

# MANUFACTURED EMERGENCIES: THE CRISIS AT THE CORE OF THE NATIONAL EMERGENCIES ACT

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*Simply declaring a national emergency under the National Emergencies Act (NEA) of 1976 grants a President the authority to invoke a parallel legal regime of otherwise-dormant standby emergency powers. On February 15, 2019, President Donald Trump took advantage of this parallel legal regime. He declared a national emergency under the NEA in order to redirect military funding toward the construction of a wall at the U.S.-Mexico border after a bi-partisan Congress repeatedly refused to authorize such funding. This emergency declaration, which sought to achieve through unilateral executive action what could not be achieved through ordinary constitutional channels, exposed the United States' system of emergency powers as unsustainable. While Trump's failed reelection campaign almost certainly spells the end of his emergency declaration, this Note examines the border wall controversy in order to highlight a series of issues within the existing emergency powers framework.*

*This Note asserts that while Trump lacked genuine authority to declare such a pretextual emergency, the federal court system failed to offer a realistic path to challenge Trump's border emergency on account of a tradition of judicial deference to the executive in the politically charged areas of national security, military necessity, foreign affairs, and immigration. It then argues that the current inability of Congress and the federal courts to meaningfully counteract President Trump's clearly manufactured emergency points to the dangers inherent to the U.S. emergency powers regime. This Note proposes relevant judicial and legislative solutions to address the stated flaws in the current emergency powers regime. In particular, it emphasizes that congressional reform to the NEA is the only path towards comprehensive institutional change.*

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Subsequent to the acceptance of this Note for publication, Donald Trump failed to win re-election and Joe Biden was inaugurated as 46th President of the United States.

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## INTRODUCTION

“We’re going to confront the national security crisis on our southern border . . . so we’re going to be signing today and registering [a] national emergency. . . . We want to stop drugs from coming into our country. We want to stop criminals and gangs from coming into our country.”<sup>1</sup> President Donald Trump claimed as much on February 15, 2019 as he introduced Proclamation No. 9844, which declared a national emergency under the National Emergencies Act (NEA) of 1976. Trump declared the national emergency in order to redirect approximately \$3.6 billion in military funding toward the construction of a concrete barrier at the United States-Mexico border.<sup>2</sup> He had signed Executive Order 13767 two years earlier, formally directing the government to begin constructing his signature campaign promise. Yet efforts quickly stagnated due to the enormous construction costs and a general lack of clarity as to the source of funding for the project.<sup>3</sup> Facing repeated congressional refusal to allocate funding toward border wall construction, Trump decided to march forward through executive fiat.<sup>4</sup> Critics from both sides of the partisan divide immediately accused Trump of fabricating an emergency in order to achieve his goals through end-runs around Congress. Speaker of the House Nancy Pelosi and Senate Minority Leader Chuck Schumer denounced Trump’s actions as an obvious “power grab by a disappointed President, who has gone outside the bounds of the law to try to get what he failed to achieve in the constitutional legislative process,”<sup>5</sup> while former Republican lawmakers published a public letter condemning the emergency declaration as a threat to the institutional integrity of the United States government and its separation of powers.<sup>6</sup>

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1. Remarks on the National Security and Humanitarian Crisis on Our Southern Border, 2019 DAILY COMP. PRES. DOC. 1 (Feb. 15, 2019); see Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

2. 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>.

3. Eileen Sullivan, *The Wall and the Shutdown, Explained*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/21/us/politics/build-the-wall-border-facts-explained.html>.

4. *Id.*

5. Press Release, Speaker Nancy Pelosi, Pelosi, Schumer Joint Statement on the President’s Unlawful Emergency Declaration (Feb. 15, 2019), <https://www.speaker.gov/newsroom/21519-2> [<https://perma.cc/XWD6-7B2Y>].

6. See Avery Anapol, *Ex-GOP Lawmakers Urge Republicans to Block Trump’s Emergency Declaration*, HILL (Feb. 25, 2019, 7:05 AM), <https://thehill.com/homenews/house/431374-ex-gop-lawmakers-pen-letter-urging-current-republicans-to-block-trumps>.

In his national emergency announcement, President Trump correctly predicted that litigation would ensue.<sup>7</sup> By day's end, the advocacy group Public Citizen and nineteen state attorneys general had sought injunctions in federal district courts to prohibit the transfer of federal funds for border wall construction.<sup>8</sup> Additional suits quickly followed. Most notably, the American Civil Liberties Union (ACLU) filed suit on behalf of the Sierra Club and the Southern Border Communities Coalition, alleging that Trump had no authority to move forward with construction on the wall without congressional approval.<sup>9</sup> Yet, as this Note will discuss, despite copious evidence that the President was merely crying wolf to acquire funds from which he would otherwise remain barred, the judiciary would be unlikely to invalidate the emergency declaration. In this vein, the border wall controversy must be understood as merely a symptom of the United States' largely flawed system of emergency powers.<sup>10</sup>

Nearly 70 years prior to Trump's announcement of this purported border emergency, Justice Robert Jackson observed in his influential concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* that broad emergency powers were "something the forefathers omitted" from the Constitution: "[t]hey knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."<sup>11</sup> He famously concluded that "[w]e may also suspect that they suspected that emergency powers would tend to kindle emergencies."<sup>12</sup> President Trump's February 15, 2019 emergency declaration, which sought to achieve through unilat-

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7. Baker, *supra* note 2.

8. *Id.*; Rachel Frazin, *19 States Sue Trump Administration over Reallocated Funding for Border Wall*, HILL (Mar. 3, 2020, 4:38 PM), <https://thehill.com/policy/energy-environment/485768-19-states-sue-trump-administration-over-reallocated-funding-for>.

9. *See* *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020). Plaintiff's legal challenge addressed two statutory provisions: § 8005 of the Department of Defense Appropriation Act, 2019 and 10 U.S.C. § 2808. While arguments on Section 8005 began without delay, the parties agreed to delay litigation over the President's authority to invoke emergency military construction powers under Section 2808 until the Department of Defense reached its final decision to fund border wall construction projects. A Ninth Circuit panel has since separately decided both issues in favor of the Sierra Club and Southern Border Communities Coalition—issuing its decision on the § 8005 question in June 2020 and deciding the more relevant Section 2808 question in October 2020—though the Supreme Court has thus far only agreed to hear arguments on the § 8005 question. *Id.*

10. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952).

12. *Id.*

eral executive action what could not be achieved through ordinary constitutional channels, breathed new relevance into Justice Jackson's forewarnings and exposed the nation's current system of emergency powers as unsustainable. While Trump's failed reelection campaign almost certainly spells the end of his emergency declaration, this Note examines the border wall controversy in order to highlight a series of issues within the existing emergency powers framework. It argues that the current inability of Congress—and the likely unwillingness of the Supreme Court—to meaningfully counteract President Trump's clearly manufactured emergency points to the dangers inherent to the U.S. emergency powers regime and underscores the urgency of long overdue reform.

Part I provides context to the emergency declaration at issue in this Note through brief discussions of the politics surrounding President Trump's declaration of an emergency at the United States' southern border, the evolution of executive emergency powers in the United States, and the perils of Trump's emergency declaration in the broader context of emergency powers. Part II asserts that Trump's alleged immigration crisis does not empirically qualify as an emergency warranting unilateral executive action and explains how the Court could—and as this Note argues, should—declare Trump's emergency declaration unconstitutional. Part III, however, asserts that the federal court system does not offer a realistic path to challenge Trump's border emergency, despite the Ninth Circuit's recent decisions in *Sierra Club v. Trump*. It discusses the Supreme Court's historical and recent jurisprudence regarding the issues of national security, military necessity, immigration, and foreign affairs as an indication of judicial unwillingness to interfere with executive emergency actions. Part IV considers both judicial and legislative solutions to flaws in the current emergency powers regime, before emphasizing that congressional reform of the NEA is the only path towards comprehensive institutional change. In doing so, it acknowledges that Congressional reform may be unpopular in the coming years, due to growing calls for climate-emergency declarations as a way to immediately address climate change. In exploring this possible critique, it remains unwavering in its assertion that congressional reform is necessary due to the capacity for abuse inherent to the NEA in its current form.

I.  
BACKGROUND

A. *Trump's Emergency Declaration and Surrounding Politics*

The disagreement between President Trump and Congress over funding for the construction of a concrete barrier along the United States-Mexico border began in the fall of 2018. President Trump repeatedly insisted that he needed \$5.7 billion to construct a border wall to halt what he deemed to be overwhelming levels of illegal immigration at the United States' southern border, and Congress repeatedly refused to acquiesce to Trump's demands.<sup>13</sup> In response, Trump refused to sign off on any congressional spending bill that did not accede to his call for \$5.7 billion in border wall funding, precipitating a 35-day partial government shutdown.<sup>14</sup> On January 4, 2019, Trump penned a letter to Congress indicating that "current funding levels, resources, and authorities are woefully inadequate to meet the scope of the problem" at the United States' southern border, and in mid-January he announced that "the federal government remain[ed] shut down because congressional Democrats refuse[d] to approve border security."<sup>15</sup>

On February 15, President Trump finally agreed to sign a routine full-year appropriations bill that provided \$1.375 billion for border wall construction—far less than the amount that he had previously demanded.<sup>16</sup> The very same day, Trump issued Proclamation No. 9844, declaring that a national emergency existed at the southern border and that it required the use of the armed forces.<sup>17</sup> In doing so, he also invoked Section 2808, a statutory provision that grants the President standby powers to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."<sup>18</sup> In a letter to Congress, Trump stated that he

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13. JENNIFER ELSEA, JAY B. SYKES, & EDWARD C. LIU, CONG. RSCH. SERV., LSB10242, CAN THE DEPARTMENT OF DEFENSE BUILD THE BORDER WALL? 1 (2019).

14. Julie Hirschfeld Davis & Emily Cochrane, *Government Shuts Down as Talks Fail to Break Impasse*, N.Y. TIMES (Dec. 21, 2018), <https://www.nytimes.com/2018/12/21/us/politics/trump-shutdown-border-wall.html>.

15. Letter to Members of Congress on Border Security, 2019 DAILY COMP. PRES. DOC. 1 (Jan. 4, 2019); Remarks on United States Missile Defense Policy at the Pentagon in Arlington, Virginia, 2019 DAILY COMP. PRES. DOC. 1 (Jan. 17, 2019).

16. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019). Trump had previously ended the shutdown on January 25, 2019 when he signed H.R.J. Res. 28 116th Cong. (2019) (enacted), agreeing to fund the remaining agencies until February 15.

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

18. *Id.*; see also Construction Authority in the Event of a Declaration of War or National Emergency, 10 U.S.C. § 2808 (1982) (stating that § 2808 may only be in-

was authorizing the Secretary of Defense “to engage in emergency construction as necessary to support the use of the Armed Forces and respond to the crisis at our southern border” pursuant to Section 2808.<sup>19</sup> However, seemingly unable to filter his speech, he stated in the press conference directly following his emergency declaration announcement, “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.”<sup>20</sup> Trump’s avowal reveals what critics and analysts had been reporting all along: that Trump did not declare his emergency in response to a true border emergency, but merely to gain access to funds for the border wall that he otherwise could not acquire.

Congress immediately moved to terminate President Trump’s emergency declaration. Using special expedited procedures established by the NEA, invoked for the first time since the law’s enactment, Congress considered a qualifying joint resolution to invalidate Trump’s emergency order.<sup>21</sup> On February 26, 2019, the House passed H.J. Res. 46, dismissing Trump’s declaration by a 245-182 vote; the resolution then passed through the Senate on March 14th by a vote of 59-41.<sup>22</sup> However, Trump inevitably quashed the resolution via presi-

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voked upon the Executive’s declaration of a national emergency “that requires use of the armed forces”). “A House Armed Services Committee report accompanying the original 1982 legislation indicated that while ‘[i]t is impossible to provide in advance for all conceivable emergency situations,’ the Section 2808 authority was intended to address contingencies ‘ranging from relocation of forces to meet geographical threats to continuity of efforts after a direct attack on the United States during which the Congress may be unable to convene.’” ELSEA ET AL., *supra* note 13, at 4 (2019). Because prior Presidents have typically invoked Section 2808 for the construction of military bases abroad, whether the provision can be invoked to construct a border fence is an issue of first impression. Before Trump, only two Presidents had invoked the NEA citing Section 2808: George H.W. Bush did so during Operation Desert Shield on November 14, 1990, and George W. Bush did so in the aftermath of the September 11 attacks. MICHAEL J. VASSALOTTI & BRENDAN W. MCGARRY, CONG. RSCH. SERV., IN11017 MILITARY CONSTRUCTION FUNDING IN THE EVENT OF A NATIONAL EMERGENCY 1 (Jan. 11, 2019).

19. Letter to Congressional Leaders on Declaring a National Emergency Concerning the Southern Border of the United States, 2019 DAILY COMP. PRES. DOC. 1 (Feb. 15, 2019).

20. Eric Lach, “*I Didn’t Need to Do This*”: Donald Trump Declares a National Emergency, NEW YORKER (Feb. 15, 2019, 1:15 PM), <https://www.newyorker.com/news/current/i-didnt-need-to-do-this-donald-trump-declares-a-national-emergency>.

21. Specifically, the NEA’s special procedures allow for a majority of Senators to discharge a committee from consideration of a joint resolution to terminate an emergency. The Senate can then take up the joint resolution without the need for a cloture process. The Act further requires a Senate vote on the resolution within three days of beginning consideration without need for a cloture process. L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 29 (2020).

22. Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/us/politics/>

dential veto, and the House ultimately failed to achieve the required two-thirds vote to override it.<sup>23</sup> The President's contrived emergency consequently remained in effect.<sup>24</sup>

## B. Emergency Powers

### 1. *The Historical Evolution of Emergency Powers in the U.S. Government*

Emergency powers have long been viewed as a necessary feature of constitutional democracies and have been incorporated into governmental regimes accordingly. Governments dating back at least to the Roman Republic have established procedures to temporarily suspend the ordinary rule of law and transfer power to a constitutional dictator in the event of an emergency.<sup>25</sup> In 1690, English philosopher John Locke—a significant influence on the American Founding Fathers—discussed the need for heightened executive powers during emergencies in *The Two Treatises on Government*. He argued that a written constitution cannot account *ex ante* for the multitude of unforeseeable threats that a liberal republic may eventually face, and it is thus the Executive's prerogative in an unforeseen, quickly unfolding crisis to act unilaterally to protect the public—particularly because the process

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trump-veto-national-emergency.html; Susan Davis, *House Passes Resolution to Block Trump's National Emergency Declaration*, NPR (Feb. 26, 2019), <https://www.npr.org/2019/02/26/698345376/house-passes-resolution-to-block-trumps-national-emergency-declaration>.

23. Message to the House of Representatives Returning Without Approval Legislation to Terminate the National Emergency Concerning the Southern Border of the United States, 2019 DAILY COMP. PRES. DOC. 1 (Mar. 15, 2019).

24. However, Trump's emergency declaration will undoubtedly be repealed in the near future, as President-elect Joe Biden has vowed to halt all border wall construction and "end the so-called National Emergency that siphons federal dollars from the Department of Defense to build a wall" within his first 100 days in office. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN FOR PRESIDENT (2020), <https://joebiden.com/immigration> [<https://perma.cc/YDJ2-XWFW>].

25. In Ancient Rome, a constitutional dictator could be appointed by senate consuls for up to six months. The dictator would be executed if he abused his privileges. "The Roman dictatorship had been thoroughly institutionalized; the two consuls had to decide to appoint a dictator, and the dictator's reign would come to an end at a specified time. . . Naming a dictator might signal an emergency, but, by definition, it did not constitute a 'constitutional crisis,' precisely because the Roman constitution provided for the institution. Moreover, it wisely separated the institution with the power to identify an emergency and call for emergency powers from the person who executed those powers, the better to prevent the dictator from trying to extend his rule by recharacterizing the situation to his advantage." Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1802 (2010); *see also id.* at 1804. In fact, Alexander Hamilton argued that Rome did not lose its republican character simply by virtue of its dictatorial office. *Id.* at 1791 n.5.



of drafting or amending legislation could prove long and cumbersome.<sup>26</sup> Today, 178 countries' constitutions contain explicit provisions authorizing emergency rule during times of war or natural disaster, or in other similarly urgent instances of public need.<sup>27</sup>

In light of this tradition of constitutional emergency regimes, the United States remains an anomaly. The Constitution fails to explicitly establish a separate, comprehensive regime to govern emergency situations.<sup>28</sup> While a small handful of crisis-response powers are granted in the Constitution, they are vested in Congress, not the Executive. For example, Article I, Section 9 grants Congress the right to suspend the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."<sup>29</sup> Article I also allows Congress to call forth the Militia "to execute the laws of the union, suppress insurrections and repel invasions."<sup>30</sup> Absent an explicit and comprehensive constitutional regime to address emergencies, Congress has delegated broad

26. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 203–07 (Thomas I. Cook ed., Hafner Pub. Co. 1947) (1690); EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 147–48 (N.Y.U. Press 4th rev. ed. 1957).

27. Elizabeth Goitein, 11 *J. NAT'L SECURITY L. & POL'Y* 27, 29 n.2 (2020). These constitutions set limitations on what extra powers a President may usurp during an emergency, at what point the President may access these powers, how they may be constrained, and how far specific rights may be overridden in times of emergency. Goitein, *supra* note 10. International human rights law has weighed in as well: The International Covenant on Civil and Political Rights contains explicit provisions delineating when a national emergency may be declared, and which particular rights may be derogated during such a declaration. U.N. Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, ¶¶ 2–4 U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

28. The Founders avoided writing executive emergency powers into the Constitution, but they did debate their inclusion. James Madison hesitated to endorse a system that sacrificed individual liberties for temporary safety due to fears that it might devolve into a presidential monarchy. *See generally* James Madison, *Helvidius Nos. 1–4*, reprinted in 15 *THE ORIGINAL PAPERS OF JAMES MADISON* 66–110 (Thomas A. Mason, Robert A. Rutland, & Jeanne K. Sisson eds., Univ. Press of Virginia 1985). Alexander Hamilton, on the other hand, pushed for an expansive interpretation of the Constitution in Federalist No. 34, writing,

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

*THE FEDERALIST* NO. 34, at 163 (Alexander Hamilton) (Yale Univ. Press 2009).

29. Habeas Corpus refers to the constitutional provision ensuring that those imprisoned or detained by the government maintain the right to appear before a court to determine if their imprisonment or detention is lawful. U.S. CONST. art. I, § 9.

30. U.S. CONST. art. I, § 8, cl. 15.

emergency powers to the Executive. This tradition of delegation began as early as 1792, when Congress passed legislation authorizing the President to call forth the militia to suppress insurrection.<sup>31</sup> The emergency powers granted to the Executive continued to expand over the course of the next century as Congress authorized various laws for responding to emergencies.<sup>32</sup> The sum total of these numerous laws created a piecemeal regime of dormant stand-by powers that the President could activate upon declaration of an emergency. This regime essentially placed no substantive or procedural limits on the Executive's discretion to declare an emergency, nor any limit on the duration of the emergency.<sup>33</sup> Additionally, it did not require the President to specify which statutory emergency powers they wished to invoke—a declaration of emergency authorized the President to access all stand-by powers without requiring them to articulate which applied to the emergency at hand.<sup>34</sup>

Congressional concern over potential abuse of emergency powers increased during the era of post-Watergate reform, when alarm over an “imperial presidency” pervaded the country.<sup>35</sup> By that point, however, Congress had granted emergency powers to the executive branch in over 470 statutes, and hundreds of emergency powers remained in effect.<sup>36</sup> A 1973 Senate Special Committee gravely concluded that the emergency powers available to the President “confer[red] enough authority to rule the country without reference to normal constitutional process.”<sup>37</sup> It was in response to this perceived threat of executive

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31. The first exercise of executive emergency power occurred two years later in 1794, when President George Washington dispatched the militia to terminate the Whiskey Rebellion, in which residents of several states rioted against the domestic whiskey tax. L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 4 (2020).

32. *Id.* at 3–7.

33. *Id.* at 1.

34. *Id.*

35. See *Hearing on The National Emergencies Act of 1976 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. 37-840 (2019) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice). For further discussion regarding this post-Watergate concern, see generally Arthur Schlesinger, Jr., *The Runaway Presidency*, ATLANTIC (Nov. 1973), <https://www.theatlantic.com/magazine/archive/1973/11/the-runaway-presidency/306211>; Smith Hedrick, *What Kind of Leader?: The Man From Plains and The Imperial Presidency*, N.Y. TIMES (Jan. 23, 1977), <https://www.nytimes.com/1977/01/23/archives/what-kind-of-leader-the-man-from-plains-and-the-imperial-presidency.html>.

36. L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505 NATIONAL EMERGENCY POWERS 8 (2020).

37. S. REP. NO. 93-549, at III (1973). For instance, the national emergency that Truman declared in 1950, during the Korean War, was being used to further the U.S.

overreach that Congress passed the National Emergencies Act of 1976, which remains in force today.<sup>38</sup>

## 2. *The NEA's Failure to Check Executive Abuse of Emergency Powers*

In passing the NEA, Congress intended to establish a framework for the President to declare national emergencies with congressional oversight and limited duration.<sup>39</sup> The NEA nullified all previously declared emergencies, and moving forward, required the President to identify which specific statutory emergency provisions they intended to activate when invoking a new national emergency.<sup>40</sup> In addition, the drafters of the NEA aimed to reinstate congressional oversight through three key safeguards.<sup>41</sup> First, the NEA stipulated that emergency declarations are to automatically expire after one year unless the President publishes a notice of renewal in the Federal Register.<sup>42</sup> Second, the NEA stipulated that Congress convene every six months during a declared emergency to consider a vote on termination.<sup>43</sup> Third, the NEA stipulated that if the President declared an emergency, Congress would have the power to terminate the declaration through a concurrent resolution—also referred to as a legislative veto—that would not be subject to a presidential signature or veto.<sup>44</sup>

Despite Congress' noble intentions, these structural safeguards have proven ineffective in practice. Presidents have routinely renewed their national emergency declarations in subsequent years, while Congress has failed to convene in order to consider terminating ongoing

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war effort in Vietnam. *Hearing on The National Emergencies Act of 1976 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. 37-840 (2019) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice).

38. S. REP. NO. 93-549 (1973).

39. 50 U.S.C. § 1621 (1976). The NEA also requires that the President “publish the proclamation of a national emergency in the Federal Register and transmit it to Congress; maintain records and transmit to Congress all rules and regulations promulgated to carry out such authorities; and provide an accounting of expenditures directly attributable to the exercise of such authorities for every six-month period following the declaration.” ELSEA ET AL., *supra* note 13, at 1 (2019).

40. 50 U.S.C. §§ 1601, 1631 (1976).

41. 50 U.S.C. § 1601–1651 (1976). However, note that Sections 201 and 301 of the NEA still grant the President complete discretion to declare an emergency and to activate statutory emergency powers, respectively.

42. 50 U.S.C. § 1622 (1976).

43. *Id.*

44. *Id.* The NEA's drafters likely assumed that it did not need to explicitly define emergency due to this provision. In the pre-*Chadha* regime, a simple majority vote of one only one house could readily terminate a presidential declaration of emergency if members deemed it to be an abuse of the power. *See infra*, note 46.

emergency declarations.<sup>45</sup> Furthermore, Congress no longer enjoys the authority to terminate an emergency via legislative veto, as the Supreme Court invalidated the procedure in its 1983 *INS v. Chadha* ruling.<sup>46</sup> In *Chadha*, the Court held unconstitutional all unicameral legislative vetoes and ruled that any provision for a two-chamber veto must also provide for presentment to the President.<sup>47</sup> Now, instead of simple majority votes in each house, only the supermajority vote required to override a presidential veto can terminate a presidential declaration of national-emergency—a nearly impossible feat in today’s hyper-partisan political environment.<sup>48</sup> Finally, on a more basic level, the NEA suffers from its failure to define the term “emergency” and to require that the powers invoked by the President relate to the circumstances giving rise to their emergency declaration. It thereby left discretion in the hands of the President to determine such matters.<sup>49</sup> In passing the NEA, Congress intended for the renewal of national emergencies to remain an exception, but due to the ineffectiveness of its structural safeguards, it has become the default. Most states of emergency have lasted for at least ten years; in fact, the state of emergency declared in response to the Iranian Hostage Crisis of 1979 remains in place today.<sup>50</sup>

*C. The Border Wall is Symptomatic of a Flawed Emergency Powers Regime*

While the incoming Administration of President-elect Joseph Biden has pledged to terminate President Trump’s emergency, which

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45. Goitein, *supra* note 10.

46. *INS v. Chadha*, 462 U.S. 919 (1983). See also 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> (highlighting that the Supreme Court’s ruling in *Chada* decimated the congressional scheme by which Congress intended itself—not the courts—to oversee the President’s use of emergency powers).

47. *Chadha*, 462 U.S. at 919. In 1985, Congress amended the National Emergencies Act to require a *joint* resolution to terminate any national emergency designation, making it compliant with the Supreme Court’s ruling in *Chadha*. The joint resolution would need to be submitted to the President under the Constitution’s Presentment Clause, and the President would then inevitably exercise his veto power, which can only be overridden by a super-majority vote in both houses. L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 11 (2020).

48. See Pildes, *supra* note 46.

49. Goitein, *supra* note 10 (“Even if the crisis at hand is, say, a nationwide crop blight, the President may activate the law that allows the secretary of transportation to requisition any privately owned vessel at sea”).

50. *What a President Can Do Under the International Emergency Economic Powers Act*, NPR (May 31, 2019, 6:11 PM), <https://www.npr.org/2019/05/31/728754901/what-a-president-can-do-under-the-international-emergency-economic-powers-act>.

would moot the ongoing legal disputes over the declaration, the border wall controversy should still be analyzed as a symptom of a largely flawed system of executive emergency powers. By simply declaring a national emergency under the NEA, the President is granted the authority to invoke otherwise-dormant standby emergency powers. This “parallel legal regime” written into 123 statutory provisions affords the President extraordinary powers with respect to a wide array of issues such as military composition, public contracts, and agricultural exports.<sup>51</sup> A President may, for example, assume the authority to shut down various forms of electronic communications inside the United States or freeze citizens’ bank accounts simply by declaring a national emergency.<sup>52</sup> In the absence of meaningful statutory safeguards, we must rely on Presidents to exercise self-restraint. As Goitein explains, “this edifice of extraordinary powers has historically rested on the assumption that the president will act in the country’s best interest when using them. With a handful of noteworthy exceptions, this assumption has held up.”<sup>53</sup> Fifty-seven out of sixty-three emergency declarations have activated the International Emergency Economic Powers Act (IEEPA), which provides a set of emergency powers that Presidents regularly interpret as a general delegation of economic sanctions authority—an interpretation that Congress has categorically acquiesced to.<sup>54</sup> Only six emergencies have been declared by past Presidents without relying on IEEPA: three in response to foreign invasions or attacks, two in response to hurricanes, and one in response to the swine flu epidemic.<sup>55</sup> However, Trump’s issuance of Proclamation No. 9844 calls into question the assumption that the President will approach their emergency powers with the necessary restraint and pushes this “edifice of extraordinary powers” to the brink.<sup>56</sup>

The Trump Administration abused IEEPA in unprecedented ways and, in light of the alleged border emergency, could have used the NEA and IEEPA to choke advocates for immigrant rights out of existence. Once unlocked, the powers amassed by IEEPA are sweeping. IEEPA authorizes the President, after declaring an emergency under the NEA, to regulate international commerce in response to any un-

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51. Goitein, *supra* note 10.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Hearing on The National Emergencies Act of 1976 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. 37-840 (2019) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice).

56. *Id.*

sual or extraordinary threat that has its source in whole or substantial part outside of the United States.<sup>57</sup> Under the USA PATRIOT ACT's amendments to IEEPA, the President can simply open an investigation into whether an organization or individual (including U.S. citizens) should be designated as a terrorist and subsequently block or freeze their assets without any transparency or due process of law.<sup>58</sup> The President can also impose civil and criminal penalties on any American that maintains financial dealings with those sanctioned. While past Presidents have generally interpreted IEEPA narrowly to impose sanctions on hostile foreign actors, the President's discretion to make such designations remains largely unfettered.

Only on rare occasions have past Presidents used IEEPA so liberally after declaring an emergency. The George W. Bush Administration, for example, came under fire when it utilized IEEPA in the wake of the September 11th attacks to expand the Treasury Department's unilateral authority to freeze the assets of organizations it considered to be aiding and abetting terrorists. Citing fears that their humanitarian aid efforts to the Middle East might be diverted to support terrorism, the Treasury Department froze the assets of the three largest U.S.-based Muslim charities without notice or designated procedure, effectively shutting them down.<sup>59</sup> However, while Bush's actions were arguably excessive, the context of September 11th at least constituted a genuine emergency.<sup>60</sup>

The Trump Administration, on the other hand, has used IEEPA in unprecedentedly excessive ways with no actual emergency in sight.<sup>61</sup> In addition to threatening to impose tariffs on Mexican imports in re-

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57. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1708 (1977).

58. Goitein, *supra* note 10.

59. In just a week and a half in December 2001, the federal government effectively shut down the Holy Land Foundation for Relief and Development, Global Relief Foundation, and Benevolence International Foundation. Before the Holy Land Foundation was shut down, it repeatedly requested assistance from government officials in how it could better comply with the law, only to be rebuffed. The ACLU points out that "Terrorism financing laws are overly broad and lack procedural safeguards that would protect American charities against government mistake and abuse. They do not require the Treasury Department to disclose the evidence on which it bases decisions to designate charities, not even to the accused charities themselves." AMERICAN CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 8 (2009), [https://www.aclu.org/sites/default/files/field\\_document/blockingfaith.pdf](https://www.aclu.org/sites/default/files/field_document/blockingfaith.pdf).

60. See discussion *infra* Section II.B.

61. See discussion *infra* Section II.B.

sponse to illegal immigration from Mexico<sup>62</sup> and ordering American companies out of China due to his ongoing trade war,<sup>63</sup> President Trump declared a national emergency in June 2020 in response to “unjust prosecutions” of U.S. war crimes in Afghanistan brought by the International Criminal Court.<sup>64</sup> Because Trump interpreted the prosecutions as an unusual or extraordinary threat to U.S. security, he invoked IEEPA and imposed sanctions on the International Criminal Court in the hopes of pressuring the court to drop the prosecutions.<sup>65</sup> If a future President harbored similar anti-immigrant sentiments, they could use IEEPA to officially designate immigration at the southern border an unusual or extraordinary threat to U.S. security. They could then invoke IEEPA to freeze the assets of any U.S. citizen or organization lending assistance to immigrants who have entered through the United States-Mexico border and render it a crime to offer those designated individuals and organizations money or aid.<sup>66</sup>

Such unrestrained executive power runs counter to the concept of checks and balances that is fundamental to our Constitution. As Goitein observed in response to Trump’s emergency declaration, “emergency powers have a place in a democracy. The problem is that democracy also has a place in emergency powers, and that’s where I feel like our current system isn’t serving us very well.”<sup>67</sup>

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62. Andrew Boyle, *Trump’s Latest Abuse of Emergency Powers Highlights a Dangerous Law in Need of Change*, BRENNAN CTR. FOR JUSTICE (June 24, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/trumps-latest-abuse-emergency-powers-highlights-dangerous-law-need-change>.

63. Trump tweeted on August 24, 2019 that he “hereby ordered” U.S. companies to seek alternatives trade partners to China. The President alluded to IEEPA in his comments but did not declare an emergency, as is required in order to invoke IEEPA. When asked about his authority to order U.S. companies to cut ties with China, he tweeted “try looking at the Emergency Economic Powers Act of 1977. Case closed!” Veronica Stracqualursi, *Trump Claims He Has ‘Absolute Right’ to Order US Companies Out of China Under 1977 Law*, CNN (Aug. 24, 2019, 12:17 PM), <https://www.cnn.com/2019/08/24/politics/trump-china-trade-war-emergency-economic-powers-act/index.html>.

64. Exec. Order No. 13928, 85 FR 36139—Blocking Property of Certain Persons Associated with the International Criminal Court, 2019 DAILY COMP. PRES. DOC. 1 (June 11, 2020); *see also* Boyle, *supra* note 62. (Describing Trump’s use of IEEPA to threaten sanctions against the ICC as a “cry for reform” to a “dangerous law,” and emphasizing the importance of congressional control over IEEPA’s powers.)

65. Boyle, *supra* note 62.

66. *See* Goitein, *supra* note 10.

67. *Yes, The President Can Declare a ‘National Emergency’ to Build a Wall*, NPR (Jan. 9, 2019, 5:00 AM), <https://www.npr.org/2019/01/09/683501440/congress-aims-to-control-presidents-emergency-powers>.

## II.

PROCLAMATION 9844 IS AN ABUSE OF THE NATIONAL  
EMERGENCIES ACT AND SHOULD BE RULED  
UNCONSTITUTIONAL

In light of Congress' inability to quash President Trump's emergency declaration, it was natural for critics of the declaration to turn to the courts for recourse. This section introduces the legal framework through which the judiciary would review Trump's emergency declaration. It then asserts that a proper application of this framework should lead courts to invalidate Trump's emergency declaration. In examining this particular case, this section also brings to light broader issues with the Court's framework for analyzing the Executive's use of emergency powers.

*A. Legal Framework: Emergency Powers in U.S. Courts*

Justice Jackson's landmark concurring opinion in *Youngstown Sheet & Tube v. Sawyer* has been adopted as the Supreme Court's framework for determining the constitutionality of an executive emergency declaration.<sup>68</sup> The case concerned a separation-of-powers challenge to President Truman's invocation of emergency powers to seize control of private steel production facilities, which Truman hoped would prevent a recent steel workers' strike from hampering the U.S. effort in the ongoing Korean War.<sup>69</sup> The steel companies sued to prevent the seizure and within a month the Supreme Court heard the case. In a splintered, seven-opinion outcome, the Court upheld the steel companies' argument that Truman had no authority to seize the steel mills. Justice Black asserted in his majority opinion that,

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress . . . from which such a power can be fairly implied.<sup>70</sup>

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68. See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 711 (2d. Cir. 2003) ("Our review of the exercise by the President of war powers in the domestic sphere starts with the template the Supreme Court constructed in *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring)."). See also, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1059 (2015); *Medellín v. Texas*, 552 U.S. 491 (2007).

69. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

70. *Youngstown*, 343 U.S. at 585 (1952). The Court rejected President Truman's Hamiltonian interpretation of executive power, which would have allowed the President to assert an implied authorization to act—despite a lack of congressional authorization—pursuant to the aggregate of the Executive's powers under Article II of the Constitution.



Like Justice Black, Justice Jackson categorically rejected the idea of open-ended executive powers, un-enumerated in the Constitution, that President Truman had attempted to assert to justify his seizure of the steel mills. However, Jackson's influential concurring opinion further elaborated that presidential power fluctuates depending on its conjunction or disjunction with congressional will.<sup>71</sup> Justice Jackson—sensitized to the dangers of an executive dictatorship after serving as Chief U.S. Prosecutor at the Nuremberg Trials—believed that the only safe approach to an emergency powers regime is to one in which the legislature controls the exercise of emergency powers.<sup>72</sup> He thus posited that an executive act is constitutional if it aligns with “an express or implied authorization of Congress” (*Youngstown* Category 1) but constitutes an unconstitutional violation of the separation-of-powers doctrine if it is “incompatible with the expressed or implied will of Congress,” unless the President is exercising constitutionally enumerated executive powers (*Youngstown* Category 3).<sup>73</sup>

In addition, Justice Jackson noted that there will nonetheless be a *zone of twilight* in which “contemporary imponderables” invite executive action in response to issues that Congress may not have yet had a chance to consider or address (*Youngstown* Category 2).<sup>74</sup> Jackson asserted that, although the President may lack congressional authorization to respond to such contemporary imponderables, Presidents can be expected to break the law out of necessity.<sup>75</sup> Justice Felix Frankfurter's concurring opinion is often called upon to analyze executive actions that fall into this *zone of twilight*, where federal statutes are silent or potentially contradictory on a matter.<sup>76</sup> Frankfurter's *historical gloss* argument infers permission to act based on past congressional will.<sup>77</sup> He explains that when there is no clear statute on point, a history of congressional acquiescence may be relevant in determining the Executive's authority.<sup>78</sup> In other words, a longstanding, consistent, and common-sense practice to which Congress has been aware and never objected may be considered constitutional—a President's action should be permissibly received by the Court if they act in a way that past Presidents have acted over long periods of time without contro-

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71. See *Youngstown*, 343 U.S. at 593 (Jackson, J., concurring).

72. *Id.*

73. *Id.* at 637.

74. *Id.*

75. *Id.* at 646.

76. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

77. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

78. *Id.* at 602–03.

versy.<sup>79</sup> While this “systematic, unbroken, executive practice” cannot contradict the text of the Constitution or federal statute, it may give meaning to such texts and may serve as a tiebreaker between contradictory interpretations.<sup>80</sup>

*B. Legal Framework Applied: Trump is Acting at the Lowest Ebb of His Authority*

Whether President Trump had the authority to declare a national emergency at the southern border in order to redirect funding towards border wall construction depends on the resolution of a single contradiction: Congress repeatedly refused to approve Trump’s request for funding to construct the border wall, but Congress also authorized presidential declarations of emergency under the NEA. The former ostensibly places Trump in *Youngstown* Category 3, while the latter grants Trump at least the guise of authority to redirect military funding under Section 2808, placing his actions in *Youngstown* Category 1. Whether or not this assertion of authority may withstand judicial scrutiny hinges on the definition of the term “emergency.” Professor Linda S. Greene concluded in a recent article that Trump’s emergency declaration does not fall within the NEA’s intended meaning.<sup>81</sup> The following examination of the term “emergency” paired with the legislative history of the NEA further substantiates this claim. As Greene asserts, without the support of the NEA, Trump’s actions fall clearly into *Youngstown* Category 3.<sup>82</sup>

The NEA’s lack of express criteria defining an “emergency” does not indicate that the term is free for interpretation by the President,

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79. *Id.* at 610. Justice Frankfurter’s analysis relies on the assumption that historical congressional acquiescence on the issue was either logical *or* inevitable; it does not grant weight to congressional silence merely because it occurred over a long period of time. *Id.* at 613.

80. Lawyers in the Office of Legal Counsel (OLC) have repeatedly misinterpreted Justice Frankfurter’s *historical gloss* theory, ignoring the underlying common-sense rationale of congressional acquiescence. For example, OLC memos have often invoked long lists of cases to demonstrate that the Executive can unilaterally wage war—without mentioning the circumstances in which and rationale for why past Presidents went to war in each case—in order to prove that war is a unilateral executive power. See, e.g., *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1, 8 (Apr. 1, 2011); *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. 1, 9 n. 3 (May 31, 2018); *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7-61 (2011) (statement of Hon. Harold Koh, Legal Adviser, U.S. Department of State, Washington, D.C.). In doing so, OLC has laid the groundwork to further expand executive power.

81. Linda Sheryl Greene, *Up Against the Wall: Congressional Retention of the Spending Power in Times of “Emergency,”* 51 *LOY. U. CHI. L.J.* 431, 448 (2019).

82. *Id.* at 439.

and Trump's emergency declaration abuses Congress' statutory omission. Trump has asserted that "the current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency."<sup>83</sup> However, in the words of Professor Ciara Torres-Spelliscy, "[t]he refusal of Congress to fund a presidential vanity project is not an emergency."<sup>84</sup>

Absent an express definition of "emergency" in the NEA, courts can look to external sources to define the term.<sup>85</sup> The plain meaning of the term is a sudden, unexpected turn of events that requires immediate action. The Merriam-Webster dictionary specifically defines an emergency as "an unforeseen combination of circumstances of which the resulting state calls for immediate action" or a situation of "urgent need for assistance or relief."<sup>86</sup> The Supreme Court weighed in on the question in a 1934 opinion, which described an emergency as an urgent and infrequent event similar to "a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation."<sup>87</sup> Legal and policy scholars have weighed in as well: constitutional scholar Edward S. Corwin described emergency situations as resulting from conditions that "have not attained enough of stability or recurrency to admit of their being dealt with according to rule."<sup>88</sup> Political scientist Cornelius Cotter, in testimony before the Senate Special

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83. In his declaration of the national emergency, Trump further claimed: The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate . . . Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.

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

84. Sean Illing, *Trump Declared a National Emergency at the Border. I Asked 11 Experts if It's Legal*, Vox (Feb. 15, 2019), <https://www.vox.com/2019/2/15/18225359/trump-speech-national-emergencies-act-border>.

85. See Greene, *supra* note 81, at 456 (arguing that the circumstances at the border do not amount to an emergency based on the plain meaning of the term and definitions of emergencies provided in other sections of the U.S. Code).

86. *Emergency*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

87. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 440 (1934).

88. CORWIN, *supra* note 26, at 3.

Committee on the Termination of the National Emergency in 1973, argued that an emergency “connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal.”<sup>89</sup> Finally, the Congressional Research Service has summarized that an emergency must necessarily meet the conditions of temporality, potential gravity, and an unanticipated need for immediate action that is untenable through ordinary rule.<sup>90</sup> Temporality refers to “a situation that is sudden, unforeseen, and of unknown duration,” while potential gravity refers to one that is “dangerous and threatening to life and well-being.”<sup>91</sup>

President Trump’s declared emergency does not, by any stretch, fall within the meaning of emergency as defined in the examples above. The Trump Administration specifically claimed,

The problem of large-scale unlawful migration through the southern border . . . has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending.<sup>92</sup>

However, immigration patterns in February 2019 were in no way sudden or unforeseen; immigration patterns across the United States’ southern border have remained relatively constant over the past decade.<sup>93</sup> In fact, 58 former United States officials flatly refuted Trump’s claim that a national emergency existed in a 13-page, bi-partisan joint statement:

According to the administration’s own data, the numbers of apprehensions and undetected illegal border crossings at the southern border are near forty-year lows. Although there was a modest increase in apprehensions in 2018, that figure is in keeping with the number of apprehensions only two years earlier, and the overall trend indicates a dramatic decline over the last fifteen years in particular. The administration also estimates that “undetected unlawful entries” at the southern border “fell from approximately 851,000 to

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89. *Hearing on the Termination of the National Emergency Before S. Spec. Comm. on the Termination of the National Emergency*, 93rd Cong. 93-549 (Apr. 11, 1973) (statement of Cornelius P. Cotter, author of *POWERS OF THE PRESIDENT DURING CRISES* (1960)).

90. L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 3 (2020).

91. *Id.*

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

93. Micah Luxen, Jessica Lussenhop & Rajini Vaidyanathan, *Is There a Crisis on the US–Mexico Border?*, BBC NEWS (Jul. 11, 2019), <https://www.bbc.com/news/world-us-canada-44319094> [<https://perma.cc/2KDK-X39H>].

nearly 62,000” between fiscal years 2006 to 2016, the most recent years for which data are available. The United States currently hosts what is estimated to be the smallest number of undocumented immigrants since 2004. And in fact, in recent years, the majority of currently undocumented immigrants entered the United States legally, but overstayed their visas, a problem that will not be addressed by the declaration of an emergency along the southern border.<sup>94</sup>

Furthermore, according to Professor Stephen Legomsky, “[i]llegal entries today are a small fraction of what they were 20 years ago, and the total size of the resulting undocumented population has stayed flat for at least the past 10 years.”<sup>95</sup> While the percentage of migrants requesting asylum at the border on the basis of a credible fear of persecution in their home countries did spike in 2019, Trump’s rhetoric regarding a border crisis began prior to this surge in asylum applications, when he was on the campaign trail in 2016.<sup>96</sup> Trump himself admitted in his emergency announcement that immigration patterns did not in fact require immediate attention, saying “I could do the wall over a longer period of time. . . . But I’d rather do it much faster.”<sup>97</sup> Given that, empirically and by the President’s own admission, February 2019 immigration patterns at the southern border posed no sudden, urgent threat to the well-being or security of the United States, they did not need to be addressed by unilateral executive action. For comparison, the 1952 steel workers’ strike—which threatened crucial war-time manufacturing—was presumably more pressing than the immigration patterns at the southern border in February 2019. And yet, the Supreme Court in *Youngstown* struck down

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94. *Exclusive: Full Text of Bipartisan Declaration of Former Senior U.S. Officials Refuting President’s Claim of National Emergency at Southern Border*, JUST SECURITY (Feb. 25, 2019), <https://www.justsecurity.org/62710/full-text-bipartisan-declaration-senior-u-s-officials-refutes-presidents-claim-national-emergency-southern-border>.

95. Illing, *supra* note 84. However, Legomsky did note that the percentage of migrants requesting asylum upon crossing the border was unprecedentedly high: “there is indeed a humanitarian crisis, but it’s the one that the Trump Administration has unilaterally created through its systematic assault on the right to apply for asylum.” *Id.*

96. Luxen et al., *supra* note 93 (“The number of migrants apprehended at the border surged in May to the highest level since 2006, with 132,887 detained - including 11,507 unaccompanied children. It was the first time that detentions had exceeded 100,000 since April 2007. . . . Looking at the wider picture, until numbers rose this spring, there has been a sharp fall in the number of people arrested in the last 18 years . . . . But even before the 2019 spike, when migration numbers were in fact at historic lows, Mr Trump described the situation on the border as a national security crisis”).

97. Lach, *supra* note 20.

Truman's steel mill seizures, finding that no emergency existed to justify such emergency measures.<sup>98</sup>

Tellingly, when presented with early legal challenges to the validity of the emergency declaration, the Trump Administration's legal counsel avoided debating whether migration at the southern border was a genuine crisis. For example, when the City of El Paso argued that the "Proclamation exceeded the President's authority under the National Emergency Act," the Trump Administration simply countered that "Congress intended to preclude judicial review of national emergency declarations" and "that the challenge presents a nonjusticiable political question."<sup>99</sup> In other words, the Trump Administration did not even bother to contend that the border crisis constitutes a genuine emergency or that the NEA should be construed broadly. Such arguments would have contradicted not only the public record but also the Administration's own official data. Instead, they simply asserted their broad discretion to decide such matters unilaterally. In a similar case, in which the plaintiffs called into question the unexpected nature of the alleged border "crisis" or "invasion," lawyers for the Trump Administration chose not to engage with the question of whether the emergency was unforeseen.<sup>100</sup> Instead, the Administration dubiously argued—to no avail—that the Administration's request for funding was unforeseen because it had not been received by the Department of Defense in time to be submitted to Congress for the yearly budget.<sup>101</sup> As these cases demonstrate, the Trump Administration has avoided grappling with the clear factual inconsistencies underlying the President's alleged emergency.

In addition to the textual arguments presented above, Trump's invocation of an emergency flies in the face of the NEA's purpose of

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98. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Court in *Youngstown* concluded that Truman's actions fell into *Youngstown* 3, even though no congressional statute explicitly restricted Truman from seizing the steel mills. Instead, the Court based its holding on the fact that, "in its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes." *Id.* at 580. It added that the order "cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." *Id.* at 587. The President's power as the Commander-in-Chief only extended so far—despite the ever-expanding concept of the "theater of war" seizure of private property in order to settle a labor dispute remained the province of the legislature. *Id.*

99. *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 846–47 (W.D. Tex. 2019). Note, however, that the court did not address the constitutionality of the proclamation because it found it unlawful on other grounds.

100. *California v. Trump*, 963 F.3d 926 (9th Cir. 2020).

101. *Id.* The court eventually concluded that neither the problem, nor the President's purported solution, was unanticipated or unexpected.

curbing the excessive use of emergency powers, clearly placing Trump's actions into *Youngstown* Category 3. Congress passed the NEA in order to ensure congressional checks on the Executive's use of emergency powers.<sup>102</sup> Tellingly, the first sentence of the Act announces that the NEA is “[a]n Act to *terminate* certain authorities with respect to national emergencies still in effect. . . .”<sup>103</sup> Here, Trump's express purpose in declaring an emergency was to circumvent Congress after it consistently refused—under both unified Republican and split Democratic-Republican control—to approve increased funding for his border wall. Moreover, the majority of Congress, including twelve Republican senators, voted to terminate Trump's emergency declaration and only failed to quash it due to Trump's veto. Had the legislative veto—one of the NEA's central features—not been invalidated by the Supreme Court's ruling in *Chadha*, Congress would have retained the power to check this abuse of executive power and prevented Trump from marching forward with his emergency declaration. Thus, it is clear Trump's invocation of an emergency contradicts the NEA's purpose.<sup>104</sup>

Because Trump's manufactured crisis fails to meet any definition of emergency—and because Congress both repeatedly refused to approve his request for funding to construct the border wall and passed a resolution to terminate his emergency declaration once it went into effect—Trump acted without any congressional authorization.<sup>105</sup>

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102. See *infra* Part I, Section B, “Emergency Powers.”

103. 50 U.S.C. § 1601 (1976) (emphasis added).

104. In fact, the 58 former U.S. national security officials further stated: “To our knowledge, the President's assertion of a national emergency here is unprecedented, in that he seeks to address a situation . . . by reprogramming billions of dollars in funds in the face of clear congressional intent to the contrary.” *Exclusive: Full Text of Bipartisan Declaration of Former Senior U.S. Officials Refuting President's Claim of National Emergency at Southern Border*, JUST SECURITY (Feb. 25, 2019), <https://www.justsecurity.org/62710/full-text-bipartisan-declaration-senior-u-s-officials-refutes-presidents-claim-national-emergency-southern-border/>.

105. Even if one were to argue that conditions at the border in February 2019 provided sufficient basis for the declaration of a national emergency, it would still not provide enough basis to invoke Section 2808, which establishes that the national emergency at issue “require use of the armed forces,” and that the construction project be “necessary to support such use.” Construction Authority in the Event of a Declaration of War or National Emergency, 10 U.S.C. § 2808 (1982). While Section 2808 does not establish specific criteria to determine whether a national emergency necessitates use of the armed forces or whether planned military construction supports such use of the armed forces, the border wall construction is simply not a military project. The border wall is a Department of Homeland Security project, run by Customs and Border Patrol—the military officers deployed at the border to maintain security are simply present as a support function; they are not armed, nor are they engaged in arresting or detaining undocumented persons.

Without a valid delegation of authority from Congress, Trump's actions fall into *Youngstown* Category 3, at the lowest ebb of presidential authority, and therefore cannot be seen as legitimate.<sup>106</sup> Accordingly, Proclamation No. 9844 should be ruled unconstitutional.

### III.

#### THE SUPREME COURT IS UNLIKELY TO CHECK THE PRESIDENT'S ABUSE OF EMERGENCY POWERS

While the courts should offer a means to properly check executive emergency power, they are unlikely to do so. Several meritorious legal challenges to Proclamation No. 9844 have already been making their way through the courts. Most recently, on October 9, 2020 a Ninth Circuit Court held the Trump Administration's invocation of 10 U.S.C. § 2808 unlawful and ordered an immediate halt to the construction of the border wall.<sup>107</sup> This holding followed another decision, *Sierra Club v. Trump*, in which the Ninth Circuit invalidated the Trump Administration's transfer of funds under § 8005 and which the Supreme Court has already agreed to review, as of January 2021.<sup>108</sup> Yet even if the Supreme Court's decision to review the Ninth Circuit's decision regarding § 8005 indicates its willingness to hear the more recent rejection of Trump's emergency authority as well, it is unlikely that the Supreme Court will agree with the Ninth Circuit and second-guess Trump's assessment that there exists an emergency at the southern border necessitating the use of the military. While Justice Jackson's *Youngstown* opinion still guides analysis of the constitutionality of executive actions, the framework's utility is dubious as it invites, and is completely at the mercy of, open-ended statutory interpretation. Here, for example, the constitutionality of Trump's emergency declaration turns on the Court's construal of the congressional enabling-statutes of the NEA and Section 2808 in light of contemporary evidence of congressional disapproval. Construing the NEA and Section 2808 narrowly, in reliance on evidence that Congress did not support

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106. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952).

107. *See Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020).

108. Press Release, ACLU, ACLU Comment on Supreme Court Hearing Arguments in Border Wall Case (Oct. 19, 2020), <http://www.aclu.org/press-releases/aclu-comment-supreme-court-hearing-arguments-border-wall-case>. In July 2019, the Supreme Court stayed a Northern District of California Court's injunction that had halted sections of border wall construction, thereby allowing construction to resume while litigation unfolded. The Court's order held that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review" of the decision to transfer the funds from a Pentagon account. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). The Ninth Circuit's June decision lifted the Supreme Court's stay. *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020).



this President's discretion to assert an emergency in the face of widespread evidence undermining its validity, would place Trump's emergency actions in *Youngstown* Category 3. Conversely, construing the statutes broadly to show that Congress endowed the President with the authority to declare emergencies would place Trump's emergency actions in *Youngstown* Category 1.<sup>109</sup>

Despite persuasive arguments as to the insubstantiality of President Trump's alleged emergency, and the Ninth Circuit's narrow construction of the emergency powers statute at issue,<sup>110</sup> the Supreme Court's jurisprudence on emergency powers and immigration indicates an unwillingness to interfere with the Executive's exercise of emergency authority. The Court's tradition of deference to the President's judgment on national security, military necessity, immigration, and foreign affairs—exemplified by its recent decisions in *Trump v. Hawaii* and *Dep't of Homeland Sec. v. Regents of the Univ. of California*—make it likely that the Court will engage in similar rhetorical gymnastics in order to uphold the emergency declaration.

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109. The Court could also rely on the reference made to “all conceivable emergency situations” in the House Armed Services Committee report that accompanied the original 1982 legislation to demonstrate that Congress intended to interpret military construction broadly. H.R. Rept. No. 97-44, at 72 (1981). See sources cited *supra* note 18. In stark contrast to Trump, past Presidents have most often invoked this authority to construct military bases in foreign countries. See MICHAEL J. VASSALOTTI & BRENDAN W. MCGARRY, CONG. RSCH. SERV., IN11017 MILITARY CONSTRUCTION FUNDING IN THE EVENT OF A NATIONAL EMERGENCY 2–3 (Jan. 11, 2019).

110. *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020). While the Court did scrutinize the Executive's actions within the framework of the NEA, the heart of their analysis focused on the validity of Proclamation No. 9844 under Section 2808. Title 10 of the U.S. Code's definition of the term “military construction” is ambiguous: it defines the term “military construction” for purposes of Section 2808 as “includ[ing] any construction, development, conversion, or extension of any kind carried out with respect to a military installation . . . or any acquisition of land or construction of a defense access road.” *Id.* at 55. No case law addresses the scope of “military construction,” so the question of whether Section 2808 extends to the construction of a border wall was one of first impression. Plaintiffs argued that the construction of a border wall along the U.S.-Mexico border does not qualify as construction undertaken “with respect to a military installation,” because Title 10 defines the term “military installation” as a “base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department.” *Id.* at 59. In response, the Trump Administration argued for a broad interpretation of “other activities” that would include border construction. *Id.* at 61. The Ninth Circuit rejected the government's broad interpretation of “other activities” under military jurisdiction, asserting that it perverts the separation of powers by allowing the Executive to assume Congress' appropriations role. It additionally held that border wall construction is not a “necessary” military project as required by Section 2808. *Id.* at 63–64.

A. *The Court Has Historically Deferred to the Executive on Matters of National Security, Military Necessity, Immigration, and Foreign Affairs*

The Supreme Court has long maintained a tradition of deferring to the Executive's judgments relating to national security, immigration, and foreign affairs, upon which the current Court could rely when reviewing this emergency declaration.<sup>111</sup> Historically, justifications for this deference have relied on two assumptions. First, it is believed that the Executive possesses unique institutional capacity to respond to such issues because the President has unparalleled access to the intelligence, expertise, and experience necessary for informed decision-making.<sup>112</sup> Second, it is believed that executive action is more legitimate than legislative responses in these fields because both the Constitution and congressional delegations have allocated authority over national security and foreign affairs to the branch.<sup>113</sup>

Two early illustrations of judicial deference to executive judgment can be found in *Martin v. Mott* and the *Prize Cases*. In its 1827 decision in *Mott*, the Supreme Court refused to question President James Madison's determination that an imminent invasion or threat existed, which required him to call forth the militia. Instead, the Court asserted that the President "is necessarily constituted the judge of the

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111. Note that courts may invoke an array of rationales when deferring to the Executive Branch, such as the State Secrets Doctrine, Last in Time Rule, *see, e.g.*, *Whitney v. Robertson*, 124 U.S. 190 (1888), and Political Question Doctrine, *see, e.g.*, *Goldwater v. Carter*, 444 U.S. 996 (1979). Courts reinforce this tradition not only through judicial precedent but also by invoking Frankfurter's *historical gloss* form of analysis—especially when courts incorrectly rely on the consistent practice, rather than consistent *common-sense* practice, of the Executive in their analysis.

112. Robert Chesney, *Judicial Deference and the Inevitable Border Emergency Litigation*, *LAWFARE* (Feb. 16, 2019, 9:14 AM), [www.lawfareblog.com/judicial-deference-and-inevitable-border-emergency-litigation](http://www.lawfareblog.com/judicial-deference-and-inevitable-border-emergency-litigation); Robert Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

113. It bears emphasizing that the emergency at the southern border is so clearly manufactured that it muddies the genuine tension between the dual aims of democracy and national security, and the occasionally necessary extension of executive power. On a basic level, the Executive is structurally better equipped to act in a true emergency. For example, no planned appropriation could have substituted for the emergency authority that President Bush invoked in the immediate wake of the September 11th attacks—his Administration alone had the competence to deploy the National Guard, U.S. Marine Corps, and U.S. Navy for rescue and recovery operations at the World Trade Center's Ground Zero, to direct the Federal Aviation Administration to ground all civilian aircrafts, and to direct the Civil Air Patrol's aerial reconnaissance missions. There was evidently no way for Congress to articulate the necessary criteria for such a fast expenditure in 1976. However, the extension of this initial emergency action into long-term crisis responses, such as military action and the broader War on Terror, highlights the dangers of executive overreach and abuse inherent in emergency powers.

existence of the exigency, in the first instance, and is bound to act according to his belief of the facts.”<sup>114</sup> Justice Story explained that it would be ill-advised to second-guess the President’s factual determination regarding a military necessity because the Court lacks access to the confidential intelligence that informs the President’s decision-making and any adverse opinion might undermine military discipline and effectiveness.<sup>115</sup> Justice Story acknowledged the risk of presidential abuse created by such deference, and emphasized the need for electoral accountability and congressional oversight to combat it.<sup>116</sup>

In the *Prize Cases*, the Supreme Court once again deferred to the President’s decision regarding an issue of national security.<sup>117</sup> Decided in the midst of the Civil War in 1862, the *Prize Cases* concerned President Abraham Lincoln’s decision to order a naval blockade of southern ports without obtaining a congressional declaration of war. In its decision upholding Lincoln’s action, the Court explained:

[w]hether the President . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.<sup>118</sup>

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114. *Martin v. Mott*, 25 U.S. 19, 31 (1827) (Story, J.). During the War of 1812, Mott refused to serve in the New York militia despite a presidential order calling forth the militia. A court martial tried and fined him, and Mott sued, asserting that Madison’s order had been illegitimate, as no imminent invasion or threat existed to render it congressionally authorized. *Id.* at 25.

115. See *Martin*, 25 U.S. at 30–31 (“The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests.”).

116. See *id.* at 32 (“[T]here is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.”).

117. *Prize Cases*, 67 U.S. 635, 670 (1862).

118. *Id.* President Lincoln also unilaterally declared martial law, called up state militias—a power explicitly reserved to Congress under Article I, Section 8—and spent unappropriated federal funds. When Congress reconvened, he acknowledged that he had acted illegally and without congressional authorization, but asserted that his actions, “whether strictly legal or not, were ventured upon what appeared to be a popular demand, and a public necessity; trusting then, as now, that Congress would readily ratify them.” Abraham Lincoln, *Message to Congress in Special Session (July 4, 1861)*, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 429 (Roy P. Basler ed., Rutgers Univ. Press 1953). While Congress retroactively validated Lincoln’s actions, it is unclear if Lincoln initially believed he was acting in accordance with Congress’ will. That is to say, it is unclear if Lincoln believed that congressional validation was nec-

While a full discussion of judicial deference to the Executive in matters of national security and foreign affairs is beyond the scope of this Note, this precedent has endured—with only minor exceptions<sup>119</sup>—from *Hirabayashi* and *Korematsu*<sup>120</sup> through the Court's contemporary decisions regarding national security and foreign affairs.<sup>121</sup> If the Court wished to review Trump's declared emergency with similar deference, it would thus have a historical basis to do so. This is particularly likely given the more recent precedent in *Trump v. Hawaii* discussed below.

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essary or that extra-constitutional action taken by the Executive in times of emergency was acceptable.

119. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting the Executive branch's request for an injunction prior to the *Washington Post* and *New York Times*' publication of the Pentagon Papers, which included official, unredacted executive branch documents regarding the State Department's Vietnam policy); see also *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008) (rejecting executive branch argument that bringing Guantanamo detainees into U.S. would present a security risk).

120. In both cases, the government defended the internment of Japanese Americans by claiming it was necessary to prevent espionage and sabotage by Japanese Americans on the West Coast. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944). In reviewing the constitutionality of the internment policy in *Korematsu*, the Court refused to scrutinize the executive branch's factual determinations as to whether the Japanese military might invade the West Coast, the likelihood that Japanese Americans would be loyal to Japan's war effort, and that an individualized screening process would not identify potentially disloyal Japanese Americans with adequate efficiency or precision. *Korematsu*, 323 U.S. at 218–19 (1944). The Court adopted this exceptionally deferential posture despite the Executive branch's reliance on dubious evidence. See *id.* at 241 n.15 (Murphy, J., dissenting) (“The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, ‘The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.’ Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.”).

121. While outside the scope of military necessity, the Court has also often given broad deference to executive decisions in cases related to foreign policy, even when such decisions have violated statutory law. For example, in *Zivotofsky v. Kerry*, the Supreme Court deferred to the executive branch after the State Department directly contradicted Congress' Foreign Relations Authorization Act Section 214(d), holding that the Act unconstitutionally interfered with the exclusive authority of the President to recognize foreign sovereigns. *Zivotofsky v. Kerry*, 576 U.S. 1 (2015). Essentially, the President denied the constitutionality of the congressional Act that he was violating, and in typical fashion, the Court responded with its nearly unconditional deference. For further examples of this deference, see *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Belmont*, 301 U.S. 324 (1937).

*B. The Current Court Has Demonstrated a Propensity for Deference to the Executive on Matters of National Security, Military Necessity, Immigration, and Foreign Affairs*

*1. The Current Court Has Been Quick to Affirm the Executive's Legitimate Authority to Act*

The Supreme Court's decision in *Trump v. Hawaii* highlights the extent of the current Court's deference to the Executive in cases of national security, immigration, and foreign affairs. The case was heard before Justice Kavanaugh joined the bench; the addition of another Trump appointee—particularly one who has evinced support for broad executive powers<sup>122</sup>—increases the likelihood that the Court would uphold the constitutionality of Proclamation No. 9844. In *Trump v. Hawaii*, the Supreme Court overturned lower court rulings that invalidated Presidential Proclamation No. 9645, colloquially known as Trump's 2017 travel ban. Proclamation No. 9645 placed entry-restrictions on nationals from eight predominantly Muslim countries, each of which allegedly lacked adequate systems to share and manage information regarding their citizens, for the stated purpose of improving vetting procedures and maintaining national security.<sup>123</sup> While lower courts held that Trump was neither constitutionally nor statutorily authorized to issue the travel ban, the Supreme Court reversed, holding that the Immigration and Nationality Act (INA) exudes deference to the President to decide matters of immigration policy.<sup>124</sup> Specifically, the Court based its ruling on Section 1182(f) of the INA, which delegates broad authority to the executive branch to determine whether and when to suspend entry of foreign nationals based on its independent determination as to whether the entry of any class of aliens would detrimentally affect national security interests.<sup>125</sup> The majority chose not to evaluate the merits of Trump's proclamation, but instead as-

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122. Michael Waldman, *Courting Disaster: The Trouble with Brett Kavanaugh's Views of Executive Power in the Age of Trump*, BRENNAN CTR. FOR JUSTICE (July 16, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/courting-disaster-trouble-brett-kavanaughs-views-executive-power-age>.

123. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

124. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

125. *Id.* INA 8 U.S.C. § 1182(f) states that:

“[W]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

Immigration and Nationality Act, 8 U.S.C. § 1182(f).

serted that Congress vested this decision-making discretion in the executive branch by passing the INA, placing the President's authority into *Youngstown* Category 1.<sup>126</sup> The Court further emphasized that its role was not to "substitute [its] own assessment for the Executive's predictive judgments on such [politically charged] matters," even in light of broad doubts as to the "effectiveness and wisdom" of the Executive's policy.<sup>127</sup> It also refused to review empirical data regarding the need for a travel ban, adding, "Plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere."<sup>128</sup>

If the Court were to maintain this line of reasoning in evaluating Trump's emergency declaration, it would likely find that Congress vested the President with the authority to declare national emergencies by passing the NEA and that it is not the Court's role to question the President's judgment with respect to such a pressing political matter. It might point out that its own factual assessment as to the existence of an emergency at the southern border should not supersede the Executive's analysis, even in light of public doubts and empirical data. Moreover, the Court could cite to the fact that Congress had never attempted to exercise its power to end an emergency since the NEA's inception—an indication of congressional acquiescence to broad presidential discretion under the NEA—as a form of Frankfurtian historical gloss.

While the Ninth Circuit's recent decisions rejecting President Trump's emergency declaration may have offered cause for optimism, it would be unlikely to determine any potential Supreme Court decision on the issue. The Ninth Circuit took a similar approach to executive powers in *Hawaii v. Trump*, ruling that Trump's travel ban could not remain in effect because it exceeded the scope of presidential authority under the INA.<sup>129</sup> However, as discussed above, the Supreme

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126. *Trump*, 138 S. Ct. at 2392.

127. *Id.* at 2422.

128. *Id.* at 2409.

129. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). The Ninth Circuit panel held that, in suspending the entry of more than 180 million nationals from six countries, suspending the entry of all refugees, and reducing the cap on the admission of refugees from 110,000 to 50,000 for the 2017 fiscal year, the President did not meet an essential precondition to exercising his delegated authority pursuant to 8 U.S.C. § 1182(f). That is, the President failed to make a sufficient finding that the entry of the excluded classes would be detrimental to the interests of the United States. The panel also held that the Order violated additional provisions of the INA that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees. *Id.*

Court rejected the Ninth Circuit's close statutory analysis, overruled its decision, and instead broadly deferred to the Executive.<sup>130</sup> Thus, because Congress passed the NEA and Section 2808 without an express definition of emergency or criteria to determine whether an emergency necessitates use of the armed forces, and because President Trump has claimed that an emergency exists necessitating the construction of a border wall through military funding, the Supreme Court may very well defer to the President—even if such an emergency barely passes the laugh test.

## 2. *The Current Court's Willingness to Defer to the Executive in the Context of Equal Protection Challenges*

The Supreme Court's decision in *Trump v. Hawaii* is not only salient due to its deference to the Executive in the context of immigration policy, but also because it maintained such deference in the face of an equal protection challenge. The Court's recent decision in *Dep't of Homeland Sec. v. Regents of the Univ. of California* also saw the Court avoid substantial consideration of equal protection challenges to the Executive's immigration policy decisions.<sup>131</sup> Together, these decisions provide evidence of the extent of the Court's willingness to defer to the Executive even when Fourteenth Amendment claims are at issue.<sup>132</sup>

In *Trump v. Hawaii*, the Court expressed an unwillingness to scrutinize the President's policy motives despite direct evidence of the

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130. In a 5-4 decision, the Supreme Court reversed the Court of Appeals on June 26, 2018, ruling that the plaintiffs' INA and Establishments Clause claims lacked a "likelihood of success on the merits." The Court vacated the Ninth Circuit's injunction and remanded the case to lower courts for further review. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

131. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).

132. In light of these two rulings, and despite Trump's many expressions of animus against Central American immigrants when discussing the need for a border wall, the Court is unlikely to be swayed by such evidence if an Equal Protection challenge were to arise. In fact, any constitutional claims of animus would concern "the entry of foreign nationals," and the Court in *Trump v. Hawaii* pointed out that its more deferential standard or review applies "to any constitutional claim concerning the entry of foreign nationals." 138 S. Ct. at 2419 n.5. The Court also noted that the travel ban's carve-outs—namely, the addition of a waiver program and the inclusion of exceptions to the travel ban for non-immigrant permanent residents and asylum seekers—bolstered the legitimacy of the ban's alleged purposes of national security and improved vetting. *Id.* at 2422. If the Court were to defend the legitimacy of Trump's border wall against claims of racial animus, it might point out that the border wall does not exclude Central Americans from seeking citizenship or applying for asylum in the U.S. through pre-established channels. Thus, while Trump's racist statements against Central American immigrants, voiced in connection to the planning and execution of the border wall, might hold sway in lower courts, the Supreme Court is unlikely to follow.

travel ban's racially discriminatory intent. Chief Justice Roberts, in his majority opinion, cited the 1972 case *Kleindienst v. Mandel* for the proposition that the Court does not look past the executive branch's "facially legitimate and bona fide" policy justifications in the realm of national security, immigration, and foreign affairs, as the Executive must be allowed the necessary "flexibility" to respond efficiently to the constantly changing arenas of immigration and national security.<sup>133</sup> In *Department of Homeland Security v. Regents of the University of California*, the Court rejected the plaintiff's claim that the Trump Administration's rescission of DACA protection violated the Equal Protection Clause.<sup>134</sup> Despite admitting that Trump's statements *could* raise a plausible inference of "invidious discriminatory purpose," the Court proved unwilling to second-guess Trump's immigration policy.<sup>135</sup>

Trump's emergency declaration regarding the southern border implicates the same deferential matters of immigration and national security discussed in these two cases, providing further evidence that the Court would be unlikely to question its validity. More broadly, based on the Court's longstanding tradition of deference and recent treatment of such issues, it is reasonable to assume that judicial review would prove an unavailing avenue to halt the construction of Trump's signature campaign promise. Importantly, if the Court were to legitimize Trump's artificial emergency, it would set a worrying precedent that could enable future Presidents to concoct further pretextual emer-

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133. 138 S. Ct. at 2419–20 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)). The Court did agree to look beyond the "face of the Proclamation to the extent of applying rational basis review," which the Court pointed out applies "to any constitutional claim concerning the entry of foreign nationals." *Id.* at 2420, 2420 n.5.

134. Dep't of Homeland Sec., 140 S. Ct. at 1915. On September 5, 2017, Attorney General Jeff Sessions announced the end of DACA—the executive program that permits undocumented individuals who arrived in the U.S. as minors to live and work in the U.S. lawfully for two-year increments—plunging 700,000 enrolled individuals into uncertainty. Michael D. Shear and Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>.

135. 140 S. Ct. at 1915. Tellingly, the majority only allocated three pages out of its 74-page opinion to plaintiffs' Equal Protection claims. Instead, the Court devised an interpretive standard to render his statements irrelevant to the analysis and rejected the notion that the Trump Administration's motivation to rescind DACA was influenced by the discriminatory sentiment Trump expressed in his past remarks. *Id.* at 1916. Chief Justice Roberts explained that such statements *could* raise this "plausible inference of an 'invidious discriminatory purpose'" if made by members of the decision-making body. *Id.* at 1915–16. Yet the Chief Justice pointed out that such statements were made by President Trump, who apparently did not qualify as a member of the decision-making body because he was not a member of the Department of Homeland Security. *Id.*



gencies and assume overwhelming power in the face of genuine crises. As Justice Story foreshadowed two centuries ago in *Mott*, the Supreme Court's tradition of virtually unconditional deference to the Executive points to a desperate need for reform of the NEA.

#### IV. ROAD TO REFORM

Although Congress failed to reject Trump's dubious emergency declaration, and the Supreme Court would be similarly unlikely to do so if it were to consider the issue, big picture reforms could address the deep issues within the current emergency powers regime that Trump's border emergency has highlighted. This section first describes an alternative approach that courts can adopt to rein in executive emergency declarations, even when those declarations concern issues of national security, military necessity, foreign affairs and immigration. Second, it suggests legislative reforms to the NEA that will ultimately prove necessary to ensure true congressional oversight of the President's use of emergency powers.

##### A. *An Alternative Approach for the Judiciary*

While the Supreme Court is unlikely to overturn Trump's national emergency declaration, there is solid legal basis to do so. The Court has room to rein in executive emergency declarations within the context of the *Youngstown* framework in cases of flagrant abuse, even when those declarations concern issues of national security, military necessity, foreign affairs, and immigration. While applying the *Youngstown* analysis to the NEA invites Courts to engage in open-ended statutory interpretation given the statute's failure to define the term "emergency," the Court possesses an array of interpretive canons with which it can define the term. Once the Court ascertains the meaning of an emergency, it will be better positioned to determine the validity of a given emergency declaration. The Court should look to the dictionary definition and plain meaning of "emergency," as well as the term's use in other sections of the U.S. Code—both of which are common practices in the judicial interpretation of statutes.<sup>136</sup> As argued in

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136. See VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 21 n.212 (2018); see also *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) (Roberts, C.J.) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'"); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (Thomas, J.) ("In the absence of such a [statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning."); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (Alito, J.) ("Unless otherwise defined, statutory

Part III, *supra*, such an approach would almost certainly invalidate Trump's declaration of an emergency at the southern border. If the Court were to deem reasonable more than one reading of the term "emergency," it could look beyond the plain text of the NEA to the statute's purpose to ascertain its meaning.<sup>137</sup> Accordingly, the Court should consider evidence as to whether a President's invocation of a national emergency contradicts the NEA's purpose of limiting emergency declarations and ensuring congressional regulation of the Executive's use of emergency powers.<sup>138</sup> Evidence might include congressional unwillingness to authorize relevant presidential action immediately preceding the declaration of a national emergency, as well as bipartisan congressional efforts to terminate a presidential emergency declaration.<sup>139</sup> Here, Trump's express purpose in declaring an emergency was to circumvent Congress after it consistently refused to approve increased funding for a border wall, and Congress immediately rebuffed Trump's emergency declaration. This evidence would clearly place Trump in *Youngstown* Category 3. In fact, the Ninth Circuit ruling in *Sierra Club v. Trump*—while focused more on Section 2808 than on the text of the NEA—showed that this method of careful statutory analysis in the context of emergency powers is

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terms are generally interpreted in accordance with their ordinary meaning."); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) (considering "the sense in which [the disputed statutory term] is used elsewhere in federal legislation and treaty").

137. One may look to the NEA's subsequent history (least authoritative), rejected proposals, colloquy on floor & hearing, sponsor statements and committee reports (most authoritative). See Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 VT. L. REV. 611, 628 (2005); see also, e.g., *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 632 (2012) (rejecting an interpretation that would undermine the purpose of a statute); *United States v. Turkette*, 452 U.S. 576, 589 (1981) (considering a statute's declaration of purpose and evaluating "various Titles of the Act" as "the tools through which this goal is to be accomplished"); *King v. Burwell*, 576 U.S. 473, 494 (2015) (finding it "implausible that Congress meant the [Affordable Care Act] to operate in this manner" after considering the meaning of a phrase in light of the entire functioning of the statute).

138. Congress passed the NEA in order to ensure congressional checks on the Executive's use of emergency powers. Tellingly, the very first sentence of the National Emergencies Act announces that the NEA is "[a]n Act to *terminate* certain authorities with respect to national emergencies still in effect." National Emergencies Act (NEA), Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601-51) (emphasis added).

139. This would mirror the approach that the Court took in *Youngstown*, when it concluded that even though no congressional statute explicitly restricted Truman from seizing the steel mills, Truman had asked Congress for permission to do so and Congress had deliberated and denied authorizing such an action in the Taft Hartley Act, placing Truman in *Youngstown* Category 3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952).

easily executed when the judiciary is willing to cut against emergency usage.<sup>140</sup> Applying this level of scrutiny would allow the Supreme Court to enforce Justice Jackson's constitutional framing in which an executive act violates the separation of powers doctrine if it contravenes "the expressed or implied will of Congress," and heed his warning that a safe approach to an emergency powers regime requires robust legislative oversight.<sup>141</sup>

Next, while the Supreme Court has historically deferred to the executive branch on matters of national security, military necessity, foreign affairs, and immigration, the judiciary need not continue in this tradition. Courts can and should second-guess executive action in cases of flagrant abuse. The often-cited argument that the Executive possesses specialized expertise required to assess national security and immigration issues that judges cannot hope to match is unsatisfactory.<sup>142</sup> As legal scholars Ganesh Sitaraman and Ingrid Wuerth explain,

It is true that courts don't have as much depth in [national security and foreign affairs] areas, but courts also have less expertise than bureaucrats in a wide variety of extremely complex issues that they routinely address, including antitrust, financial regulation, public utilities rate regulation, nuclear waste disposal, and insurance markets. In our system of generalist judges, there is no reason to single out 'national security [and foreign affairs]' decisions as categorically too technical or otherwise difficult to evaluate.<sup>143</sup>

The related belief that issues of national security are of unique importance and thus require deference to the President is similarly misguided.<sup>144</sup> Courts regularly hear cases concerning domestic issues that have great implications for the nation's safety and welfare.<sup>145</sup> In other words, the risk presented by judicial decision-making in the realm of national security is no greater than the risks of judicial decision-making in many other areas that courts routinely adjudicate:

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140. See *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020).

141. *Youngstown v. Sawyer Sheet & Tube Co.*, 343 U.S. 579, 637–38 (1952).

142. Ganesh Sitaraman & Ingrid Wuerth, *National Security Exceptionalism and the Travel Ban Litigation*, *LAWFARE* (Oct. 12, 2017, 3:00 PM), <https://www.lawfareblog.com/national-security-exceptionalism-and-travel-ban-litigation> ("Courts and commentators sometimes reason that in all national security cases, courts should defer to the executive branch because the courts lack expertise in the field of national security, or because national security issues are uniquely important. . . . Unfortunately, these justifications do not withstand logical scrutiny.")

143. *Id.*

144. *Id.*

145. *Id.*

It is true that national security is an important objective. . . . But domestic issues such as surveillance, data collection, health care, property rights, and firearms are also of great—or sometimes even greater—significance to the lives and well-being of millions of Americans, and errors could be significant in those arenas. Yet courts routinely adjudicate those cases.<sup>146</sup>

In this same vein, constitutional scholar Ilya Somin argues that

Vastly more Americans die every year because of ordinary domestic crime and traffic accidents than because of war or terrorist attacks by foreigners or immigrants . . . like national security policy, traffic safety and domestic law enforcement involve a variety of technical issues on which the legislative and executive branches have greater expertise than courts. Yet the courts regularly decide cases in these fields without granting the government any special deference.<sup>147</sup>

Lastly, arguments that the executive branch has specialized knowledge grounded in the non-reviewable, confidential nature of specific national security policy is unwarranted. Established protocols exist for courts to privately review such evidence, and the Court can implement these “in camera” procedures for considering confidential information without much difficulty.<sup>148</sup>

In the 2015 case *Zivotofsky v. Kerry*, the Supreme Court itself emphasized that the President is not free from congressional oversight in the realm of national security and foreign affairs, despite ultimately finding in favor of the President. Writing for the majority, Justice Anthony Kennedy explained that “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”<sup>149</sup> Chief Justice Roberts similarly noted in his dissent that “the President’s so-called general foreign relations authority . . . does not authorize him to disregard an express statutory directive

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146. *Id.*

147. Ilya Somin, Opinion, *The Case Against Special Judicial Deference in Immigration and National Security Cases*, WASH. POST (Oct. 22, 2017, 4:58 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/22/the-case-against-special-judicial-deference-in-immigration-and-national-security-cases>. Somin also debunks justifications for immigration-exceptionalism, pointing to the lower crime rates of immigrants and the fact that immigration policy does not rely on classified information any more than other policy areas do. *Id.*

148. *Id.* (“[C]ourts have established procedures for considering such evidence ‘in camera’ without revealing it to the public. Strikingly, the Trump Administration has chosen not to avail itself of such procedures in the travel ban litigation. They agreed to confidentially reveal the government report supposedly justifying the most recent travel ban order to one of the federal judges considering its legality, but urged him *not* to consider the report in making his decision.”) (emphasis added).

149. *Zivotofsky v. Kerry*, 576 U.S. 1, 3 (2015).

enacted by Congress.”<sup>150</sup> By extension, it would be imprudent for the Court to allow emergency actions to go unchecked when presented with comprehensive evidence of congressional disapproval. The Executive’s national security and immigration policies are not unreasonably challenging for judicial review, and the Court must intervene when the Executive oversteps its authority with respect to these matters.

### *B. Legislative Reform*

If we are to continue regarding emergency power as an unavoidable mechanism for responding to unforeseen and unforeseeable exigencies, then a transformation of the current emergency regime to ensure true congressional oversight is imperative. The urgent need to reform the NEA has not gone unnoticed in Congress. In March 2019, Senator Mike Lee introduced the “Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies” (ARTICLE ONE) Act, which was subsequently amended by the Senate Homeland Security and Governmental Affairs Committee by a bipartisan 12-2 vote and continues to await consideration by the full Senate.<sup>151</sup> If passed, ARTICLE ONE would update the NEA in a number of significant ways. First, it would require emergency declarations to expire automatically after thirty days unless a simple-majority of Congress approves a renewal, and at the end of every calendar year unless extended through a joint resolution.<sup>152</sup> This annual sunset provision would also apply to already existing national emergencies. Importantly, if Congress chooses not to renew an emergency, a President could not subsequently declare another emergency regarding identical circumstances.<sup>153</sup> This way, the President would still be able to invoke emergency authority in the event of a legitimate crisis, but could not take advantage of emergency powers to make end-runs around the legislature. Second, the ARTICLE ONE Act would work to ensure heightened transparency of the executive branch by requiring the President to report to Congress the circumstances necessitating an emergency declaration or renewal; the emergency’s estimated duration; a summary of actions the Executive plans to take in response to a stated emergency and the corresponding statutory authority for such actions; and, in the event of a renewal, a list of all

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150. *Id.* at 66 (Roberts, C.J., dissenting).

151. Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act (“ARTICLE ONE Act”), S. 764, 116th Cong. (2019).

152. *Id.*

153. *Id.*

actions the Executive undertook in the preceding year in response to the emergency.<sup>154</sup>

While the ARTICLE ONE Act would be a move in the right direction, it should not be the end of congressional reform. Congress should additionally require congruence between the nature of the emergency declared and the statutory powers invoked by the President to address that emergency. First, this stipulation would limit the President's discretion to exercise emergency authority without having to rely on a congressional response or judicial review. Moreover, in the event that the courts are needed to halt executive actions, it would offer a specific grant of powers against which a court could measure the President's actions in order to determine whether they exceeded their authority under *Youngstown*. Congress should similarly add a definition of "emergency" to the NEA so that, in the event of judicial review, courts have an express standard against which to evaluate the President's actions. A definition could adopt the four prongs of temporality, potential gravity, the government's role and authority to act, and an unanticipated need for immediate action that is untenable through ordinary rule identified by the Congressional Research Service.<sup>155</sup> Additionally, Section 204 of the ARTICLE ONE Act excludes IEEPA from its provisions—the Act ostensibly regards IEEPA as a necessary carve out to rally bipartisan support, as it is used often but narrowly as a core tool of the US economic sanctions regime.<sup>156</sup> However, as discussed above in Part I.C, the IEEPA powers under emergency declarations are similarly ripe for abuse by the Executive, and must be subject to congressional oversight.<sup>157</sup> Lastly, the unfettered discretion delegated to the Executive through Section 212(f) of the INA, to which the Court deferred in legitimizing Trump's authority to

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154. *Id.*

155. *See supra* notes 90, 91 and accompanying text. Temporality would require emergencies to be "sudden, unforeseen, and of unknown duration;" the potential gravity factor would require that an emergency be "dangerous and threatening to life and well-being." Whether it is "the government's role and authority to act" is a matter of perception—the Constitution may guide consideration of this factor, but it is not always conclusive. *See* L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505. NATIONAL EMERGENCY POWERS 6 (2020).

156. *Id.* at 13. That said, the ARTICLE ONE Act specifies that the President cannot invoke IEEPA to enact tariffs, protecting Congress' power of taxation. ARTICLE ONE Act, S. 764, 116th Cong. (2019).

157. This agenda was pushed by the ACLU in a recent letter to the Senate. Ronald Newman & Kate Oh, *ACLU Letter to Senate on Article One Act (S. 764) to Reform National Emergencies Act*, ACLU (Oct. 24, 2019), <https://www.aclu.org/letter/aclu-letter-senate-article-one-act-s-764-reform-national-emergencies-act>.

invoke the 2017 travel ban, should also be subject to congressional review.<sup>158</sup>

It is necessary to acknowledge that, even with the safeguards of the ARTICLE ONE Act in place and the additional reforms suggested here, Congress' history of deference to the Executive suggests that the legislature may continue rubber-stamping executive emergency declarations.<sup>159</sup> However, the ARTICLE ONE Act would make it possible to strike down flagrant abuses of emergency powers used in response to events that are by no means "unexpected or unforeseen." In other words, this reform bill would have enabled Trump's declared border emergency—rejected by Congress on a bi-partisan basis—to be brought to an end.

*C. An Unlikely Source Of Pushback Against Legislative Reform:  
Advocates For A "Climate Emergency"*

Considering President Trump's flagrant abuse of the emergency powers regime, it is possible that objection to comprehensive NEA reform will come from a surprising source. It is not only executive unilateralists who may critique such reforms—progressive politicians in the United States have called for a future Democratic President to declare a national emergency in response to climate change, arguing that rising sea levels, hurricanes, wildfires, and droughts put the lives of millions of Americans at risk. This progressive push stems from a growing global movement of climate activists urging governments to declare climate emergencies at the national, state, and local levels. Thousands of local entities across the globe have already declared such emergencies, though they are typically symbolic in that they do not activate actual emergency powers and merely put governments on the record acknowledging the importance of climate change.<sup>160</sup> Yet, in the United States, this agenda is surpassing mere symbolism.

At both the local and federal levels, politicians are being urged to declare climate emergencies that carry tangible weight. Organizations like Sunrise Movement and Extinction Rebellion have made emergency declarations a central component of their campaigns, and New York City and Los Angeles declared climate emergencies and took

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158. *Id.*

159. As evidenced by our colossal administrative state, Congress tends to affirmatively delegate much of its power to the Executive branch.

160. Carolyn Kormann, *The Case for Declaring a National Climate Emergency*, NEW YORKER (Jul. 11, 2019), <https://www.newyorker.com/news/news-desk/the-case-for-declaring-a-national-climate-emergency>.

corresponding actions in the summer of 2019.<sup>161</sup> Congresspeople Bernie Sanders, Alexandria Ocasio-Cortez, and Earl Blumenauer introduced a concurrent resolution in July 2019 calling for the United States to declare a climate emergency, and more specifically “a national, social, industrial, and economic mobilization of the resources and labor of the United States at a massive scale to halt, reverse, mitigate, and prepare for the consequences of the climate emergency.”<sup>162</sup> While not legally binding, the resolution aimed to direct the national conversation and pressure 2020 presidential candidates to debate climate change within this framework.<sup>163</sup> For instance, Minnesota House Representative Ilhan Omar tweeted shortly after Trump’s announcement of a border emergency that “Our next President should declare a #NationalEmergency on day one to address the existential threat to all life on the planet posed by Climate Change.”<sup>164</sup> In fact, former Presidential Democratic candidate Tom Steyer made the declaration of a climate emergency upon day one in office a foundation of his presidential campaign,<sup>165</sup> while former Democratic Presidential hopeful Senator Bernie Sanders stated that he would “declare a national emergency on climate change and take immediate, large-scale action to reverse its effects.”<sup>166</sup>

The idea of an emergency declaration on climate change is not only being discussed amongst politicians and activists; legal scholars have also weighed in on this debate. Dan Farber, an environmental

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161. Anne Barnard, *A ‘Climate Emergency’ Was Declared in New York City. Will That Change Anything?*, N. Y. TIMES (Jul. 5, 2019), <https://www.nytimes.com/2019/07/05/nyregion/climate-emergency-nyc.html>; *New Department is Set to Assist Communities Affected by Climate Change*, NBC L.A. (July 3, 2019, 3:22 PM), <https://www.nbclausangeles.com/news/new-department-is-set-to-assist-communities-affected-by-climate-change/78130/>.

162. Kormann, *supra* note 160.

163. *Id.*

164. Tal Axelrod, *Omar: Next President Should Declare National Emergency on Climate Change ‘on Day 1,’* HILL (Feb. 15, 2019, 2:26 PM), <https://thehill.com/homenews/house/430252-omar-next-president-to-declare-national-emergency-on-climate-change-on-day-1>.

165. *Steyer Says He’d Declare Climate Change a ‘State of Emergency’*, BLOOMBERG (Nov. 20, 2019), <https://www.bloomberg.com/news/videos/2019-11-21/steyer-says-he-d-declare-climate-change-a-state-of-emergency-video>. He explained that he would have used his emergency powers to “reenter [the Paris climate accords], freeze and reverse the Trump rulemaking. . . establish a cabinet level position, put a climate lens on all purchasing . . . and if Congress cannot pass a Green New Deal [within 100 days], set clean energy standards.”

166. Umair Irfan & David Roberts, *The Executive Actions Democratic Presidential Hopefuls Intend to Use to Fight Climate Change*, VOX (last updated Feb. 19, 2020), <https://www.vox.com/energy-and-environment/2019/10/14/20880696/2020-democratic-debates-climate-change-executive-actions>.



and constitutional law scholar, explained that a future President could theoretically use emergency powers to impose sanctions against countries and companies trafficking in fossil fuels, to divert military funds to renewable energy initiatives, and to impose regulations on the fossil fuel industry.<sup>167</sup>

However, if Trump's manufactured emergency has taught us anything, it is to tread lightly when entering the territory of emergency powers. Emergency powers must be reserved for rapidly unfolding events that render a bureaucratic, legislative response untenable. Climate change is undoubtedly a crisis that Congress must address,<sup>168</sup> but it is by no means sudden or unexpected.<sup>169</sup> Additionally, although many manifestations of climate change such as floods, hurricanes, wildfires, and other natural catastrophes will occur suddenly and unexpectedly, Congress enacted the Stafford Disaster Relief and Emergency Assistance Act of 1988 in order to provide assistance to state and local governments in the event of such natural disasters.<sup>170</sup> These established federal response arrangements have been administered with no disruption of constitutional arrangements, suggesting that natural disasters do "admit of their being dealt with according to rule."<sup>171</sup> As such, while climate change is certainly a moral imperative necessitating immediate action, following in Trump's playbook to unilaterally tackle agendas that have otherwise stagnated in Congress sets a troubling precedent.<sup>172</sup> A central tenet of the U.S. constitutional framework

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167. For example, the President could mandate that automakers reduce greenhouse emissions gas and suspend oil leases. Dan Farber, *Declaring a Climate Change Emergency: Would It Be Legal? Would It Be Useful?*, REVELATOR (Mar. 29, 2019), <https://therevelator.org/climate-change-emergency>.

168. Many climate scientists have postulated that there are imminent points of no return with regard to the amount of carbon released into the atmosphere. However, these predictions have been matters of public record for decades, and thus cannot be described as unexpected.

169. Mark Patrick Nevitt, *On Environmental Law, Climate Change & National Security Law*, 44 HARV. ENV'T. L. REV. 321 (2020).

170. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 (1998); L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 6 (2020).

171. See CORWIN, *supra* note 26, at 3.

172. Those who support climate-focused emergency action may point to many warnings issued by climate scientists that the earth is approaching a quantifiable "point of no return" in the effort to combat climate change. That is to say, an emergency declaration could be justified by the combination of a definite timeframe for action and lack of congressional will or ability to address these crucial-based threats. However, because climate change is a gradually developing issue, it is by definition not an emergency. Congress and other public officials can deliberate upon a response during the course of its worsening. These demands for a climate-based emergency declaration highlight the much larger issue of congressional inability to legislate in response to

is the notion that Congress makes laws and the Executive enforces them; Congress' appalling failure to act in the face of an impending climate catastrophe is no basis to invoke a national emergency, and risks contorting the NEA into a tool by which Presidents can, with impunity, play politics with the nation's safety.

### CONCLUSION

When the Supreme Court notoriously upheld the internment of Japanese Americans in its 1944 *Korematsu* decision, Justice Jackson observed in a strongly worded dissent that each emergency power "lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>173</sup> It seems as though the only thing Jackson got wrong was the need for such a claim to be plausible. Donald Trump's February 15, 2019 emergency declaration, which aimed to accomplish through unilateral action what could not be completed through ordinary legislative channels, shed a new light on Jackson's premonitions and revealed the flaws inherent to the National Emergencies Act. Trump's emergency declaration to redirect military funding towards border wall construction highlighted a gap in the Court's willingness to check executive power. It underscored a pressing need for both comprehensive judicial review as well as new legislation to rein in the Executive's emergency powers.

Justice Jackson later observed in his 1952 *Youngstown* concurrence that "[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."<sup>174</sup> In a global context of rising authoritarianism—and after four years in which the resilience of our democratic institutions was continually tested—it would be imprudent to merely trust that our existing regime will continue to withstand threats in the future. It is thus imperative to reinforce the institutional frameworks inherent to our liberal republic. It is imperative to ensure congressional and judicial checks on executive power. In returning to first principles, and in light of Justice Jackson's conclu-

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issues that don't fall under the auspices of budget reconciliation—largely due to the existence of the filibuster. However, this issue falls outside the scope of this Note.

173. *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944) (Jackson, J., dissenting).

174. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

sion that “emergency powers would tend to kindle emergencies,”<sup>175</sup> the current system of emergency powers must be reformed.

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175. *Id.* at 650.