

Presidential Emergency Powers: In Search of a Definition of ‘Emergency’

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Executive emergency power raises some of the most difficult and interesting problems in the field of separation of powers. At issue is the inherent tension between a claim of necessity for the good of the country, and the perennial temptation of the executive to corrupt the delicate system of checks of balances to the detriment of the people’s liberty. “The executive branch – unitary, always in session, possessing confidential sources of information – is the best equipped to act with the necessary decisiveness, dispatch, and knowledge. On the other hand, granting plenary executive power to act in emergencies may pose great dangers to the rule of law and to our system of limited, constitutional government.”¹

Emergencies, which are generally considered to be exceptional circumstances, have become so commonplace as to be ordinary.² In the early 1970s, when Congress was seeking to reclaim control over the executive in the context of Watergate and the Vietnam War, it shocked to find that four emergencies remained in effect at that time. To better contain executive power, it passed, among other measures, the National Emergencies Act [NEA] on September 14, 1976.³ Yet by 2019 there were more than 30 emergencies in effect, all in compliance with the procedures delineated by the NEA.⁴

Fears about executive overreach and abuse of emergency powers are pressing in our time. In 2019, President Donald Trump shocked many when he declared a state of emergency under the NEA for the purpose of securing funding for his border wall when he could not get the funds he was seeking from Congress.⁵ Most agree that there was no emergency that would justify such a declaration. Yet he was able to take this action of questionable legality, at least in part, because there is no definition of an emergency within the NEA to guide his discretion. Then, with the very real emergency posed by the pandemic in 2020, many are dismayed that more forceful executive power is not being exercised. Instead, discretion to deal with a problem of global proportions is left to the states, with an ensuing

¹ "The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power." *Harvard Law Review* 96, no. 5 (1983): 1102-1120. Accessed August 4, 2020. doi:10.2307/1341001.

² For a brief history of how emergencies have become institutionalized features of American law, see: Kim Lane Scheppele, "Small Emergencies," *Georgia Law Review* 40, no. 3 (Spring 2006): 835-862.

³ Public Law 94-412, 90 Stat 1255 (1976) codified at 50 U.S.C. §§ 1601-51. It also passed the better-known War Powers Resolution, Pub. L. no 93-148, 87 Stat. 555 (1973) codified at 50 U.S.C. §§ 1541-1548 (which will NOT be discussed in this paper) as well as the International Emergency Economic Powers Act [IEEPA] Pub. L. No. 95-223. 91 Stat. 1625 (1977) codified at 50 U.S.C. §§ 1701-1706 (which will be discussed).

⁴ Congressional Research Service, *National Emergency Powers*, Rep. 98-505, 12-14. Updated August 5, 2019. Accessible at <https://crsreports.congress.gov/product/pdf/RL/98-505>. See also Brennan Center for Justice, "Declared National Emergencies under the National Emergencies Act," (May 17, 2019). <https://www.brennancenter.org/analysis/declared-national-emergencies-under-national-emergencies-act>. (Accessed August 12, 2019).

⁵ "Executive Office of The President: Presidential Documents: Declaring a National Emergency Concerning the Southern Border of the United States: [FR DOC # 2019-03011]," 84, no. Wednesday, February 20, 2019 (2019): 4949-4950.

disarray of patchwork responses.⁶ As another high-stakes presidential election approaches in 2020, distrust in how the President invokes emergency power has become so great that House Majority Whip Jim Clyburn (D-SC) has voiced his concern that President Trump might try to invoke emergency powers to stay in office should he lose the 3 November election.⁷

These recent developments follow widespread concern about the measures taken by Bush administration in conducting the “War on Terror.” Questions such as whether and when torture might be used to extract information from alleged terrorists,⁸ the seemingly endless detention of “enemy combatants” in Guantanamo,⁹ as well as warrantless surveillance by the National Security Agency,¹⁰ gave rise to a rich body of scholarship by leading jurists and constitutional scholars debating the limits of executive powers in a time of crisis. With divisive populist politics, emerging nationalist movements, a pandemic, and ongoing acts of terror, the question of when and how executive power can legally be used when an emergency is declared by a President will remain of pressing relevance for the foreseeable future.

I. Should One Try to Define an ‘Emergency’?

There is no generally accepted definition of what constitutes an emergency within American jurisprudence. There is also no definition of the term “emergency” in the National Emergencies Act. A definition of the term “emergency” was proposed in earlier drafts of the NEA but was omitted in the bill that ultimately became law. Instead, Congress imposed toothless procedural checks upon the executive in that legislation.¹¹ Both Congress and Courts have, to date, favored leaving this matter to the executive, presumably out of fear that they might unduly tie the hands of the executive in an emergency, should they provide too narrow a definition.

Outside of the NEA, there is some modicum of guidance about the circumstances that exist for emergency powers to be exercised. The three most routinely declared and foreseeable emergencies relate to: 1) natural disasters; 2) pandemics or public health crises; and 3) foreign affairs. Natural disasters are primarily by the governed by the Stafford Act.¹² Public health crises typically invoke the Public Health

⁶ The President declared a state of emergency under the Stafford Act to allow for more federal emergency funding to be provided to the states. Yet this intervention is on par with what would be done in the case of an isolated national disaster. Administration of Donald J. Trump, 2020 Letter to Federal Agencies on an Emergency Determination for the Coronavirus Disease 2019 (COVID-19) Pandemic Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act *March 13, 2020*

⁷ Jim Clyburn, interview by Dana Bash, *CNN State of the Union*, August 2, 2020. Accessible on: <https://www.cnn.com/videos/politics/2020/08/02/sotu-clyburn-peacefully-transfer-power.cnn>

⁸ Sanford Levinson, ed., *Torture: A Collection* (Oxford: Oxford University Press, 2004); Tom Head, ed., *Is Torture Ever Justified?* (Detroit: Thomson Gale, 2005), Karen Greenberg, ed., *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006)

⁹ *Boumediene v. Bush*, 553 U.S. 723 (2008); Richard H. Fallon Jr., “The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science” *Columbia Law Review* Vol. 110, No. 2, Symposium in Honor of Henry Paul Monaghan (MARCH 2010), 352-398.

¹⁰ Louis Fisher, *The Constitution and 9/11: Recurring Threats to America’s Freedoms* (Lawrence, Kansas: University Press of Kansas, 2008), 285-297; Richard A. Posner, “Privacy, Surveillance, and Law” *The University of Chicago Law Review* Vol. 75: 1 (Winter, 2008): 245-260.

¹¹ Note, “The National Emergency Dilemma: Balancing the Executive’s Crisis Power with the Need for Accountability” 52 S. Cal. L. Rev. 1453, 1461-72 (1979).

¹² *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, PL 100-707 (November 23, 1988), which amended the Disaster Relief Act of 1974, PL 93-288, codified at U.S. Code 42, §§ 5121 et. seq.

Service Act (although the Stafford Act has also been invoked in cases of public health crises).¹³ Foreign affairs, with delegated presidential powers to investigate, regulate or prohibit commercial transactions and property rights related to foreign entities, are governed principally by the International Emergency Economic Powers Act [IEEPA].¹⁴ In each of these pieces of legislation, the conditions constituting a kind of emergency, for which concomitant extraordinary powers may be exercised by the executive branch, are broadly stipulated.

The IEEPA is notable in many respects, not least of which is that more national emergencies are declared under its auspices, and in conjunction with the NEA, than is the case with any other piece of legislation. For its delegated powers to be tapped, the President must find: i) an unusual or extraordinary threat; 2) the source of the threat, in whole or in substantial part, is outside of the United States; and 3) the threat affects the national security, foreign policy or economy of the United States.¹⁵ It also requires that the President declare a national emergency through the NEA and only use the IEEPA powers to deal with the specific emergency at issue.¹⁶ When these conditions exist, the IEEPA delegates to the executive broad powers to regulate or restrict economic transactions or property rights of foreign countries or foreign nationals.¹⁷ It also stipulates, for further clarity, what powers are *not* delegated, specifying, for instance, that the Act does not delegate authority to interfere with personal communications of no commercial value, or with personal items carried during travel.¹⁸ Furthermore, the IEEPA also requires the President to provide reasons why the President believes the conditions defined in the Act exist, to identify the delegated powers therein to exercised, and to explain why these actions are necessary.¹⁹ Moreover, the President is to report to Congress at least once every six months.²⁰

Compared to utter lack of guidance in the NEA as to what constitutes an emergency, the IEEPA has much to recommend it. Yet in a note published in the *Harvard Law Review* in 1983, its editors concluded that Congress did a fine job in (not) guiding the executive, lauding that the IEEPA fails to provide a meaningful definition to cabin presidential discretion. First, they observed that “the threats constituting an emergency are broadly characterized and need not threaten interests of the highest order.”²¹ Second, “the only disasters that appear to be excluded by the language are purely domestic insurrections and natural disasters occurring within the geographic boundaries of the United States.”²² Finally, Presidents can always declare a new national emergency as circumstances arise.²³ Not only was the alleged good judgment of Congress in failing to provide a meaningful definition of an emergency praised; future efforts to strive to define an emergency statutorily were discouraged because:

¹³ *Public Health Service Act*, PL 78-410 (July 1, 1944), codified at U.S. Code 42, § 247(d).

¹⁴ International Emergency Economic Powers Act [IEEPA] Pub. L. No. 95-223. 91 Stat. 1625 (1977) codified at 50 U.S.C. §§ 1701-1706.

¹⁵ U.S. Code 50, § 1701.

¹⁶ U.S. Code 50, § 1701 (a)-(b).

¹⁷ U.S. Code 50, § 1702(a).

¹⁸ U.S. Code 50, § 1702(b).

¹⁹ U.S. Code 50, § 1703(b).

²⁰ U.S. Code 50, § 1703(c).

²¹ "The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power." *Harvard Law Review* 96, no. 5 (1983): 1102-1120, 1115. Accessed August 4, 2020. doi:10.2307/1341001

²² *Ibid.*

²³ *Ibid.*, 1116.

To the extent that such definitions are meant to restrain rather than to advise the President, their enforcement depends upon judicial review. ...[C]ourts have generally deferred to presidential use of emergency power. ...Indeed the judiciary should defer to the President's judgement. Emergency power is entrusted to the President precisely because he is the best judge of both the gravity of the danger and the appropriateness of the response. He has the information (including from secret sources) and the foreign policy experience necessary for making the best judgment.²⁴

One must wonder whether editors at Harvard Law Review would reason the same today given all that has happened in the intervening years to erode trust in executive judgment. The days of assuming that any president is the best judge in matters of foreign affairs and, more generally, in exigent circumstance are gone. They likely never existed. Madison's observation that the Constitution was constructed with the knowledge that "Enlightened statesmen will not always be at the helm"²⁵ is enough to question whether the "executive knows best" attitude should have been seriously entertained.

Yet even assuming that presidents of impeccable judgment and integrity will serve in office henceforth, the notion that Congress and the Courts should not interfere within a realm of executive prerogative is simply inconsistent with the foundational principles of the Constitution. At the heart of separation of powers is the idea, articulated by Montesquieu and echoed by James Madison, that: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." If the executive can declare an emergency without any definition of what an emergency is, *prima facie* it appears that the executive is engaging in a legislative act. Once that emergency is declared, the risks grow of the executive legislating within the domain that is declared to be an emergency, especially when there are neither principles to guide the judgment of the executive or meaningful procedural limits. Yet as Madison advised: "the magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law."²⁶

A final point to note about the open-ended definition of an emergency provided in the IEEPA is that this statutory framework deals primarily (although not exclusively) with foreign affairs and foreign entities. Many scholars assert that a distinction exists between the extent of executive power in the domestic sphere and in foreign affairs. This belief is bolstered by the infamous case of *United States v. Curtiss-Wright Corp.* In it, Justice Sutherland opined in dicta: "It is important to bear in mind that we are dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."²⁷ In the domain of crises emerging in foreign affairs, an effort *was* made by Congress to provide some sort of principles to guide the executive. Yet no such principles – none – exist when an emergency is declared under the NEA alone. A President may declare an emergency under the NEA which is entirely domestic in its nature without any guidance from

²⁴ Ibid.

²⁵ James Madison, Federalist 10 in Clinton Rossiter, ed., *The Federalist Papers* (New York: Signet, 2003), 75

²⁶ James Madison, Federalist 47 in Clinton Rossiter, ed., *The Federalist Papers* (New York: Signet, 2003), 299-300.

²⁷ *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-320 (1936). For a review of scholarly criticism, see Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (Lawrence, Kansas: University of Kansas Press, 2017), 65-78. Note that the Supreme Court has more recently rolled back the "sole organ" dicta in *Zivotofsky v. Kerry*, 576 U.S. 1059 (2015).

Congress. How paradoxical that Congress has provided guidance for the President in the field of foreign relations but not in the NEA, where the liberties of the people are most at risk.

The risks to liberty associated in giving carte blanche to the President to declare an emergency are significant as the extraordinary powers available to the President once an emergency is declared are breathtaking. A handful of examples may illustrate the potential for abuse, which grows as declarations of emergency become increasingly common and distinctions are not made between well-defined emergencies and those that are not.²⁸ One of the better-known emergency powers of concern is that the President may regulate, close, or remove devices or apparatuses that emit radio waves. This law would include cell phones and could allow for the shutting down of internet services. No statutorily defined emergency conditions must exist for this far-reaching power to be tapped. All that is required is the judgment of the President that such action is needed “in the interest of national security or defense.”²⁹ Take another example of extraordinary power that may be tapped unmoored from intelligible principles. A President may “prohibit or curtail the export of any agricultural commodity during a period for which the President has declared a national emergency.”³⁰ Again, no definition or stipulations of any conditions that may constitute national emergency is provided. As a third example, consider that all that may be needed to allow for the dumping into the sea of plastic products containing toxic chemicals or heavy metals is an undefined declaration of a national emergency by the President.³¹ These examples suggest that a haphazard treasure trove of extraordinary powers is available once a President unilaterally declares a national emergency. In these cases, the NEA’s omission of meaningful substantive and procedural checks is potentially quite serious. Little statutory assurance is provided to prevent unwarranted power grabs by the chief executive under the guise of an emergency.

Yet those who are inclined to oppose the attempt to define an emergency will remain fearful of hamstringing the executive, and perhaps the whole country, when an unforeseen exigency arises. Alexander Hamilton, an advocate for energetic government and a powerful executive, will come to mind. Hamilton argued forcefully in Federalist 23: “These powers ought to exist without limitation, *because it is impossible to foresee or to define the extent of national exigencies, and the correspondent extent of the variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”³²

²⁸ The Brennan Center for Justice provides a list of 123 emergency powers. This list does not purport to be comprehensive. Brennan Center for Justice, “A Guide to Emergency Powers and Their Use” (December 5, 2018). <https://www.brennancenter.org/analysis/emergency-powers>. (Accessed August 12, 2019).

²⁹ U.S. Code 47, § 606 (c): “Upon proclamation by the President that there exists... a state of public peril or disaster or other national emergency...the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any... devices capable of emitting electromagnetic radiations within the jurisdiction of the United States ... and may cause the ... removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and/or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the owners.”

³⁰ U.S. Code 7, § 5712(c).

³¹ U.S. Code 33, § 1902 (b)(3)(F).

³² Hamilton, Federalist 23, in *The Federalist Papers*, 149. (Emphasis in original.)

Schlesinger noted: “Hamilton was not asserting these unlimited powers for the Presidency, as careless commentators have assumed. He was asserting them for the national government *as a whole* – for, that is Congress and the Presidency combined.”³³ Perhaps as importantly, Hamilton was not advocating that the President is the proper judge of exigent circumstance. He was making the sensible point that “the *means* ought to be proportionate to the *end*; the persons from whose agency the attainment of any *end* is expected ought to possess the *means* by which it is to be attained.”³⁴ In other words, once an emergency exists, extraordinary powers are needed to deal with them.

Congress has taken Hamilton’s point to heart. It has given to today’s President extraordinary means to deal with an emergency and the President may decide what means are needed to deal with the crisis at hand. All that is typically needed to tap these extraordinary powers is a declaration of an emergency. This was not always the case. Abraham Lincoln could not simply declare an emergency to access by law many of the tools he needed in the American Civil War. He “assembled the militia, enlarged the Army and the Navy beyond their authorized strength, called out volunteers for three years’ service, spent public monies without congressional appropriation, suspended *habeas corpus*, arrested people ‘represented’ as involved in ‘disloyal’ practices and instituted a naval blockade of the Confederacy.”³⁵ Today’s president may not be given the power to suspend habeas corpus, and trying to do so would run afoul of the Constitution.³⁶ But as a result of the generous means made available to today’s executive by Congress, Presidents are well-equipped to handle emergencies. Unfortunately, they also now rarely return to Congress, as Lincoln did, to explain why their actions were necessary. Lincoln needed to strike an apologetic tone: “It is with deepest regret that the Executive found the duty of employing the war-power, in defense of the government, forced upon him. He could but perform this duty or surrender the existence of the government.”³⁷ Acknowledging his accountability to Congress and the people in the face of extralegal action, Lincoln requested congressional acceptance: “He sincerely hopes that your views and your action may so accord with his as to assure all faithful citizens who have been disturbed in their rights of a certain and speedy restoration to them under the Constitution and the laws.”³⁸ Congress subsequently approved of Lincoln’s actions “passing an act ‘approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.”³⁹ Today’s Presidents do not need to follow Lincoln’s path as they have been (wrongly) delegated the power to unilaterally determine when an emergency exists and to access extraordinary statutory powers that need nothing more than the President’s say-so to access these.

The fact that Presidents: 1) may no longer need to justify to Congress their actions in an emergency after the fact; 2) are not limited by any meaningful procedural checks (apart from Congress deciding to stop funding), 3) have been given an ample labyrinth of extraordinary powers, and 4) can unilaterally declare an emergency to tap extraordinary powers, are circumstances that may well have made Alexander

³³ Arthur M. Schlesinger, Jr., *The Imperil Presidency* (1973; repr. with a new introduction by the author, Boston: Mariner Books, 2004), 5.

³⁴ Hamilton, Federalist 23, in *The Federalist Papers*, 149. (Emphasis in original.)

³⁵ Schlesinger, 59.

³⁶ This restriction on power is found in Article I, s. 9, which details restrictions on Congress.

³⁷ Abraham Lincoln, “Message to Congress in Special Session, July 4, 1861,” in *Collected Works of Abraham Lincoln*, ed. Roy B. Basler, vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953; Ann Arbor, MI: University of Michigan Digital Library Production Services, 2001), 440.
<http://name.umd.umich.edu/lincoln4>

³⁸ Lincoln, 440.

³⁹ *Prize Cases*, 67 U.S. 635, 670 (1862). (Emphasis in original.)

Hamilton blanche. Alexander Hamilton went to great lengths in Federalist 69 to enumerate the many ways in which the powers of the President were more limited than those of the British King. In the British experience, the king possessed all powers over treaties and war, possessed sovereignty in making laws (through an absolute veto), and was above the law. While the American President does not possess royal prerogative, executive powers are no longer simply Hamiltonian; they are quasi-royal, or, as Schlesinger coined it, they are imperial.

II. Why Was No Definition of an “Emergency” Included in the NEA?

The passage of this NEA represented the culmination of over three years of work that was spearheaded by the Senate Special Committee on National Emergencies and Delegated Emergencies Powers (Special Committee).⁴⁰ The Special Committee was originally convened for a relatively modest purpose: “to study the effect of terminating the only emergency known to be in existence at that time, that declared by President Truman in 1950 during the Korean War,”⁴¹ Originally called the Senate Special Committee on the Termination of the National Emergency, its mandate and name changed as the Committee grew to appreciate the extent of the morass that was the field of national emergencies and the extent of presidential unaccountability that prevailed in the absence of congressional oversight. First, it discovered that not one but four national emergencies were in effect, leading the Committee to the remarkable conclusion that “A majority of Americans alive today have lived their entire lives under emergency rule. Since 1933, protections and procedures guaranteed by the Constitution have, in varying degrees, been abridged by Executive directives whose legality rests on the continued existence of Presidentially proclaimed states of emergency.”⁴² Second, it discovered that “disorder enveloped the entire field of emergency statutes and procedures.”⁴³ as “no comprehension record of statutes effective during times of emergency had been compiled” and no “consistent procedure was being followed in declaring, administering, and terminating states of national emergency.”⁴⁴ Finally, it concluded that the Congress itself was primarily responsible for this state of affairs and Congress had a responsibility to reclaim its inherent power:

This dangerous state of affairs is a direct result of Congress’s failure to establish effective means for the handling of emergencies and its willingness to defer to the Executive branch leadership. In the face of the wars, emergencies, and crises and determined Presidents of the past forty years, the Congress, through its own actions has transferred awesome magnitudes of power to the Executive without ever examining the cumulative effect of that delegation of responsibility. It has tolerated and condoned Executive initiatives without fulfilling its own Constitutional responsibilities. It has in important respects permitted the Executive branch to draft and in large

⁴⁰ A handy compilation of all legislative debates and committee reports related to the passage of the National Emergencies Act was created by Congress for the benefit of future scholars: United States Congress Committee on Government Operations and the Special Committee on National Emergencies and Delegated Emergency Powers, United States Senate, *The National Emergencies Act (Public Law 94-412) Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 2d sess., 1976 (Washington, DC: U.S. Government Printing Office, 1976). It will be referred to as **Source Book**. It has conveniently been scanned and is available digitally:

<https://play.google.com/books/reader?id=vghEuqGc6jQC&hl=en&pg=GBS.PP3>

⁴¹ Final Report of Special Committee, 2; Source Book, 34.

⁴² Final Report of Special Committee, 1; Source Book, 33.

⁴³ Final Report of Special Committee, 3; Source Book, 35.

⁴⁴ Final Report of Special Committee, 4; Source Book, 36.

measure to make the law. This has occurred despite the constitutional responsibility conferred on Congress by Article I, Section 8 of the Constitution which states that it is Congress that “makes all Laws...”⁴⁵

The NEA sought to provide as much of a clean slate as possible for Congress by ending existing emergencies and providing processes to regularize how they would be declared and implemented in the future. It terminated all powers and authorities possessed by the President as a result of any previously declared national emergency two years after the signing of the NEA, without affecting rights and duties settled prior to the enactment of the NEA and without interfering with pending actions to be settled.⁴⁶ For all future emergencies, the NEA stipulates that the President is to declare a national emergency as a condition of using special or extraordinary powers granted by Congress. To formalize a declaration of emergency, the President must proclaim such an emergency to Congress and publish it in the Federal Register.⁴⁷ The NEA also establishes the means to terminate national emergencies. Among these, a national emergency will end on the one-year anniversary of its declaration unless the President notifies Congress within a ninety-day window prior to termination that it is to remain in effect and publishes the same in the Federal Register.⁴⁸ This provision for automatic termination without Presidential renewal was dubbed in the House the “Matsunaga ‘self-destruct amendment,’” so named for the Representative (D-HI) who proposed this provision.⁴⁹ The NEA also requires the President to specify which extraordinary or special powers delegated by Congress will be exercised for these powers to be licitly used.⁵⁰ Finally, the President is to maintain records of its emergency declarations as well as of all rules and orders stemming from the emergency declaration, including all executive orders or proclamations.⁵¹

One of the well-known yet biting ironies of the NEA is that Congress had originally given itself a legislative veto to override a Presidential declaration of emergency. The Supreme Court subsequently decided that legislative vetoes are unconstitutional in *INS v. Chadha*.⁵² As a result, this procedural check of the NEA, which was viewed as critical to legislative control of presidentially declared national emergencies by the original authors of the law, was changed by Congress in 1985.⁵³ This amendment gives the President the power to veto Congress’ attempts to terminate a national emergency.

The National Emergencies Act does not define the term “emergency.” Given that the Committee responsible for spearheading the NEA found that Congress had “in important respects permitted the Executive branch to draft and in large measure to make the law,”⁵⁴ this omission is peculiar. The legislative record reveals that the omission resulted from the complex negotiations between the Special Committee and executive branch, the overwhelming weight of pre-existing legislation that gave extraordinary powers to the executive branch, as well as a fear that their working definition might do

⁴⁵ Final Report of Special Committee, 1; Source Book, 33.

⁴⁶ U.S. Code 50, § 1601.

⁴⁷ U.S. Code 50, § 1621.

⁴⁸ U.S. Code 50, § 1622(d).

⁴⁹ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 267-268.

⁵⁰ U.S. Code 50, § 1631.

⁵¹ U.S. Code 50, § 1641.

⁵² 462 U.S. 919 (1983). A majority of the Supreme Court ruled that Congress can override the executive only by creating new law, which requires presentment to the President for signature (and veto) as well as bicameral approval.

⁵³ 99 Stat. 405, 448; § 801.

⁵⁴ Final Report of Special Committee, 1; Source Book, 33.

more harm than good. When Senator Mathias (R-MD) first sought Senate approval for the creation of the Special Commission, he explained to the Senate Committee on Foreign Relations: “It is expected that the committee’s recommendations would, among other things, have the effect of restoring to Congress its full constitutional authority to regulate commerce, and *would clearly define a national emergency*.”⁵⁵ The bill initially drafted by the Special Committee and then subsequently approved by the House as H.R. 3884 (with the Matsunaga self-destruct amendment) included this definition of an emergency in section 201(a):

In the event that the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States, the president is authorized to proclaim the existence of a national emergency.⁵⁶

This palpably unsatisfactory definition suggests that little time or effort was expended in defining the term. Representative Walter Flowers (D-AL) in the *Report of the House Committee on the Judiciary* that accompanied H.R. 3884 explained why: “The Committee has been advised that the greatest part of the effort which the Executive and the legislative branches have devoted to this bill and earlier bills in the last several years has been directed toward identifying those powers and dispositions which should be preserved while the rest are abandoned.”⁵⁷ In other words, once the Special Committee became aware of the Pandora’s box of powers at the disposal of the President, its focus became the practical one of identifying the specific powers that had been delegated throughout approximately 470 statutes. It then engaged in extensive consultation with the relevant department and agencies in the executive branch to figure out how these concrete powers were being used and which should be repealed. The process of identifying delegated powers in hundreds of statutes was heroic, although it was made more manageable through an early deployment of early computer technology. The further task of consulting with the various branches of the executive to ascertain whether and how each of these delegated powers might impede the operation of government if they were repealed was herculean. In the process of consultation with executive departments, the members of the Special Committee gradually came to adopt the perspective of the executive branch. The Committee’s focus shifted from limiting abusive executive power to enabling agencies to do their jobs as long as procedural conditions were met.

Members continued to use compelling language of constitutional abuse of power to justify the overall need for the NEA. Yet the Committee’s practical attempts to understand the full scope of its delegation powers in cases of emergencies led it down more paths than it was equipped to handle. It raised the question of whether the executive branch was actually equipped to deal with disaster relief.⁵⁸ It required the Committee to exempt certain statutes granting extraordinary powers from the NEA as these extraordinary powers were relied upon by the bureaucracy for ordinary functions.⁵⁹ It led the Committee to open old wounds as it discovered that the legislative authority that enabled the internment of Japanese Americans in World War II through the power of the executive to designate military zones was still in

⁵⁵ *Initial Authorizing Resolution of the Special Committee*, Congressional Record, 118, (May 23, 1972): S18367-S18369); Source Book, 14. (Emphasis added.)

⁵⁶ *A Recommended National Emergencies Act*, 93rd Cong. 2nd sess., 1974, S. Rep. 93-1170; Source Book, 25.

⁵⁷ House of Representatives, Committee on the Judiciary, *Report on H.R. 3884*, 94th Congress, 1st sess., H. Rept. 94-238 (May 21, 1975); Source Book, 193.

⁵⁸ Senate Special Committee on National Emergencies and Delegated Powers, *Staff Report on Emergency Preparedness in the United States*, March 1976, attached to Final Report of Special Committee, 24-38; Source Book, 55-67.

⁵⁹ Final Report of Special Committee, 10; Source Book, 42.

effect.⁶⁰ With the number of complex and sensitive issues uncovered by the Special Committee, it is small wonder that it accomplished as much as it did.

Only one significant debate over the meaning of an emergency was recorded. It occurred in the House of Representatives just prior to H.R. 3884 being approved by that chamber. Among the bill's most ardent detractors was Mr. Drinan, (D- MA), a Jesuit priest and human rights activist opposed to the Vietnam War, who served for ten years in Congress until he was ordered removed from politics by John Paul II. He subsequently became a professor of law at Georgetown University, where he taught, among other subjects, constitutional law.⁶¹ Mr. Drinan objected that "I do not think this legislation as presently proposed should allow the President to unilaterally declare a national emergency whenever he thinks it is essential to do so."⁶² Ms. Holtzman, (D-NY) a Harvard Law School graduate and then the youngest woman ever to serve in the House,⁶³ iterated this concern as she objected: "These are pretty vague and broad standards for declaring a national emergency."⁶⁴ Mr. Drinan then proposed a bold amendment to define a national emergency. His amendment read in part:

The President shall issue such a proclamation pursuant only to: (1) a declaration of war; (2) an attack upon the United States; its territories or possessions, or its armed forces; or (3) the prior enactment of a joint resolution specifically authorizing the President to issue such a proclamation. The President in every possible instance shall seek the advice and counsel of Congress and provide Congress with all pertinent information before proclaiming the existence of a national emergency.⁶⁵

Mr. Drinan justified his amendment by arguing: "Mr. Chairman, in H.R. 3884 there is no standard really. Whatsoever, when and why the President can proclaim a national emergency."⁶⁶ Drinan's amendment met with forceful objection by Mr. Flowers, who argued: "The gentleman's amendment would attempt, it appears, to derogate the power of the President under the Constitution of the United States. It would attempt to define within a very, very narrow scope the power of the President to declare a national emergency."⁶⁷ Mr. Moorhead (R-CA) likewise objected: "Mr. Chairman, this amendment would completely take away from the President the flexibility of acting in times of crisis or an emergency."⁶⁸

⁶⁰ United States Senate, *Introduction of S. 3957: A National Emergencies Act*, 93rd Cong., sess. 2, Congressional Record, 120 (August 22, 1974): S15784-S15794; Source Book, 77-78.

⁶¹ Associated Press, "Rev. Robert Drinan, Ex-Congressman, Dies at 86," New York Times, January 29, 2007, <https://www.nytimes.com/2007/01/29/us/29drinan.html>.

⁶² House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 257.

⁶³ United States House of Representatives, "HOLTZMAN, Elizabeth," *History, Art & Archives* <https://history.house.gov/People/Detail/15213>.

⁶⁴ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 276.

⁶⁵ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 278.

⁶⁶ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 279.

⁶⁷ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 279.

⁶⁸ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 280.

The Drinan amendment was rejected and H.R. 3884, with its vague definition of an emergency that was originally drafted by the Special Committee, overwhelmingly passed the House. Of the five members who voted against it were Mr. Drinan, Ms. Holtzman, and Mr. Conyers (D-MI),⁶⁹ also a civil rights activist. The first two refused to endorse a bill that did not define the circumstances in which an emergency could be declared. Mr. Conyers may have been skeptical of Mr. Flowers' assurance that the legislative veto was constitutionally foolproof. Mr. Conyers alone had raised the question of the legality of a legislative veto on the floor of the House.⁷⁰ Time has proven that the concerns of these dissenting Representatives were well-founded.

When the House bill was sent to the Senate, it was reviewed by the Senate Committee on Government Operations, where it underwent an important substantive amendment. The definition of the term "emergency," featured in the original bill drafted by the Special Committee and debated in the House, was removed entirely. After consultation with constitutional experts, the Senate Committee on Government Operations: "concluded that section 201(a) is overly broad and might be construed to delegate additional authority to the President with respect to declarations of national emergency."⁷¹ As an alternative, "the Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers."⁷² Perhaps the Committee had become willfully blind that no definition of a national emergency is provided in many of the statutes delegating extraordinary powers in a time of emergency. After three years, the Senate may well have been ready to stop debate, pass a bill, and hope for the best. The lack of definition in many of these statutes was even noted by Mr. Mathias on the floor of the Senate in its final deliberation:

Despite the responsibilities to make the law conferred on the Legislature by the Constitution, most laws were framed by the executive branch and written in such ways that they gave virtually open ended authority to the executive branch to exercise the power contained in more than 470 emergency power statutes. The combined power contained in these 470 statutes is far too broad to permit their continuation without constitutional checks.⁷³

How could Congress have believed that it had reclaimed control over emergency powers absent a definition of the subject matter it was seeking to regulate? Evidently, it believed that the legislative veto it had given itself, which was later taken from it, would suffice. As Senator Church (D-ID) explained on the Senate floor, "the procedures governing the use of emergency powers in the future will always be subject to congressional review and any declaration of an emergency may be terminated by a concurrent resolution of the Congress. Thus the legislative branch will be in a position to assert its ultimate authority."⁷⁴ With a legislative veto, Congress believed it was safe to delegate to the President the extraordinary powers in emergencies to: "seize property; organize and control the means of production;

⁶⁹ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 283.

⁷⁰ House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 280.

⁷¹ Senate Committee on Government Operations, *National Emergencies Act Report [To accompany H.R. 3884]*, 94th Cong., sess. 2, S. Rept. 94-1168 (August 26, 1976); Source Book, 292.

⁷² Senate Committee on Government Operations, *National Emergencies Act Report [To accompany H.R. 3884]*, 94th Cong., sess. 2, S. Rept. 94-1168 (August 26, 1976); Source Book, 292

⁷³ United States Senate, *Debate and Adoption of H.R. 3884*, 94th Cong., sess. 2, Congressional Report, 122 (August 27, 1976): S-14840-14844; Source Book, 333.

⁷⁴ United States Senate, *Debate and Adoption of H.R. 3884*, 94th Cong., sess. 2, Congressional Report, 122 (August 27, 1976): S-14840-14844; Source Book, 338.

seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of all private enterprise; restrict travel; and, in a host of other ways, regulate the lives of all American citizens.”⁷⁵ Congress clung to the legislative veto in spite of being notified a year prior to the passage of the NEA by the Office of Management and Budget that the executive believed a concurrent resolution to be unconstitutional in not allowing for presentment to the President as required by Article I, s. 7.⁷⁶ President Ford was also very clear in his signing statement of September 14, 1976 that he viewed congressional control of national emergencies through concurrent resolution to terminate to be unconstitutional.⁷⁷

In short, the NEA contains no definition of an emergency because: 1) Congress believed a definition wasn’t necessary as it could meaningfully curb executive abuse with a (now non-existent) legislative veto; 2) it spent little time defining an emergency because it was overwhelmed by the effort of tracking down the extraordinary powers it had already delegated to the executive in approximately 470 statutes; 3) it came to adopt the perspective of bureaucratic actors in its negotiations over delegated powers in hundreds of statutes; and 4) it wanted to ensure that the executive would not be unduly hampered by providing too narrow a definition. For this reason, it originally created a definition that so was very vague and broad that it might unwittingly grant the Executive more power than intended. Congress ultimately concluded no definition was better than the one it proposed. It tried. Yet the NEA still invites the executive to make law when declaring an emergency.

III. Can an “Emergency” Be Usefully Defined Statutorily or Constitutionally?

Should one try to define an emergency by envisioning a central case of an exigency, or should one try to foresee the various circumstances in which they will occur, one will be stumped. Emergencies, by definition, are outside of the norm. While it is foreseeable that they will occur, the circumstances that will bring them about cannot generally be foreseen.

Should one try to define an emergency by reference to certain recurring categories – natural disasters, pandemics, foreign interference, or acts of war – what will be excluded will be among the most consequential exigencies of all. America’s own history illustrates this. Two of America’s most transformative national emergencies were the Civil War and the Great Depression. Neither fell neatly into categories of recurring emergencies. The Civil War, while characterized initially by Lincoln as a rebellion, was far graver than this, being a protracted existential threat to Union that ultimately transformed the Constitution with the addition of three significant Civil War Amendments that ended slavery and granted enormous power to the federal government over the states. The Great Depression was a time of unmatched economic suffering, which brought greater authority to the office of the President, greater expectations of the federal government, lasting party realignments, and ultimately precipitated World War II. Congress reasonably had these transformative experiences in hesitating to provide a clear

⁷⁵ United States Senate, Debate and Adoption of H.R. 3884, 94th Cong., sess. 2, Congressional Report, 122 (August 27, 1976): S-14840-14844; Source Book, 335.

⁷⁶ James M. Frey to Senator Abraham Ribicof, September 15, 1975, appended to Senate Committee on Government Operations, *National Emergencies Act Report [To accompany H.R. 3884]*, 94th Cong., sess. 2, S. Rept. 94-1168 (August 26, 1976); Source Book, 331.

⁷⁷ Text of President’s Statement Upon Signing H.R. 3884 “Weekly Compilation of Presidential Documents” v. 12, (September 20, 1976), 1340; Source Book, 343.

definition of an emergency in the NEA as well as within other laws that delegate powers to the executive when a national emergency is declared.⁷⁸

Equally fruitless is the attempt to define an emergency by reference to the ends being advanced. Terms such as “national security,” “safety,” “common defense,” “welfare,” or the like provide little guidance in distinguishing the extraordinary from the ordinary or in making assessments about degrees of urgency. The NEA’s initial definition of an emergency was omitted in part because this approach was adopted and it was properly judged to be counterproductive in providing meaningful guidance to the executive.

If one searches through Supreme Court decisions to identify the language it uses to characterize an emergency, one will encounter the same difficulty. The courts, like the legislative branch, have avoided defining the term. Instead, they have looked at fact specific occurrences of great consequence that allow for judicial notice.⁷⁹ The judicial branch may be willing to declare an end to an emergency, as it will make its own determination about whether the facts, upon which extraordinary delegated powers are claimed, persist: “It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.”⁸⁰ The language used by the courts to describe emergencies often depends upon the concrete circumstances before the court. For instance, in *Youngstown v. Sawyer*, Justice Burton declined to find that President Truman could seize steel mills in the context of the Korean War on the basis of asserted prerogative in war because there was no “imminent invasion or threatened attack.”⁸¹ Yet this language does not, and was not intended as an all encompassing definition of an emergency.

An adequate definition of emergency is patently difficult to find. Part of the reason for this difficulty is that an emergency is *not* simply a dire state of affairs in the world. Instead, the term embodies an assessment of circumstances as dire *by someone with the authority* to make such a determination *and* a prescription for immediate action. To name an “emergency” is to make a number of subtle, complex judgments. The characterization of a “national emergency” simultaneously prescribes that urgent governmental action is warranted in light of unusual and threatening facts. An emergency involves “urgent public need demanding...relief...produced by other and economic causes.”⁸² These facets of an “emergency” are articulated by the Congressional Research Service, which refers to dictionary definitions, case law, and scholarly literature in striving to provide Congress with an adequate concept of the term.

The first is its temporal character: An emergency is sudden, unforeseen, and of unknown duration. The second is its potential gravity: An emergency is dangerous and threatening to life and well-being. The third, in terms of governmental role and authority, is the matter of perception: Who discerns this phenomenon? The Constitution may be guiding on this question, but it is not always conclusive. Fourth, there is the element of response: By definition, an emergency requires immediate action but is also unanticipated and, therefore, as Corwin notes,

⁷⁸ See Mr. Moorhead’s comments in the debate regarding a definition of a national emergency. House of Representatives, *Debate and Adoption of H.R. 3884*, 94th Congress, 1st sess., *Congressional Record*, 121 (September 4, 1975): H8325-H8341; Source Book, 280.

⁷⁹ *Home Building & Loan Assn v. Blaisdell*, 290 U.S. 398, 444 (1935).

⁸⁰ *Ibid.*, 442.

⁸¹ Justice Burton concurrence in *Youngstown v. Sawyer*, 343 U.S. 579, 659 (1952).

⁸² *Home Building & Loan Assn v. Blaisdell*, 290 U.S. 398, 440 (1935).

cannot always be “dealt with according to rule.” From these simple factors arise the dynamics of national emergency powers.⁸³

However difficult it might be to define, it is worth the effort. Otherwise, our Courts may eventually be forced to confront the possibility that the NEA and other legislating delegating extraordinary powers to the President is unconstitutional on the basis that Congress has provided no intelligible principles to the President of what constitutes an emergency.⁸⁴ Without a more clearly articulated concept of what an emergency is, Congress may stand accused of having delegated to the President the power to make law. The Supreme Court has stated that it determines whether intelligible principles are provided by examining: “whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.”⁸⁵ More recently, the Supreme Court has suggested that it will look at the “text, considered alongside its context, purpose, and history.”⁸⁶ Intelligible principles are needed even when “Congress may feel itself unable conveniently to determine exactly when its exercise of legislative power should be effective, because dependent on future conditions, and it may leave the determination of such time to the decision of the executive.”⁸⁷

Were the NEA and other statutes granting extraordinary powers to the President treated like any other statute, it would almost certainly need to be struck down as an unconstitutional delegation of legislative power to the President. The NEA contains no discernible policy, it utterly lacks standards to guide the President, it requires no specific finding of facts, it provides weak procedural checks, and it manifests no serious effort on the part of Congress to define an “emergency.” All that is offered is a bald requirement for the president to find that an emergency exists. If the Court were to consider the “text, considered alongside its context, purpose, and history,”⁸⁸ it would find that the purpose of the NEA in particular was for Congress to regain some control over the Executive and to prevent the President from usurping Congress’s role in making law. Yet the legislation fails to achieve that objective, especially since the legislative veto contained in the original version was declared unconstitutional by the Supreme Court.

The prospects for the NEA might seem grimmer still given recent changes in the composition of the Court. Justice Gorsuch signaled in his forceful dissent in *Gundy v. United States* that he is intent on revisiting the Court’s jurisprudence in this area with a stricter eye to separation of powers concerns.⁸⁹ Justice Kavanaugh has indicated Justice Gorsuch’s more stringent approach is worth exploring as he is on record as stating: “JUSTICE GORSUCH’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”⁹⁰ Were Justice Gorsuch’s seemingly more demanding approach to prevail, the Court would consider whether the executive is merely “filling in details,” or whether the statute makes application of the law dependent upon fact-finding by the executive, or whether the matter is already in the scope of executive authority,

⁸³ Congressional Research Service, *National Emergency Powers*, Rep. 98-505, 3-4. Updated August 5, 2019. Accessible at <https://crsreports.congress.gov/product/pdf/RL/98-505>

⁸⁴ *J.W Hampton Jr. v. United States*, 272 U.S. 394, 409 (1928); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429-430 (1935); *Gundy v. United States*, 588 U.S. __ (2019).

⁸⁵ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935).

⁸⁶ See Kagan majority opinion in *Gundy v. United States*, 588 U.S. __ (2019).

⁸⁷ *J.W Hampton Jr. v. United States*, 272 U.S. 394, 407 (1928).

⁸⁸ See Kagan majority opinion in *Gundy v. United States*, 588 U.S. __ (2019).

⁸⁹ See Gorsuch dissent in *Gundy v. United States*, 588 U.S. __ (2019). Compare Neil Gorsuch, *A Republic If You Can Keep It* (New York: Crown Forum, 2019), 90-91.

⁹⁰ *Ronald J. Paul v. United States*, 589 U.S. __ (2019).

such as in foreign affairs.⁹¹ The NEA neither involves the President merely in filling in the details, nor does it require findings of fact. This would leave consideration of whether there is an inherent prerogative in the President to declare emergencies in Article II.

The weight of scholarly judgment, based on originalist constitutional principles, does not support the claim that the executive has a prerogative *under Article II* to take action in an emergency.⁹² As Justice Jackson forcefully articulated in his famous concurrence in *Youngstown v. Sawyer*: “The appeal, however, that we declare the existence of an inherent power *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a real pretext for usurpation.”⁹³ However, the claim that the President has the power *outside of the law* to act in an emergency has some merit to it. Lincoln’s practiced this prerogative in the Civil War. This kind of extra-legal power is Locke’s executive prerogative: “This power to act according to discretion, for the public good, without the prescription of law, and sometimes even against it, *is* that which is called *prerogative*.”⁹⁴ As a power outside of the law, it cannot be given the blessing of those dedicated to the rule of law even if it may be exercised on rare occasion as a practical necessity.

The option of striking down the NEA and other statutes granting extraordinary emergency powers as unconstitutional because they allow the executive the power to make law has little to recommend it. Neither Congress, the Courts, nor the President could reasonably judge that Presidents are to be deprived of extraordinary delegated powers in times of an emergency, thereby potentially doing real harm to the American people and their country, simply because no statutory definition of an emergency exists. Decisive, energetic action by the executive is needed once an emergency occurs. And the executive is the agent most capable of acting decisively and energetically once there is an emergency. Moreover, the alternative could tempt presidents to exercise executive prerogative outside of the law when emergencies occur. Still is the choice between bad and worse?

Perhaps there is a third way between unbridled executive prerogative and a toothless NEA, neither of which serves the purpose of meaningfully constraining the President from acting arbitrarily. For the purpose of law and political life, the facet of an emergency that matters most is the third identified by the Congressional Research Service, which is of the greatest perennial interest: Who decides? For any national emergency, some authority in government decides – but who? This question troubled Locke in his reflections on executive prerogative. He posed the very same question as he asked: “*who shall be*

⁹¹ Gorsuch dissent in *Gundy v. United States*, 588 U.S. ____ (2019)

⁹² While the idea of Article II executive prerogative is much contested, many believe it is a modern claim of executive power that could not sustain an originalist analysis. See Robert Scigliano, “The President’s ‘Prerogative Power’” in Thomas E. Cronin, ed., *Inventing the American Presidency* (Lawrence, KS: University Press of Kansas, 1989), 236-256; Benjamin A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence, Kansas: University Press of Kansas, 2009); Arthur M. Schlesinger, Jr., *The Imperial President* (Boston: Houghton Mifflin Co, 2004), 8-9; Louis Fisher, *Supreme Court Expansion of Presidential Power* (Lawrence, Kansas: University Press of Kansas, 2017), 1-30. For a contrary view in the context of the war power, see for example, John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers.” *California Law Review* 84, no. 2 (1996): 167-305. Accessed August 10, 2020. doi:10.2307/3480925.

⁹³ *Youngstown v. Sawyer*, 343 U.S. 579, 649-650 (1952).

⁹⁴ John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (1690; Indianapolis: Hackett Publishing, 1980), 84, c. 14, §160. (Emphasis in original.)

judge when this power is made a right use of?”⁹⁵ The question of “Who decides?” is also the central question of constitutional governance.

Perhaps instead of expecting Congress to provide a statutory definition of an emergency, a better approach may be to define an emergency through the lens of separation of powers principles, or to regard the existence of an emergency as a constitutional issue. The coequal branch must be concerned about whether the Executive is engaging in law-making in declaring an emergency. Congress may not grant to the executive the power to legislate, even in an emergency. If it grants to the President the power to declare an emergency, the declaration of an emergency must not itself be a legislative act, unbounded by foundational principles of what an emergency is in the context of the relationship between Congress and the President. The intelligible principles of what constitutes an emergency may emerge from a fundamental of understandings of the legislative and executive branches in the context of exigent circumstances.

Naturally, John Locke is one of the authorities from which guidance may be procured in judging the boundaries between executive and legislative authority. He explained that the legislative is the supreme power as it most fully represents the people and the legislative power is to direct the executive. “The *legislative power* is that, which has a right to *direct how the force of the common-wealth* shall be employed for preserving the community and the members of it.”⁹⁶ Yet the legislative is not always in session: “there is no need, that the legislative should be always in being, not always having business to do.”⁹⁷ Moreover, the legislative will be more cumbersome and deliberative in action: “in well-ordered commonwealths, where the good of the whole is considered, as it ought, the legislative power is put into the hands of divers people.”⁹⁸ On the other hand, the executive should be “a *power always in being*, which should see the execution of the laws that are made, and remain in force.”⁹⁹ The executive does not supersede the legislative in its supremacy, although it may act forcefully and energetically where the legislative may not: “In some common-wealths, where the *legislative* is not always in being, and the *executive* is vested in a single person, who has a share in the legislative; there that single person in a very tolerable sense may also be called *supreme*: not that he has in himself all the supreme power, which is that of law-making; but because he has in him the *supreme execution*.”¹⁰⁰ Time and again, Locke stressed that one of the central differences between the legislative and the executive is that the former can and should act continually, while the latter acts continuously: “It is not necessary, no, nor so much as convenient, that the legislative should always be in being; but absolutely necessary that the executive should, because there is not always need of new laws to be made, but always need of execution of the laws that are made.”¹⁰¹ This difference in the nature of their functions and modes of operation is also essential to Locke’s idea of executive prerogative in emergencies: “the lawmaking power is not always in being, and is usually too numerous, and is too slow for the dispatch requisite to execution.”¹⁰²

Following upon Locke’s idea of legislative supremacy, the Founders believed that the legislative branch would overpower the executive and judicial branches: “The legislative department is everywhere

⁹⁵ Locke, 87, c. 14 §168. (Emphasis in original.)

⁹⁶ John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (1690; Indianapolis: Hackett Publishing, 1980), 75, c. 12, §143.

⁹⁷ *Ibid.*, 76, §143.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, 76, §144.

¹⁰⁰ *Ibid.*, 78, § 151.

¹⁰¹ *Ibid.*, 79, § 153.

¹⁰² Locke, 84, c, 14 §160.

extending the sphere of its activity and drawing all power into its impetuous vortex.”¹⁰³ For this reason, they went to great lengths to make it more difficult for the legislative branch to act, appreciating that “an elective despotism was not the government we fought for.”¹⁰⁴ They were of the view that the executive branch was most to be feared in a hereditary monarchy and in a pure democracy where “tyranny may well be apprehended, on some favorable emergency” but in a representative republic, “the executive magistracy is carefully limited, both in the extent and the duration of its power.”¹⁰⁵ For the overreaching legislative branch, the “remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action ... little connected with each other.”¹⁰⁶ They gave the executive branch a partial veto power when laws are made but did not give to the executive the power to make the law. They modeled the executive upon Locke’s executive: “that single person in a very tolerable sense may also be called *supreme*: not that he has in himself all the supreme power, which is that of law-making; but because he has in him the *supreme execution*.”¹⁰⁷

Based on the authority of Locke and the Founders, the relevant question in determining whether an emergency exists for constitutional purposes is to ask whether Congress can reasonably be expected to act at all in the circumstances, in addition to asking whether immediate action is truly necessary. In asking these questions, it must be kept in mind that Congress was designed to be slow to act and was expected often be immobilized due to internal disagreement over pressing policy issues. The cumbersome design of Congress was, as Justice Gorsuch has noted, to prevent excess law-making, to protect minority interests, and to ensure that members of Congress remain accountable and do not thrust responsibility for law-creation upon others.¹⁰⁸ Its inefficiency by design was not intended to authorize the President to assume the role of supreme law-maker. So too, its inefficiency by design was not intended to paralyze the country when an immediate response is required. For the Courts, Congress, or the President to determine whether an emergency actually exists requires an examination of the capacities, design, and purpose of Congress as well as an assessment of the circumstances at hand. There will be a perennial temptation by the executive to circumvent the laborious legislative process by declaring an emergency or by claiming expansive Article II powers. There may also be a perennial temptation by members of Congress to try to avoid the hard responsibility of making laws within an institution designed to make that difficult to do so. The three branches of government share the responsibility of examining the carefully designed strengths and weaknesses of Congress in the context of concrete circumstances to determine if an emergency exists. Differences in judgment can be expected. Yet these questions are not meaningless; they provide some guidance. In practice, were Congress and the President to disagree, the Supreme Court, in exercising judicial review, could decide the question of whether an emergency exists as a constitutional matter after taking judicial notice of the facts as well as evaluating the actions and capabilities of its coequal branches in the context of the alleged emergency at hand.

This functional approach - in the literal sense of asking whether Congress can reasonably be expected to function as designed in the circumstances - mirrors the approach that the Courts have taken in judicial-executive disputes over separation of powers when their own ancient prerogative of reviewing habeas corpus are denied by executive action. The effect of the suspension of this writ is to deprive individuals of their right to appear before the courts and to demand that they be released if not charged with a crime.

¹⁰³ Federalist 48, p. 306.

¹⁰⁴ Ibid., p. 308

¹⁰⁵ Federalist p. 306

¹⁰⁶ Federalist, 51, p. 319

¹⁰⁷ Ibid, 78, § 151.

¹⁰⁸ See Gorsuch dissent in *Gundy v. United States*, 588 U. S. ____ (2019).

In the context of an alleged emergency, the writ of habeas corpus can protect individuals from wrongful detention when held by the executive without being charged with a crime. The simple question asked by the courts is whether the emergency justifying detention is so severe that the courts cannot function. As stated by Justice Grier in the famous *Prize Cases*, adjudicated during the Civil War:

The truest test of its existence, as found in the writings of the sages of the common law, may thus be stated summarily: “When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if the opposing Government were foreign enemies invading the land.”¹⁰⁹

If federal courts can function, individuals are entitled to appear before a judge. As the Supreme Court ruled in the case of *Ex Parte Milligan*: “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction...”¹¹⁰ By analogous reasoning, it might be inferred that as long as Congress is capable of legislating to create policy that can meet the circumstances at hand, even in spite of its own internally inefficient processes, then an emergency allowing the President to act outside of congressional delegated powers does not exist.

Congress is responsible for passing legislation and, given its collective action hurdles, it may need to be prodded to defend its own powers, however difficult the business of making law may be. Justice Jackson’s famous concurrence in *Youngstown v. Sawyer* rued the twilight zone that emerges from “congressional inertia, indifference or quiescence [which] may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility”¹¹¹ The more light that can be shed on separation of powers principles in the context of emergencies, the lesser that twilight zone will be. The system of checks and balances was designed to prevent overreach by the co-equal branches to better protect the people’s liberties. As Justice Brandeis sagely advised: “the doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental power among the three branches, to save the people from autocracy.”¹¹²

Conclusion: An Emergency is a Constitutional Question

As emergencies raise fundamental separation of powers concerns, the question of whether an emergency exists can and should be treated as a constitutional issue for which each of the co-equal branches is responsible. Once regarded as a constitutional issue, the President may more safely be delegated a vast array of emergency powers by Congress without inviting the President to make law through the declaration of an emergency. Statutory laws, such as the NEA, which contain no definitions of emergencies, can be saved from the Constitution’s nondelegation requirement if the question is a constitutional one. Emergencies do not need to be occasions for the executive office to be transformed into a one-person legislator, nor need they be occasions for inviting the President to exercise extralegal (or illegal) executive prerogative. While emergencies are outside of the norm, they almost always can and should be governed by law. Emergencies need not be occasions for a breakdown in constitutional order.

¹⁰⁹ *Prize Cases*, 67 U.S. 635, 667-668 (1862). (Emphasis in original.)

¹¹⁰ *Ex Parte Milligan*, 71 U.S. 2, 127 (1866)

¹¹¹ *Youngstown v. Sawyer*, 343 U.S. 579, 637 (1952).

¹¹² Justice Brandeis in dissent, *Myers v. United States*, 272 U.S. 52, 293 (1926).