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The Constitution and Emergencies: Regulating Presidential Emergency Declarations

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KEY TAKEAWAYS

Emergency powers, deployed carefully in response to a crisis, can reduce harm and help to restore the damage a crisis causes.

Presidents of both parties, however, have abused emergency powers to wield extraordinary power in service of a political agenda otherwise beyond their reach.

Congress should follow constitutional guidelines and act to ensure that emergency powers once again have only a salutary effect on the body politic.

During his presidency, President Joe Biden has used emergency powers to advance his political agenda. He relied on President Donald Trump's earlier COVID-19 emergency declaration to activate a September 11–era law that he claimed gave him the power to forgive student loans.[1] Meanwhile, he is also considering declaring that climate change and the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[2] are national emergencies that ought to be addressed by means of extraordinary executive powers.[3]

Declarations of this sort are not rare in the world of presidential power. Biden's predecessors declared national emergencies on a host of prior occasions to address various problems for which they lacked specific congressional authorization.[4] Donald Trump, for example, declared that a national emergency existed to respond to the influx of people seeking to enter the

nation across our border with Mexico. He declared another one to deal with the COVID-19 pandemic. Barack Obama relied on an emergency declaration issued by George W. Bush after the September 11, 2001, terrorist attacks to skirt congressional spending restrictions on a naval base in Bahrain.[5] Other Presidents have issued similar edicts. Some of them have had enormous effects on Americans' lives.[6] In perhaps many cases, Presidents gave in to the "Don't just stand there! Do something!" urge to which we all have succumbed at some time.[7]

The purpose of this *Legal Memorandum* is not to analyze the legality of those individual declarations. Neither will it join the debates about whether the executive branch should have broad or even unbounded emergency powers as a matter of political theory, reality, or prudence[8] or whether the President has inherent emergency powers under Article II of the Constitution.[9] Our more modest task is to outline the constitutional text and logic that ought to inform Congress as it considers how much power the President should have to act without Congress's express, specific, and contemporaneous authorization when an emergency arises.

This analysis is both necessary and fitting because for the first time since passage of the National Emergencies Act in 1976,[10] Congress appears to have an appetite to rein in presidential emergency powers. Members of both parties have introduced bills to rein in emergency powers,[11] and Congress passed a bipartisan resolution ending the COVID-19 emergency declaration despite President Biden's opposition.[12] Although academic debates about the wisdom of Carl Schmitt's political philosophy are interesting,[13] they are not useful to Congress. That body's primary concern is crafting problem-solving legislation, and the Constitution's text and logic ought therefore to be at the forefront of the Members' minds as they craft legislation, because an unconstitutional law solves nobody's problem.[14] This paper gives them what they need to know about the relevant constitutional text as well as its logic and offers specific policy recommendations.

It is worth pausing here to clarify what sort of emergency powers we are addressing. We focus on extraordinary powers delegated to the President by Congress upon a declaration of a national emergency.[15] Emergencies, most recently the COVID-19 pandemic, have led to unusual exercises of executive-branch powers like the Centers for Disease Control and Prevention's eviction moratorium and the Occupational Safety and Health Administration's vaccination mandate.[16] But these unusual exercises of power were not "extraordinary" in the sense used here because the agencies claimed that these powers were present, though heretofore hidden, in their statutory regimes. In other words, they claimed that these powers

were normal powers that they could have exercised even if an emergency had not been declared.[17] The Supreme Court of the United States disagreed, but these are not the emergency powers we are concerned with here.[18] We are concerned with the vast number of statutes that allow the President to redirect funding, suspend laws, and freeze foreign assets, among other things, when he or Congress declares a national emergency.[19] Accordingly, this paper proposes a long-term remedy for the problem of "government by emergency": a limitation period of no more than two years for any presidentially declared emergency and the repeal of laws granting emergency powers in situations where Congress can respond to an emergency with appropriate speed.

The Constitution in Emergencies

In the forward to *Powers of the President During Crisis*,[20] Professor Robert Rankin recounted a lesson that a country doctor taught to him when he was a boy, which later informed his understanding of emergency powers:

> One day while driving to see a patient who was gravely ill, the doctor opened his medicine chest and pointed to a glass vial containing morphine. "That drug," he said, "is the most potent medicine in my chest but requires great skill in prescribing. Used properly it relieves pain and suffering. Used improperly it makes animals of men." Emergency power bears to government the same general relationship of morphine to man. Used properly in a democratic state it never supplants the constitution and the statutes but is restorative in nature. Used improperly it becomes the very essence of tyranny.[21]

What Rankin observed in 1960 the Framers knew in 1787. Justice Robert Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer* most famously summarized their thinking: "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."[22] Because of this, there is no emergency-powers clause in the Constitution. This is not an oversight; the Constitution anticipates emergencies and a federal response in at least 10 places (depending on how you count).[23] Three do so explicitly.

- The Suspension Clause allows Congress to suspend the writ of habeas corpus during rebellion, invasion, or when public safety requires it and is the only clause in the Constitution that grants any branch of government extraordinary powers in emergencies.[24]

- The Extraordinary Occasions Clause provides that when the country faces "extraordinary Occasions" (what Justice Joseph Story described as foreign attacks, "unexpected calamities," insurrections, and "innumerable other important exigencies, arising out of the intercourse and revolutions among nations"[25]), the President may call special sessions of Congress.[26]

- The Guarantee Clause guarantees that the federal government will protect the states from "Invasion" and, if requested by a state, from "domestic Violence."[27]

Seven other provisions implicitly anticipate emergencies. What is remarkable about them is that they anticipate emergencies of the most serious sort and yet grant no special powers or exceptions from normal governmental procedures.

- The Army Clause requires Congress to reappropriate money for the Army every two years and makes no exception during invasions or rebellions.[28]

- The Militia Clause's exclusive grant of power to Congress to "provide for calling forth the Militia" leaves the President no ability to do so *sua sponte*.[29]

- The Declare War Clause gives to Congress alone the power to declare war with no exception for the President to do so during exigencies.[30]

- The Treaty Clause forbids the President from concluding a peace treaty without the approval of two-thirds of the Senate.[31]

- The Third Amendment forbids the government from quartering troops except "in a manner to be prescribed by law" with no exception during war or other emergencies.[32]

- The Succession Clause anticipates simultaneous vacancies of both the Presidential and Vice-Presidential offices and yet makes no succession plan for such a crisis, leaving Congress instead to enact a plan.[33]

- Article II, Section 2 requires Senate confirmation for all high-level executive positions, no matter how important, and makes recess appointments temporary.[34]

The theme woven throughout those provisions is that even during the severest emergencies—like invasion or rebellion—the federal government is generally supposed to react through its normal procedures with Congress taking the lead.[35]

An early national emergency, the Whiskey Rebellion, shows how the process is supposed to work. The Militia Clause gives Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[36] Under that clause, the Second Congress passed the first of two Militia Acts in 1792, giving the President the power to call the militias when the country faced invasion or whenever a "the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[37] The acts included several limitations in the form of conditions precedent on the President's power to call the militia. For example, in the case of an insurrection, he was required first to attempt a peaceful solution and to obtain from a Supreme Court Justice or a district judge a certification that the problem could not be handled by local law enforcement.[38] The acts also expired after two years.[39] George Washington relied on and complied with the acts to call out the militia against the Whiskey Rebellion in 1794.[40]

The Whiskey Rebellion is a good example of how the Constitution expects the government to respond to emergencies. First, it gives Congress the ability to enact anticipatory legislation. Second, Congress does so, and the legislation delineates the delegated power. Third, the President uses only as much power as is delegated and only for as long as is necessary to solve the crisis. The Constitution does not abandon its main goal of separating power when the country faces emergencies. Quite the opposite, it doubles down on that principle. Even the Suspension Clause preserves it because Congress itself cannot arrest or jail people.[41] It may suspend the writ, but only the President can give the suspension practical consequences.

There is wisdom in this approach because, to refer again to the eminently quotable Justice Jackson, "[w]e may also suspect that [the Framers] suspected that emergency powers would tend to kindle emergencies."[42] Thus, Jackson observed, "emergency powers are consistent with a free government only when their control is lodged elsewhere than in the Executive who exercises them."[43] And that is the constitutional key to good emergency governance: The President should not have the sole power to decide when there is an emergency, what actions he will take to deal with it, and when it will end. Congress must set guiderails at every step.[44]

Two modern uses of emergency powers show how the nation has swerved outside the Constitution's guidelines. First, in response to a mounting humanitarian and national security crisis caused by massive illegal immigration over the southern border, President Trump requested that Congress appropriate funds to construct a network of barriers along parts of the border. For a time, Congress refused, but it eventually appropriated part of the funds he sought.[45] Rather than accept the compromise, Trump resisted. He concluded that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency."[46] Those magic words activated a statute that allows the President to "undertake military construction projects...not otherwise authorized by law that are necessary to support such use of armed forces" and to pay for them with funds appropriated for almost any other military construction.[47]

That delegation is extraordinarily broad. The President alone gets to decide whether there is a national emergency. The President alone gets to decide what response is necessary. The President alone gets to decide how much money will be redirected and from what other projects. And the President alone gets to decide when the emergency ends. Having delegated all that authority to the President, Congress may take it back only by passing a law that the President may veto.[48]

Second, in partial fulfillment of a campaign promise, President Biden announced that the government would cancel up to $10,000 of federal student loan debt (in some cases up to $20,000) for individuals making less than $125,000 per year.[49] To do this, he relied on an emergency-powers statute called the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, which was enacted in the wake of September 11, 2001, to help military personnel.[50] During a declared national emergency, it gives the Secretary of Education the power to "waive or modify any statutory or regulatory provision" governing federal student loans for specific purposes, including to make sure that recipients of those loans who are affected by the emergency "are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[51] Biden relied on this statute coupled with Trump's COVID-19 national emergency declaration to announce his waiver of several hundreds of millions of dollars of student debt, adding between $469 billion and $519 billion to the nation's tab (according to an analysis by the University of Pennsylvania, Wharton School of Business) without congressional appropriation.[52]

Putting aside whether these two delegations of emergency power violate the law, the major questions doctrine, or the non-delegation doctrine,[53]

they contradict the Constitution's emergency framework.[54] The delegations were broad and vague, invokable by the President at his sole discretion, not subject to meaningful congressional checks, and not subject to any expiration date.

Both invocations—the border wall funding and student loan cancellation—were also arguably pretextual. Each was announced long after the President had recognized the existence of an emergency; each sought to deliver a partisan policy proposal; and each was announced after the President had failed to persuade Congress to deliver that proposal. This pretext shows that emergency powers have become commonplace political tools rather than exceptional remedies for extraordinary problems. When Justice Jackson said that the availability of emergency powers might tend to inspire fake emergency declarations, he thought he was offering a warning; he was, in fact, prophesying.

The Problem of Emergency Rule

Just how much "government by emergency" are we willing to accept? The answer now seems to be "a lot." Justice Jackson was more right than he knew. In many ways, the federal government operates in a perpetual state of emergency.[55] There are 41 active declared emergencies under the National Emergencies Act alone.[56] The oldest is 43 years old.[57] Nine others are more than 20 years old.[58] Only nine are from this decade.

That probably surprises the average person who presumes, quite reasonably, that the number of statutes granting the President emergency powers is small. After all, there should be few occasions where the President needs to act so quickly that Congress cannot be involved. Unlike some state legislatures, which sit for limited times each or every other year,[59] Congress is in session 11 months of the year;[60] modern-day transportation enables Members to return to Washington, D.C., quickly if there is an urgent reason to legislate; and in the past, Congress has empowered its Members to cast votes electronically[61] (the House did this during the COVID-19 pandemic) rather than on the floor of the House and Senate.[62] The President also possesses the power to convene Congress if it is in recess during an emergency.[63] Once in session, Congress has also proved that it can act with dispatch. Congress took only 14 days after 9/11 to pass the Authorization for the Use of Military Force so that President George W. Bush could use all necessary military force to respond to al-Qaeda's attacks on the nation.[64] Congress also declared war on Japan only one day after the December 7, 1941, attack on Pearl Harbor.[65] Accordingly, it would seem generally unnecessary for Congress to allow the President to legislate in its absence.

Besides, the ordinary understanding of the term "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[66] The approach of a known or predictable event can hardly be considered an "emergency." Some consequences of Congress's failure to appropriate funds to keep the government up and running might be dire, but no one can reasonably call the end of a fiscal year "unforeseeable." It is even less of an emergency (if that were possible) when the Constitution itself sets the event's expiration date, as it does for funding the army.[67] Accordingly, circumstances that recur with regularity or that can be seen far over the horizon cannot linguistically, logically, or reasonably be considered the type of unforeseeable event that the President must be able to handle before Congress can be convened to consider and resolve it.

Yet they often are. Many laws grant the President authority to act in place of Congress when an "emergency" arises. At one time, there were more than 470 federal statutes that vested emergency lawmaking or decision-making power in the President.[68] A Senate committee reviewing those laws even said that the body of emergency-power legislation that Congress had enacted would have allowed Senators and Representatives to spend the entire two-year congressional term (less one day each year) on vacation. "This vast range of powers, taken together, confer enough authority [for the President] to rule the country without reference to normal constitutional processes."[69]

That is not how the Framers intended the nation to be run. They spent most of their time at the Convention of 1787 deciding what would be the architecture of the new federal government, how the national government could make a "Law" that would restrain private conduct, and what role each branch would play in that process.[70] As far as domestic policy goes, Congress was to be the principal lawmaking body. The President's primary function was to see to the implementation of the laws that Congress passed.[71]

As Justice Neil Gorsuch recently noted, departing from the Framers' design and giving to a few executive-branch agents the power to run the country by emergency declaration "does not tend toward sound government."[72] Their decisions, produced by fear, announced on the fly, and insulated from public debate and criticism, are often bad.[73] Worse, they tend to prevent the American people from participating in their own governance and to weaken civil liberties.[74] The greatest danger yet, however, is that the American people may come to "cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms."[75]

Government by emergency creates another problem: It allows Congress to spend money like a drunken sailor on shore leave. For example, Presidents

and Congress can regularly abuse the emergency process to break budgetary limitations. The Budget Control Act of 2011 (BCA)[76] capped defense and non-defense discretionary spending through fiscal year (FY) 2021 but excluded emergency spending from those ceilings. In the five years before enactment of the BCA, emergency funding averaged $22.5 billion per year. In the seven years since passage of the BCA, that average has increased to $29 billion annually. Congress and Presidents Obama and Trump found a loophole in the BCA.

Rather than funding legitimate emergency requirements, the emergency designation has become a means to circumvent the BCA caps. For example, in FY 2018, Congress appropriated more than $125 billion for emergency purposes. Of that, less than $50 billion went toward immediate response and recovery efforts. The Department of Housing and Urban Development's Community Development Block Grant (CDBG) fund received more than $35 billion (about 10 times its base appropriation). That fund does not address emergencies. Rather, it provides state and local governments with funds to "develop viable urban communities...for low- and moderate-income persons."[77] While its effectiveness is debatable, the CDBG is not equipped for, nor has it ever been intended to serve, an emergency-response role.[78] This is just one of many examples of how emergency designated spending is being misused to increase other areas of the federal budget.

Even the mechanisms that are designed for disaster relief and response, such as the Federal Emergency Management Agency (FEMA) Disaster Relief Fund, are poorly designed. The Stafford Act, as implemented by FEMA regulation, requires states to prove only that the cost of a disaster is more than $1.77 per capita.[79] That means a small-scale event causing as little as $10 million in damages could be declared a federal disaster in 33 states as well as the District of Columbia and Puerto Rico. With such a declaration comes the guarantee that the federal government will pay for at least 75 percent of the costs of recovery. The result is a perverse incentive for states to call out for easily available federal disaster funds rather than being more prepared themselves.[80]

It is doubtless true that urgent and unforeseen problems will arise that demand immediate action by the federal government—9/11 is a classic example—and sometimes only the President can muster the nation's resources with the speed necessary to respond to them immediately and effectively. The President therefore needs some flexibility to respond to unforeseen and unforeseeable events. But he does not need the nearly unlimited flexibility that he has now. Insofar as possible, Congress ought to draw a clear line giving the President only precisely as much power as he needs for no longer than he might need it before Congress can convene.

Policies to Adopt and Policies to Avoid

Congress tried to fix this problem once before. In 1976, it passed the National Emergencies Act (NEA) to try to rein in the President's runaway emergency powers.[81] That law imposed procedural limitations on the President's use of emergency powers conferred by other statutes, but it did not eliminate many grants of substantive emergency power. That was a mistake. As originally passed, the NEA allowed the President to declare a national emergency and thus activate any of the many secondary laws that vested him with emergency power, but it also required him to comply with certain procedural requirements, such as naming the laws that he intended to invoke and publishing his emergency declaration in the *Federal Register*.

Congress sought to preserve an oversight role for itself in two parts of the National Emergencies Act. The act allowed Congress to end an emergency declaration by concurrent resolution (a legislative veto) and required each house of Congress to meet and vote on those concurrent resolutions six months after the emergency declaration. Only the first one had any teeth, but in *INS v. Chadha*,[82] the Supreme Court held that legislative vetoes were unconstitutional, filing those teeth to nubs. In response, Congress amended the NEA to replace concurrent resolutions with joint resolutions that the President could veto. This severely constrained Congress's ability to procedurally restrain executive emergency powers.

As for the second oversight provision—forcing Congress to vote on the President's declarations—Congress has avoided that option like the plague. Why? Oversight takes a great deal of prehearing work (at least by staff); it is not "sexy" (unless you can identify corruption or something scandalous done by a President of the opposite party); and it doesn't "bring home the bacon" to constituents. Congress ignored its oversight role until Trump's border wall emergency.[83] It therefore is unsurprising that Congress has not exercised that authority since it became law in 1976.

Thus, Congress today finds itself in almost the same position it was in before the NEA's passage. Presidents continue to have vast emergency powers that allow them to circumvent Congress unless Congress has a veto-proof majority. So where do we go from here?

Policies to Adopt. The Constitution points the way. Recall that even during invasions, occasions of domestic violence, and other "extraordinary Occasions,"[84] the Constitution expects that Congress—not the President—will lead the response even if it is adjourned.[85] The Constitution anticipates a presidential response in only one case—domestic violence in a state—and then *only if* Congress "cannot be convened."[86] This suggests that Congress

should jealously guard the power to respond to emergencies. This is not to say that it should give the President no such powers, but that Congress should give them to him only if it cannot react with the necessary speed. This will necessarily be a high bar because today's Congress, which benefits from air travel, mass communication, and, if necessary, remote voting, can act even faster than the Congresses of the past—and those Congresses still managed at times to react speedily.[87] Thus, Congress's first step should be to reexamine all the laws that give the President emergency powers and to eliminate all but those that Congress believes require a speedier response than it can deliver. In all other situations, Congress should keep the power to respond to an emergency for itself.

If Congress does give the President emergency power, it should set a time limit on it so that the power does not outlast the emergency that spawned it. How long should the time limit be? It might vary depending on the emergency or the powers attendant to it, but in no case should emergency powers last longer than two years. The Army Clause is the reason.[88] That clause requires Congress to reapportion money for the Army every two years. It includes no exceptions, even if a foreign army has invaded. If the solution (an army) to a truly existential crisis (invasion) expires after two years, then no other emergency power needs to last longer.

A few Members of Congress, including Senator Mike Lee (R–UT) and Representative Chip Roy (R–TX), have introduced legislation that helps. For example, the Assuring that Robust, Thorough, and Informed Congressional Leadership Is Exercised Over National Emergencies (ARTICLE ONE) Act would amend the NEA to terminate all emergency declarations and attendant emergency powers automatically after 30 days unless Congress passes a joint resolution approving them.[89] It would also set a one-year deadline on emergencies unless, again, Congress renews them. One shortcoming is that it leaves in place all of the extant emergency powers statutes. Another is that it would permit Congress to extend an emergency indefinitely. Congress has already given the President a blank check and may yet be tempted to give it to him in perpetuity. This temptation can be avoided by borrowing a provision from Senator Chris Murphy's (D–CT) National Security Powers Act,[90] which states that "under no circumstances may a national emergency declared by the President under section 201(a) continue on or after the date that is five years after the date on which the national emergency was first declared."[91] If Congress added this line to the ARTICLE ONE Act, changed "five years" to "two years," and then repealed all of the unnecessary emergency powers laws, it would be well on its way to restoring the Constitution's approach to emergencies.[92]

Policies to Avoid. Having established what we should do, it is worth noting what we should *not* do. There are two proposals that we do not support. The Supreme Court need not, first, overrule *INS v. Chadha*. Although that decision precludes Congress from imposing meaningful procedural restrictions on the President's emergency powers, that is not a serious problem. Procedural restrictions are second-best solutions to this issue; substantive limitations on presidential power are better. There are three reasons for this.

- Procedural limitations on the use of delegated emergency power do not address the underlying constitutional directive that Congress—not the President—should retain primary responsibility for reacting to emergencies.

- Because of the pendulum dynamic where the President's party likes his emergency declarations and the party out of power does not, Congress is likely to exercise procedural oversight only when it is controlled by the opposite party. That only reinforces the partisan nature and perception of emergency declarations.

- Congress is very rarely successful at binding future Congresses to carry out oversight functions when emergencies are concerned.[93]

Therefore, overruling *Chadha* would not help to rein in the use of emergency powers.

It would be as unhelpful for Congress to create a statutory definition of "emergency." Some commentators have suggested this solution so that the courts can decide whether the President's declaration is true or pretextual.[94] This cure, however, is worse than the disease. For one thing, the courts are unlikely to play the role it assigns them. Courts are reluctant to second-guess a President's determination that there is an emergency; they are not experts in foreign policy, terrorist threats, or infectious diseases[95] and are not designed to make quick or well-thought-out decisions based on scant or imperfect information. Courts are also aware of the precedential effects of their decisions and thus know that if they invalidate an apparently fake emergency today, they may limit a future President's flexibility to address an apparently real emergency tomorrow. They are aware, too, that partisans—who vacillate from hating emergency power to loving it depending on whether the President is a member of their political party—will try to exploit precedent for political gain. For these reasons, courts will likely be unwilling to enforce a statutory definition of "emergency."

The second problem is definitional: Any definition of emergency will use broad flexible terms so that it does not limit the President's power to adapt to unforeseen, legitimate crises. No one foresaw Russia's effort to arm Cuba with missiles carrying nuclear warheads, and no one wants to bind the President's hands in dealing with a similar emergency today. Therefore, even if the courts would enforce the definition, they would still likely defer to the President's interpretation.[96] For example, if Congress used Merriam-Webster's definitions—"an unforeseen combination of circumstances or the resulting state that calls for immediate action" or "an urgent need for assistance or relief"[97]—courts would have to fix concrete meaning to vague language with monumental consequences in the face of a potential crisis. They will likely refuse to do so, and for good reason.

The final problem with a statutory definition of emergency is that it does not cure the fundamental problem that the President should not have the power both to invoke and to wield emergency powers.[98] Justice Jackson was right: This concentration of power is an unwise thing. The Constitution foresaw this danger; we should restore its defenses against it. If we do not, if we permit the government to rule by indefinite emergency edict, we risk leaving ourselves with "a shell of democracy and civil liberties just as hollow."[99]

Conclusion

Emergency powers, like morphine, can be powerful tools for good. Deployed carefully in response to a crisis, they can reduce harm and help to restore the damage a crisis causes. There is a risk, however, of addiction, which can lead to abuse. Just as abuse of morphine "makes animals of men," so abuse of emergency powers makes tyrants of governments. Successive Presidents are deep in the throes of this addiction, and successive Congresses have refused to cut off their supply.

Presidents of both parties have abused emergency powers not to preserve or restore the country after a crisis, but to enjoy the high that comes from wielding extraordinary power in service of a political agenda otherwise beyond their reach. It is time for them to get clean. Some of the Presidents' erstwhile enablers in Congress agree. They should follow the constitutional guidelines laid out here to put the cork back in the bottle so that emergency powers once again have only a salutary effect on the body politic.

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Endnotes

1. Memo. from U.D. Dep't of Educ. Gen'l Counsel Lisa Brown to Sec'y of Educ. Miguel A. Cardona, Aug. 23, 2022 (hereinafter "Brown Memorandum").
2. 142 S. Ct. 2288 (2022).
3. Tarini Parti, *Biden Is Pressed to Declare Emergencies After Climate, Abortion Setbacks*, Wall St. J., July 20, 2022, https://www.wsj.com/articles/biden-faces-pressure-to-declare-emergencies-after-climate-abortion-setbacks-11658318400.
4. *See*, *e.g.*, Special Committee on the Termination of the National Emergency, Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency, S. Rep. No. 93-149, 93d Cong. (1973) (hereinafter Special Committee Report) (discussing presidential emergency declarations); Jess Bravin, *Can Trump Build a Wall Under a National Emergency?*, Wall St. J., Jan. 10, 2019, https://www.wsj.com/articles/when-is-it-legal-to-declare-a-national-emergency-11546943401?mod=article_inline (last visited Feb. 23, 2019); Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, Lawfare, Dec. 8, 2017, https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency (last visited Aug. 19, 2020).
5. Elizabeth Goitein, *Statement of Elizabeth Goitein*, *Testimony Before the House Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties* xx n.70 (May 17, 2022).
6. Justice Neil Gorsuch recently offered the following compelling description of what that the Covid-19 emergency order entailed:

   > Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent. Federal executive officials entered the act too. Not just with emergency immigration decrees. They deployed a public-health agency to regulate landlord–tenant relations nationwide. They used a workplace-safety agency to issue a vaccination mandate for most working Americans. They threatened to fire noncompliant employees, and warned that service members who refused to vaccinate might face dishonorable discharge and confinement. Along the way, it seems federal officials may have pressured social-media companies to suppress information about pandemic policies with which they disagreed.

   Arizona v. Mayorkas, 143 S. Ct. 1312, 1314–15 (2023) (Statement of Gorsuch, J.) (footnotes omitted).
7. Again, Justice Gorsuch was spot on:

   > Doubtless, many lessons can be learned from this chapter in our history, and hopefully serious efforts will be made to study it. One lesson might be this: Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat. A leader or an expert who claims he can fix everything, if only we do exactly as he says, can prove an irresistible force. We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—the right to worship freely, to debate public policy without censorship, to gather with friends and family, or simply to leave our homes. We may even cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms. Of course, this is no new story. Even the ancients warned that democracies can degenerate toward autocracy in the face of fear. But maybe we have learned another lesson too. The concentration of power in the hands of so few may be efficient and sometimes popular. But it does not tend toward sound government. However wise one person or his advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process. Decisions produced by those who indulge no criticism are rarely as good as those produced after robust and uncensored debate. Decisions announced on the fly are rarely as wise as those that come after careful deliberation. Decisions made by a few often yield unintended consequences that may be avoided when more are consulted. Autocracies have always suffered these defects. Maybe, hopefully, we have relearned these lessons too.

   Id. at 1315–16 (footnotes omitted).
8. *See*, *e.g.*, Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2011); Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts (2007); Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (Revised ed., 2002), *with, e.g.*, Bruce Ackerman, The Decline and Fall of the American Republic (2013); Bruce Ackerman, *The Emergency Constitution*, 113 Yale L. J. 1029 (2003); Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic* (U. of Chicago, Pu. L. Working Paper No. 747, 2020); Kim Lane Scheppele, *Small Emergencies*, 40 Ga. L. Rev. 835 (2006); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1392 (1989); Patrick A. Thronson, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. Mich. J.L. Reform 737 (2013); Avi Weiss, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 Colum. L. Rev. 1853 (2021).

9. Presidents, the Supreme Court of the United States, and commentators have often spoken to that issue. *See, e.g.,* Seth Barrett Tilman, Ex parte *Merryman: Myth, History, and Scholarship*, 224 Mil. L. Rev. 481 (2016) (refuting the pervasive myth that President Lincoln refused to comply with the writ of habeas corpus order issued in *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861)); *infra* note 20; *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace.... No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism...."); Cunningham v. Neagle (*In re* Neagle), 135 U.S. 1 (1890) (relying on the Take Care Clause to uphold an executive order authorizing a U.S. marshal to protect Justice Stephen Field in the absence of statutory authority); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting the claim that the President has implied power to take possession of steel mills during a national emergency); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2021) ("It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends."); Michael W. McConnell, The President Who Would Not Be King: Executive Power Under the Constitution 29 (Princeton University Press 2020) ("But our Constitution makes no provision for extraconstitutional powers in time of emergency. The pros and cons of those arguments lie in the field of political theory, not constitutional interpretation."); J. Malcolm Smith & Cornelius P. Cotter, Powers of the President During Crises (1972); *National Emergencies and the President's Inherent Powers*, 2 Stan. L. Rev. 303 (1950); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. Int'l L. & Foreign Aff. 75 (2007); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 Const. Comment. 155 (2002); Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. Cal. L. Rev. 863 (1983); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004); Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 184 (2004); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996).
10. National Emergencies Act, Pub. L. No. 94-412, § 201(a), 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1621–1622 (2018)).
11. *See*, *e.g.*, Assuring that Robust, Thorough, and Informed Congressional Leadership Is Exercised over National Emergencies, S. 241, 117th Cong. (2021); National Security Powers Act, S. 2391, 117th Cong. (2021); Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021); Restraint of Executive in Governing Nation Act, S. 4279, 116th Cong. (2020).
12. Brett Samuels, *Biden Signs Bill Ending National COVID-19 Emergency*, The Hill, April 10, 2023, https://thehill.com/homenews/administration/3943119-biden-signs-bill-ending-national-covid-19-emergency/.
13. Albeit to only a tiny number of people. *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095 (2009).
14. *See Ex parte* Siebold, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").
15. A list of many of the statutory provisions that create such powers can be found in *A Guide to Emergency Powers and Their Use*, Brennan Center for Justice, Dec. 5, 2018 (updated Mar. 4, 2022), https://www.brennancenter.org/media/4976/download (hereinafter Brennan Center Report).
16. *See*, *e.g.*, Paul J. Larkin, *The Sturm and Drang of the CDC's Home Eviction Moratorium*, 2021 Harv. J.L. & Pub. Pol'y 18 (2012); Paul J. Larkin, *Constitutional Challenges to the OSHA Covid-19 Vaccination Mandate*, 20 Geo. J.L. & Pub. Pol'y 367 (2022); Paul J. Larkin, *The Choice Between Persuading and Coercing Americans to Get Vaccinated Against COVID-19*, 20 Geo. J.L. & Pub. Pol'y 351 (2022); Ginsburg & Versteeg, *supra* note 8.
17. The Centers for Disease Control and Prevention claimed that authority for its eviction moratorium came from the Public Health Service Act, which requires no emergency declaration. *See* 42 U.S.C. § 264(a). The Occupational Safety and Health Administration claimed that authority for its vaccine mandate came from the Occupational Safety and Health Act, which similarly requires no emergency declaration. *See* 29 U.S.C. § 651 *et seq*.
18. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (holding that challengers of the vaccine mandate were likely to prevail on the merits); Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) (same with respect to the CDC eviction moratorium).
19. *See* Special Committee Report, *supra* note 4 (counting 470 such provisions in 1973); Brennan Center Report, *supra* note 15 (counting 136 such provisions in 2022).
20. Smith & Cotter, *supra* note 9 at v.
21. *Id*.
22. 343 U.S. at 650 (Jackson, J., concurring).
23. One could argue that the number is higher or lower depending on how Article I, Section 8 is parsed, but we are not trying to assemble the longest or shortest possible list. We aim only to show that the Constitution anticipates emergencies and federal responses.
24. U.S. Const. art. 1, § 9, cl. 2. There is some debate about whether the clause empowers only Congress or also the President. The overwhelming consensus is that the power belongs only to Congress, although this is complicated because President Abraham Lincoln claimed the power for himself during the Civil War. Congress subsequently ratified his decision and allowed him broad discretion to decide when to suspend the writ. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 256–64 (2014).
25. 3 Joseph Story, Commentaries on the Constitution of the United States 575–76.
26. U.S. Const., art. II, § 3.
27. U.S. Const., art. IV, § 4.

28. U.S. Const., art. I, § 8, cl. 12. More generally, the remainder of that section gives Congress the power to establish and regulate the various branches of the armed forces.
29. U.S. Const., art. I, § 8, cl. 15.
30. U.S. Const., art. I, § 8, cl. 11.
31. U.S. Const., art. II, § 2, cl. 2.
32. U.S. Const., amend. III.
33. U.S. Const., art. II, § 1, cl. 6.
34. U.S. Const., art. II, § 2.
35. *See generally* GianCarlo Canaparo, *Examining Potential Reforms of Emergency Powers, Testimony Before the House Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties* (May 17, 2022) (discussing this theme and making recommendations for reform bills).
36. U.S. Const., art. I, § 8, cl. 15.
37. Militia Act of 1792, ch. 28, 1 Stat. 264, art. I, § 2. *See also* Militia Act of 1792, ch. 28, 1 Stat. 271 (specifying composition and organization of the militias pursuant to Article I, § 8, cl. 16).
38. Militia Act of 1792, ch. 28, 1 Stat. 264, §§ 2–3. It is worth noting that in 1792, American law enforcement was in its infancy. Congress created the U.S. Marshals Service in 1789, there were county sheriffs in the states, and some cities hired night watchmen, but modern-day police departments did not exist until the middle of the 19th century. Philadelphia Police Dep't, Department History, May 17, 2008, https://web.archive.org/web/20080517082302/http://www.ppdonline.org/hq_history.php. That is significant because, despite the obvious need to enforce the law, Congress conditioned the President's exercise of authority under the Militia Act of 1792 upon approval of a federal judge.
39. Congress eliminated that expiration date in the Militia Act of 1795. Militia Act of 1795, ch. 36, 1 Stat. 424.
40. Vladeck, *supra* note 9 at 160–61.
41. *See generally* Barrett, *supra* note 24 (arguing that broad delegations by Congress to the President to decide the predicates to suspension violate the Suspension Clause). A limited exception to the rule that Congress cannot arrest or jail people is that both chambers have a Sergeant at Arms who ensures the security of representatives, enforces chamber rules, and may arrest or jail people, including Members, to fulfill those duties. United States Senate, *About the Sergeant at Arms: Historical Overview*, https://www.senate.gov/about/officers-staff/sergeant-at-arms/overview.htm (last visited May 8, 2023); United States House of Representatives, *People: Sergeants at Arms*, https://history.house.gov/People/Office/Sergeants-at-Arms/ (last visited May 8, 2023). The Architect of the Capitol recounts the story of a man named Henry Wikof who was jailed in the Capitol after the House adopted a resolution finding him in contempt. Architect of the Capitol, *"Prisons" in the U.S. Capitol*, https://www.aoc.gov/explore-capitol-campus/capitol-hill-facts/prisons (last visited May 8, 2023).
42. *Youngstown Sheet & Tube*, 343 U.S. at 650 (Jackson, J., concurring).
43. *Id*. at 652 (Jackson, J., concurring).
44. Whether congressionally imposed guiderails are judicially enforceable and to what extent, if any, they should be are complicated questions outside the scope of this paper. We note, however, that when Congress gives the President the power to declare an emergency, the Supreme Court is unwilling to second-guess his declaration. For that reason, we argue that Congress should give the President that power sparingly. *See* Martin v. Mott, 25 U.S. 19 (1827) (Story, J.) ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object.").
45. Rebecca Ballhaus et al., *Trump to Declare National Emergency After Signing Spending Bill*, Wall St. J., Feb. 14, 2019, https://www.wsj.com/articles/lawmakers-set-to-vote-on-spending-package-to-keep-government-open-11550157589?mod=searchresults&page=4&pos=15 (last visited Feb. 23, 2019).
46. Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, The White House (Feb. 15, 2019) https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/; Video, *Trump Declares National Emergency over Border Wall*, Wall St. J., Feb. 14, 2019, https://www.wsj.com/video/trump-declares-national-emergency-over-border-wall/02B35CEA-1368-478C-8505-114CB67AAB4A.html?mod=searchresults&page=4&pos=4 (last visited Feb. 23, 2019).
47. 10 U.S.C. § 2808 (2018).
48. *See* INS v. Chadha, 462 U.S. 919 (1983) (holding unconstitutional a legislative veto).
49. Brown Memorandum, *supra* note 1; *see also* Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt,"* Forbes, Oct. 7, 2020, https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/?sh=6691e72158a7.

50. 20 U.S.C. § 1098aa (West 2023) (describing the purpose of the act as "to support the members of the United States military and to provide assistance with their transition into and out of active duty and active service."); Joseph Simonson, *Biden Says This Law for the Troops Gives Him Authority to Cancel Harvard Grads' Debt*, Wash. Free Beacon, Aug. 24, 2022, https://freebeacon.com/latest-news/biden-says-this-law-for-the-troops-gives-him-authority-to-cancel-harvard-grads-debt/ (collecting statements from politicians indicating that they believed the HEROES Act would apply to military service personnel).
51. 20 U.S.C. § 1098bb(a)(1)–(2).
52. Junlei Chen & Kent Smetters, *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, Penn. Wharton Budget Model, Aug. 26, 2022, https://budgetmodel.wharton.upenn.edu/s/Forgiving-Student-Loans_Budgetary-Costs-and-Distributional-Impact.pdf. The $469 billion–$519 billion range includes only the debt forgiveness. Add to that Biden's continuation of loan forbearance and his changes in the income-based repayment program, and the Penn-Wharton model estimates costs exceeding $1 trillion. *Id.*
53. In truth, they do. For an in-depth discussion of the history and legality of this proposal, see Jack Fitzhenry & GianCarlo Canaparo, *Student Loans, Major Questions, and the Dean Wormer Theory of Administrative Law*, 27 Tex. Rev. of L & Pol. 371 (2023).
54. *See* Canaparo, *supra* note 35 at 3–4 ("[I]f the president gets extra powers when there is an emergency, one might reasonably worry that the president will go find some useful emergencies.").
55. Scheppele, *supra* note 8 at 839 ("America has not in general had a toggle-switch approach to crises, where normal constitutionalism continues until a switch is flipped to stop it, and then the emergency continues until the switch is flipped back. Instead, the United States has tended to normalize its emergencies.").
56. *Declared National Emergencies Under the National Emergencies Act*, Brennan Center for Justice Resource, May 17, 2019 (updated Aug. 4, 2022), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act. The Brennan Center's tracker shows 42, but Congress terminated the COVID-19 emergency declaration after its most recent update. *See* Samuels, *supra* note 12.
57. *Id.*
58. *Id.*
59. *See* Va. Const. art. IV, § 6 ("Legislative sessions) ("The General Assembly shall meet once each year on the second Wednesday in January. Except, as herein provided for reconvened sessions, no regular session of the General Assembly convened in an even-numbered year shall continue longer than sixty days; no regular session of the General Assembly convened in an odd-numbered year shall continue longer than thirty days; but with the concurrence of two-thirds of the members elected to each house, any regular session may be extended for a period not exceeding thirty days.").
60. *See* U.S. Const. art. I, § 4 cl. 2 (The Congress shall assemble at least once in every year[.]").
61. There have been challenges to the constitutionality of congressional proxy voting. One case is ongoing, but another was rejected by the lower courts, and the Supreme Court refused to hear the challenge. *See* Michael Macagnone, *Texas Challenges Federal Spending Law Over Proxy Voting Rule*, Roll Call, Feb. 16, 2023, https://rollcall.com/2023/02/16/texas-challenges-federal-spending-law-over-proxy-voting-rule/; Todd Ruger, *Supreme Court Won't Review House COVID-19 Proxy Voting*, Roll Call, Jan. 24, 2022, https://rollcall.com/2022/01/24/supreme-court-wont-review-house-covid-19-proxy-voting/. We do not weigh in on the constitutionality of that issue here, but for an overview of the arguments *see* Thomas Jipping & John Malcolm, *In History of Congress, House Democrats' New Proxy Voting Is Radical*, The Daily Signal, May 28, 2020, https://www.dailysignal.com/2020/05/28/in-the-history-of-the-us-congress-house-democrats-new-proxy-voting-is-radical/.
62. *See* U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings[.]").
63. *See* U.S. Const. art. II, § 3 ("[The President] may, on extraordinary Occasions, convene both Houses, or either of them[.]").
64. Authorization for the Use of Military Force (S. J. Res. 23, 107th Cong. (2001)), Pub. L. No. 107-40, 115 Stat. 224 (2001).
65. S. J. Res. 116, Pub. L. No. 328, ch. 561 (1941).
66. Merriam-Webster Dictionary (definition of "emergency"), https://www.merriam-webster.com/dictionary/emergency?src=search-dict-hed (last visited Feb. 23, 2019); *see also*, *e.g.*, Cambridge Dictionary ("a dangerous or serious situation, such as an accident, that happens suddenly or unexpectedly and needs immediate action"), https://dictionary.cambridge.org/us/dictionary/english/emergency; Dictionary.Com ("a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action"; "a state, especially of need for help or relief, created by some unexpected event:"), https://www.dictionary.com/browse/emergency; Oxford Living Dictionaries ("serious, unexpected, and often dangerous situation requiring immediate action"), https://en.oxforddictionaries.com/definition/emergency.
67. *See* U.S. Const. art. I, § 8, cl. 12 ("[The Congress shall have Power To] raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[.]").
68. S. Rep. No. 93-149, *supra* note 4, at III.
69. *Id.*
70. *See*, *e.g.*, Jack Rakove, Revolutionaries: A New History of the Invention of America (2010).
71. *See* U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed, and shall Commission all Officers of the United States.").
72. *Arizona v. Mayorkas*, 143 S. Ct. 1316 (Statement of Gorsuch, J.).

73. *Id*.
74. *Id*. at *8.
75. *See id*. at *7.
76. Pub. L. No. 112-25, 125 Stat. 240 (2011) (codified as amended at 2 U.S.C. ch. 20 (2018)).
77. U.S. Dept. of Housing and Urban Development, *Community Development Block Grant Program*, https://www.hud.gov/program_offices/comm_planning/cdbg (last visited May 5, 2023).
78. *See* Justin Bogie, *Congress Must Stop the Abuse of Disaster and Emergency Spending*, The Heritage Found., *Backgrounder* No. 3380 (Feb. 4, 2019), https://www.heritage.org/sites/default/files/2019-02/BG3380.pdf.
79. FEMA, *Per Capita Impact Indicator and Project Thresholds*, https://www.fema.gov/assistance/public/tools-resources/per-capita-impact-indicator, last accessed, Mar. 20, 2023.
80. Justin Bogie, supra note 78 (explaining how emergency declarations allow the President to undermine the Budget Control Act by funneling vast sums of money through the act's emergency loophole).
81. National Emergencies Act, Pub. L. No. 94-412, § 201(a), 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1621, 1622 (2018)).
82. INS v. Chadha, 462 U.S. 919 (1983).
83. Alex Leary & Kristina Peterson, *Trump Vetoes Congressional Disapproval of Emergency Declaration*, Wall St. J., Mar. 15, 2019, https://www.wsj.com/articles/trump-to-discuss-border-policy-as-he-prepares-first-veto-11552672395.
84. U.S. Const., art. II, § 3.
85. *Id*.
86. U.S. Const., art. IV, §4.
87. *See* text accompanying footnotes 58 & 59.
88. U.S. Const., art. II, § 8, cl. 12 ("The Congress shall have Power…To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[.]").
89. S. 241, 117th Cong. (2021). It includes a limited exception: "If Congress is physically unable to convene as a result of an armed attack upon the United States or another national emergency, the 30-day periods…shall begin on the first day Congress convenes for the first time after the attack or other emergency." *Id*. at § 201(c)(3).
90. S. 2391, 117th Cong. (2021).
91. *Id*. at § 202(b).
92. Of course, no Congress can bind itself or its successors by statute to a law enacted today. *See* Dorsey v. United States, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. See, *e.g., Fletcher v. Peck*, 6 Cranch 87, 135 (1810); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932). And Congress remains free to express any such intention either expressly or by implication as it chooses."). That is a generic problem for any statute and cannot be solved except by a constitutional revision, but the perfect should not be the enemy of the good.
93. Canaparo, *supra* note 35 at 5 (citing Martha Minow, *What Is the Greatest Evil?*, 118 Harv. L. Rev. 2134, 2166–67 (2005), *and* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 Fordham L. Rev. 631, 648 (2006) ("Where emergencies provoke panic, unleash socially harmful motivations, and encourage legislators to defer to executive power, earlier framework legislation is most likely to be circumvented or repealed outright.")).
94. *See* Bravin, *supra* note 4 (quoting sources).
95. *See*, *e.g.*, Martin, 25 U.S. 19 (Story, J.); United States v. Amirnazmi, 645 F.3d 564, 579 (3d Cir. 2011) ("Mindful of the heightened deference accorded the Executive in this field, we decline to interpret the legislative grant of [emergency] authority parsimoniously."); United States v. Spawr Optical Rsch., Inc., 685 F.2d 1076, 1080 (9th Cir. 1982) ("Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed 'the essentially political questions surrounding the declaration or continuance of a national emergency'….") (quoting United States v. Yoshida Int'l, Inc., 526 F.2d 560, 573 (C.C.P.A. 1975)); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 31 (D.D.C. 2020) ("[Plaintiff's] claim raises one obvious question: was the President correct that a national emergency exists at the southern border? The trouble is that this is a quintessential political question.").
96. In the context of foreign policy and military matters, courts are loath to interfere or to permit Congress to interfere with the President's authority. *See* Zivotofsky v. Kerry, 576 U.S. 1 (2025) (refusing to allow Congress to constrain the President's power to recognize foreign nations); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936) (permitting Congress to vest the President with "broad discretion" over a matter of foreign policy).
97. Merriam-Webster Dictionary (definition of "emergency"), https://www.merriam-webster.com/dictionary/emergency (last visited May 5, 2022).
98. *Youngstown Sheet & Tube*, 343 U.S. at 652 (Jackson, J., concurring) ("[E]mergency powers are consistent with a free government only when their control is lodged elsewhere than in the Executive who exercises them.").
99. *Arizona v. Mayorkas*, 143 S. Ct. at 1316 (Statement of Gorsuch, J.).