no such theory of checks and balances justifies regulatory legislative vetoes. Rather, they are defended "only in terms of Congress' performance of its own legislative function."[232] By reserving for Congress an ex post power to cancel individual agency actions with which it does not agree, regulatory legislative vetoes "provid[e] a mechanism whereby difficult issues can be cheaply revisited."[233] This "cheap" revisitation comes at the cost of imprecision in the drafting of delegatory statutes, an undesirable outcome given that precision both "facilitate[s] judicial review" and "protect[s] the citizen against arbitrary action."[234] In these situations,

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230. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984); *see* THE FEDERALIST NO. 51, *supra* note 64, at 264 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.").

231. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 161 (Walter Kaufmann trans., Vintage Books 1966) (1886); *see* sources cited and discussed *supra* note 214.

232. Strauss, *supra* note 209, at 817–18.

233. *Id.* at 810. *But cf.* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 164 (2019) (finding, in a vaguely analogous context, "no empirical evidence" that agencies are any more likely to "promulgate vague rules that expand agency discretion" merely because they enjoy deference to their interpretations of their own rules).

234. Strauss, *supra* note 209, at 810. This particular critique of casual congressional drafting should not be understood as a broader attack on the essential and valuable practice of delegation in the modern administrative state. Some degree of delegation is not only inevitable; it is useful. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred."); Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) ("Even further, the administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government. Those delegations are necessary given the economic, social, scientific, and technological realities of our day."); Keith E.

the "reservation of an unconditional congressional negative" is not essential to restraining the power of the executive branch or maintaining Congress' fundamental role in the legislative process; to the contrary, it serves only to excuse "political self-aggrandizement."[235] Nor is there a risk of an executive branch unbound in the absence of regulatory legislative vetoes, not least because — in situations not involving war and national security — courts are willing and able to hold government actors accountable to intelligible principles and invalidate administrative actions which run afoul of statutory and/or constitutional obligations.[236]

Applying this dichotomy to the provisions at issue in the INA and the NEA illustrates why the former was an impermissible regulatory legislative veto while the latter was an admissible political legislative veto. The removal provision struck down in *Chadha* was a regulatory legislative veto. First, it undid an action taken by the Attorney General, not the President.[237] Second, the INA provision did not pertain directly to "the internal arrangements of government."[238] Rather, by allowing one chamber of Congress to choose which particular people would not be able to benefit from canceled deportation orders, the provision had the "principal purpose and effect [of] 'altering the legal rights, duties[,] and relations of persons' outside government."[239] Third, the provision invalidated in *Chadha* had no broader connection to a power-sharing agreement between Congress and the President or to upholding basic checks and balances. The INA provision merely was an outlet for Congress to "control, in random and arbitrary fashion, [a] matter[ ] customarily regarded as the domain of administrative law": i.e., whether an individual meets the statutorily prescribed standards for relief from deportation.[240] Thus, *Chadha*'s result is defensible even under the revisionist reading.

Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017) (arguing that "there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power").

235. Strauss, *supra* note 209, at 807, 811.

236. *See id.* at 809 ("We permit Congress to delegate notably open-ended rulemaking authority to agencies, subject only to the now limited constraints of the delegation doctrine: that the authority has been clearly delegated; and that the authority be described with clarity sufficient to permit a court to assess whether it has been exceeded.").

237. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 924–28 (1983).

238. Strauss, *supra* note 209, at 817.

239. *Id.* at 819 (emphasis deleted) (quoting *Chadha*, 462 U.S. at 952).

240. *Id.* at 792.

In contrast, a concurrent resolution to terminate a President's emergency declaration qualifies as a political legislative veto under Professor Strauss' framework. First, the actor subject to the legislative veto is "the President himself."[241] Second, the NEA's "subject matter principally concerns the internal arrangements of government rather than rules of conduct applicable to the public, and judicial consideration at any stage is unlikely."[242] To be sure, a legislative veto terminating a presidential declaration of an emergency would have the indirect effect of "'altering the legal rights, duties[,] and relations of persons' outside government."[243] Yet that was ancillary to the NEA concurrent resolution procedure's "*principal* purpose and effect": structuring congressional-executive relations in times of crisis by granting Congress the ability to curb improper presidential exercise of emergency powers.[244] Third, the NEA's concurrent resolution provision was designed to share power with the President while not eliminating Congress' role during crises. The NEA's original legislative veto emerged from the "horse-trading" inherent in the "continuing political dialogue between [the] President and Congress, on matters having high and legitimate political interest to both."[245] This point is key: Congress sacrificed a number of limits on presidential use of secondary emergency statutes in exchange for retaining its ability to terminate emergencies via concurrent resolutions.[246] In light of this legislative history, the original NEA's termination procedure was defensible as a means of "preserving balance" between the branches.[247] For these reasons, that provision was a political legislative veto, and thus constitutionally permissible under a more functionalist reading of *Chadha*.

Is such a reading likely to find purchase in the current Court? Almost certainly not. Given the decidedly formalist disposition of the Nine nowadays, there is virtually no likelihood that the Court will revisit, let alone overrule, *Chadha* any time soon.[248] But, at

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241. *Id.* at 817; *see* National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255, 1255–57 (1976).

242. Strauss, *supra* note 209, at 817.

243. *Id.* at 819 (emphasis deleted) (quoting *Chadha*, 462 U.S. at 952).

244. *Id.* (emphasis added).

245. *Id.* at 791–92, 806.

246. *See supra* notes 159 to 173 and accompanying text.

247. Strauss, *supra* note 209, at 806.

248. *See, e.g.*, Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 385 & n.28 (2015) (describing how "close observers have noticed a more general trend towards formalism in the rhetoric of the Roberts

the very least, this choice to adhere to a particular formalist view of the separation powers is just that: a choice, one that neither *Chadha*'s holding nor the Constitution compels.[249]

Accordingly, the next-best option is to revisit the balance of power *within* the statutory framework. For example, the recently proposed Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies ("ARTICLE ONE") Act would modify the existing framework in several ways, most notably by forcing a presidentially declared emergency to conclude within thirty days unless affirmatively approved by Congress through a joint resolution.[250] If Congress did not do so, the emergency would end and the President would be unable to "declare a subsequent national emergency . . . with respect to the same circumstances" for the rest of her term.[251] And even if Congress *did* grant its consent, the national emergency would terminate one year from the date that President transmitted her declaration to Congress unless both the President and Congress granted their approval in the same manner and under the same constraints (i.e., lasting only thirty days unless Congress passed a joint resolution approving the declaration of the emergency).[252] Alternatively, the emergency would end even sooner if terminated by the President or by "an Act of Congress."[253]

The ARTICLE ONE Act, in essence, would seek to reinstate some elements of the draft versions of the NEA which were altered or eliminated before its passage.[254] Concededly, the former would likely run into the same roadblock as the latter did: executive recalcitrance. No matter how one designs statutory solutions to the

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Court"; collecting publications from those observers). The three changes to the Court's composition since that Article's publication — Justice Neil Gorsuch replacing Justice Scalia, Justice Brett Kavanaugh replacing Justice Anthony Kennedy, and Justice Amy Coney Barrett replacing Justice Ruth Bader Ginsburg — have served only to tilt the Court in a more formalist direction.

249. For a somewhat similar criticism of separation of powers formalism in a different context, see Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2244–45 (2020) (Kagan, J., dissenting).

250. *See* Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies (ARTICLE ONE) Act, S. 764, 116th Cong. § 202(a)(1) (2019) (as reported by S. Comm. on Homeland Sec. & Governmental Affs., Nov. 18, 2019), https://www.congress.gov/116/bills/s764/BILLS-116s764rs.pdf [https://perma.cc/AHZ5-DMD5].

251. *Id.* § 201(c)(1).

252. *See id.* § 202(b).

253. *Id.* § 202(c).

254. *See, e.g.*, *supra* notes 160 to 163 and accompanying text (describing the removal of an automatic sunset provision).

Chadha problem, the same conundrum arises: Congress' virtual inability, as a "practical political matter, to reclaim any of these powers except as the President is willing to relinquish them."[255] Overriding a presidential veto would require the cooperation of a substantial number of the members of the President's party, a prospect which seems unlikely to materialize no matter which party holds each branch. Still, these difficulties are worth attempting to surmount for the sake of moving towards the restoration of parity between the political branches.

V. CONCLUSION

In the legendary words of Chief Justice John Marshall, the U.S. Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[256] The original NEA was one such adaptation: it allowed Congress to delegate part of its emergency declaration power to the President while also "building in opportunities for congressional participation and checks."[257] Restoring the concurrent resolution termination procedure or adopting a variant of the ARTICLE ONE Act would promote these purposes by preventing one person from "decid[ing] on the exception."[258]

255. *Special Committee Hearings*, *supra* note 36, at 69 (statement of Sen. Church).
256. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).
257. *Special Committee Hearings*, *supra* note 36, at 33 (statement of Prof. Cornelius P. Cotter).
258. SCHMITT, *supra* note 29, at 5.