

# TRUST THE PROCESS: HOW THE NATIONAL EMERGENCY ACT THREATENS MARGINALIZED POPULATIONS AND THE CONSTITUTION—AND WHAT TO DO ABOUT IT

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On February 15, 2019, President Donald Trump issued Proclamation 9844 pursuant to the National Emergencies Act of 1976<sup>1</sup> (NEA), declaring a “National Emergency Concerning the Southern Border of the United States.”<sup>2</sup> On February 27, the House of Representatives voted 245–182 to overturn the declaration of national emergency; on March 14, the Senate agreed with the House in a 59–41 vote.<sup>3</sup> The following day, the President vetoed the joint resolution.<sup>4</sup> Neither house of Congress was able to override the veto and so, more than a year later, the emergency remains in place.<sup>5</sup>

The border wall emergency declared by President Trump has awakened strident opposition in Congress, which is a historical anomaly.<sup>6</sup> And yet, although virtually none of the previous declarations engendered the vehement outcry that accompanied the border wall emergency declaration, they were substantially different only in scope, not in kind. Including Trump’s border wall emergency

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<sup>1</sup> National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2018).

<sup>2</sup> Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 20, 2019) (ordering the military to assist the Department of Homeland Security at the U.S.-Mexico border, i.e. in constructing a border wall).

<sup>3</sup> Jordain Carney, *Senate Again Votes to End Trump Emergency Declaration on Border Wall*, HILL (Sep. 2019), <https://thehill.com/homenews/senate/462983-senate-again-votes-to-end-trump-emergency-declaration-on-border-wall> [<https://perma.cc/T5ED-EQN6>].

<sup>4</sup> President Donald Trump, Veto Message to the House of Representatives for H.J. Res. 46 (Mar. 15, 2019).

<sup>5</sup> Congress passed another joint resolution to end the emergency in October 2019, which the President again vetoed. Eric Beech, *Trump Vetoes Measure to End His Emergency Declaration on Border Wall*, REUTERS (Oct. 15, 2019), <https://www.reuters.com/article/us-usa-trump-congress-emergency/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKBN1WV06P> [<https://perma.cc/JGL7-T8C7>].

<sup>6</sup> JENNIFER K. ELSEA, EDWARD C. LIU & JAY B. SYKES, CONG. RESEARCH SERV., LSB10242, CAN THE DEPARTMENT OF DEFENSE BUILD THE BORDER WALL? (2019) (“While the NEA directs each house of Congress to meet every six months to consider whether to terminate a national emergency by joint resolution, *Congress has never met* to consider such a vote.”) (emphasis added).

declaration and four subsequent emergency declarations,<sup>7</sup> Presidents going back to Jimmy Carter have declared a total of 57 emergencies under the NEA.<sup>8</sup> Thirty-four of these are still active. And all but four of them could hardly be called emergencies. Even without the partisan political context of the border wall dispute, any of these should have been sufficient to raise the question of whether and how to rein in presidential power.

**Table I. Number of Emergencies in Effect and Emergencies No Longer in Effect, by President**  
1979-2019

President	Number of National Emergencies in Effect	Number of National Emergencies No Longer in Effect <sup>a</sup>	Total
James E. Carter	1	1	2
Ronald W. Reagan	0	4	4
George H. W. Bush	0	4	4
William J. Clinton	5	10	15
George W. Bush	10	2	12
Barack H. Obama	10	2	12
Donald J. Trump	8	0	8
<b>Total</b>	<b>34</b>	<b>23</b>	<b>57</b>

Source: L. ELAINE HALCHIN, CONG. RESEARCH SERV., CRS REP. NO. 98-505, NATIONAL EMERGENCY POWERS 12 (2020).

As a practical matter (if not a *political* one) virtually all of these “emergencies” could have been effectively addressed through the normal legislative process. The four possible exceptions are two in response to the attacks of September 11, 2001, one in 2009 that relaxed certain regulations to allow hospitals to better address the H1N1 (swine flu) pandemic, and the most recent declaration in response to the COVID-19 pandemic.<sup>9</sup> The rest dealt overwhelmingly with sanctions on individuals such as terrorists, drug dealers, foreign government officials, or foreign states themselves<sup>10</sup>—nothing that would seemingly require the unique energy and speedy action of the unitary executive.

Yet most of the declarations were not even *nominally* objected to by majorities of either party for the simple reason that they produced politically

<sup>7</sup> Including most recently, of course, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

<sup>8</sup> For a list of these declared emergencies including their start and end dates, see L. ELAINE HALCHIN, CONG. RESEARCH SERV., CRS REP. NO. 98-505, NATIONAL EMERGENCY POWERS 12–16 (2020).

<sup>9</sup> See Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic, Proclamation No. 8433, 74 Fed. Reg. 55,439 (Oct. 23, 2009); Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001); Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

<sup>10</sup> See HALCHIN, *supra* note 8 (listing declared national emergencies since 1979).

expedient, short-term results that were acceptable to Republicans and Democrats alike.<sup>11</sup> Moreover, because the vast majority of emergencies declared under the NEA thus far have been focused on sanctioning foreign individuals for human rights violations, they have not primarily had any domestic effect, nor have they imposed significant harm on substantial voting populations or significant political interests. As a result, they have not aroused much concern from political opponents looking to gain the support of the electorate or score political points. But it beggars belief that no one considered the bigger picture: the impact on the balance of power between the executive and legislative branches.

Indeed, as the border wall “emergency” aptly demonstrates, Congresses and Presidents that delegate or receive broadened power must be careful what they wish for. After all, the power you give to “your President” will eventually be in the hands of “their President.” Case in point: in the political free-for-all surrounding Trump’s invocation of the NEA to divert congressionally appropriated funds to build his border wall, Democrats began posturing about how, when in power, they, too, would declare emergencies to evade the inconvenient political constraints in Congress and address their own priorities, like climate change and gun violence.<sup>12</sup> Even in the face of the realization of the extent of power such expansive declarations entail, promises to invoke the NEA to address such “non-emergency-emergencies” continue.<sup>13</sup> As then Democratic presidential candidate Bernie Sanders avowed as recently as October of 2019: “As president, [I] will declare a national emergency on climate change . . . [I] will use executive authority to ban fossil fuel extraction on public lands, effectively ban fracking and mountaintop removal coal mining, ban offshore drilling, ban imports and exports of all fossil fuels, [and] end all new federal fossil fuel infrastructure permits . . .”<sup>14</sup>

To be sure, it is possible to envision circumstances that are indeed true emergencies that can benefit from (temporarily) expanded presidential power; arguably the current COVID-19 crisis is one such emergency. But the relatively narrow needs of a specific emergency do not justify the wholesale abdication of a constitutional structure aimed at mitigating the excessive agglomeration of power in a single branch of government. And, indeed, as we discuss at greater length below, it is not even clear that the federal government’s response to the COVID-19

<sup>11</sup> See Elsea, Liu & Sykes, *supra* note 6.

<sup>12</sup> E.g., Eliza Relman, *Democrats Respond to Trump’s National Emergency Declaration by Calling for Executive Action to Address Gun Violence and Climate Change*, BUS. INSIDER (Feb. 15, 2019), <https://www.businessinsider.com/democrats-call-for-national-emergencies-on-guns-and-climate-change-2019-2> [<https://perma.cc/R8GF-AX4W>].

<sup>13</sup> See, e.g., Editorial Board, *Now It’s a Climate ‘Emergency,’* WALL ST. J. (Jul. 14, 2019), <https://www.wsj.com/articles/now-its-a-climate-emergency-11563138092> [<https://perma.cc/K3Z3-WLVF>] (noting that Senator Bernie Sanders and Representative Alexandria Ocasio-Cortez “introduced a joint resolution declaring that the climate Apocalypse is nigh, and demanding ‘a national, social, industrial, and economic mobilization of the resources and labor of the United States at a massive-scale’”); Umair Irfan & David Roberts, *The Executive Actions Democratic Presidential Hopefuls Intend to Use to Fight Climate Change*, VOX (Oct. 15, 2019), <https://www.vox.com/energy-and-environment/2019/10/14/20880696/2020-democratic-debates-climate-change-executive-actions> [<https://perma.cc/35XT-6KWC>] (publishing responses from seven Democratic candidates to the question, “what executive actions are you prepared to take to reduce carbon emissions?”).

<sup>14</sup> Irfan & Roberts, *supra* note 13.

pandemic has turned in any meaningful way on the President's invocation of the NEA.<sup>15</sup>

When Congress expands executive power for purposes of protecting the nation against an emergency—whether real or imagined—that power is often turned against vulnerable, marginalized populations that are easily scapegoated as threats to the state. The most glaring historical example of this is the internment of more than 100,000 Japanese Americans pursuant to the congressional declaration of war during World War II.<sup>16</sup> But there are other troubling examples, as well, including the selective enforcement of the 1917 Espionage Act and 1918 Sedition Act to censor anti-war speech (primarily by German immigrants and members of the Socialist Party) during and after World War I.<sup>17</sup> While, as noted, presidential invocations of the NEA thus far have primarily targeted politically unsympathetic foreign individuals, the expansion of executive power they entail could easily be expanded for use against marginalized groups domestically, as well. Indeed, given President Trump's recent targeting of Iranian Americans returning to the United States<sup>18</sup> and his recent expansion of the 2017 travel ban,<sup>19</sup> there is obvious potential for executive power to be turned against minority groups. The political value of the border wall “emergency” itself is, of course, rooted in part in xenophobia and racism.

Unfettered executive power is not just a problem for vulnerable groups when in the hands of President Trump. Say, for example, a future Democratic President declares a climate-related national emergency and imposes a massive fuel tax or suspends off-shore oil drilling in an effort to lower carbon emissions.<sup>20</sup> While these might seem to entail long-term benefits for everyone, the more-near-term economic costs borne by those most dependent on fossil fuels and least able to

<sup>15</sup> See *infra*, notes 52-65 and accompanying text.

<sup>16</sup> See generally, History.com Editors, *Japanese Internment Camps*, HISTORY.COM (Feb. 21, 2020), [https://www.history.com/topics/world-war-ii/japanese-american-relocation#section\\_1](https://www.history.com/topics/world-war-ii/japanese-american-relocation#section_1) [<https://perma.cc/2K6X-TDKK>].

<sup>17</sup> For a discussion of President Wilson's repressive enforcement of the Espionage Act of 1917 and the Sedition Act of 1918, both during and after WWI, see generally Daniel J. Tichenor, *Historical Set Points and the Development of U.S. Presidential Emergency Power*, 11 PERSP. ON POL. 769, 776–79 (2013).

<sup>18</sup> See Zolan Kanno-Youngs, Mike Baker & Mariel Padilla, *U.S. Stops Dozens of Iranian-Americans Returning from Canada*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/us/politics/iranian-americans-border.html> [<https://perma.cc/5J8C-UNKP>] (reporting that in the wake of the Qasem Soleimani killing, the Department of Homeland Security stopped over 60 Iranian-Americans at the US-Canada border, detaining some up to 10 hours and turning others away temporarily).

<sup>19</sup> Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9983, 85 Fed Reg. 6,699 (Feb. 5, 2020).

<sup>20</sup> See, e.g., Irfan & Roberts, *supra* note 13 (quoting, among others, presidential candidate Joe Biden (“On day one, [I] will sign a series of new executive orders with unprecedented reach that put us on the right track to address our climate crisis”) and then-candidates Tom Steyer (“I will not hesitate to use the emergency powers of the presidency to protect the American public from the climate crisis, just as I would use those powers to protect our country from a hostile military invasion”) and Elizabeth Warren (“My plan for public lands includes signing an executive order on my first day as president that says no more drilling. . . .”)).

switch to more expensive renewable energy sources could be significant—and significantly greater than those borne by wealthier individuals.<sup>21</sup>

It is also possible, of course, that an emergency declaration could be used to help, rather than scapegoat, the most vulnerable—for example, if one were issued to implement some kind of national health insurance program.<sup>22</sup> But such tangible benefits should not be seen as a reason to subvert the constitutional process of legislation or to erode the norms of liberal democratic governance. One of the purposes of enshrining governing principles in a difficult-to-amend Constitution is to privilege process over outcomes, means over ends, and the long-term over the short-term.

Using emergency powers to sidestep the constitutionally-assigned processes for governance, in the way that President Trump used the declaration of national emergency to divert money from an appropriated use to build his border wall—a project which Congress had explicitly chosen *not* to fund<sup>23</sup>—undermines democratic process and norms alike. As Daniel Ziblatt and Steven Levitsky, authors of *How Democracies Die*,<sup>24</sup> warned in the *New York Times*:

[Such actions] threaten the constitutional balance even under democratically minded presidents like Abraham Lincoln and Franklin Roosevelt. But they can be fatal under would-be autocrats. . . . Crises present such great opportunities for concentrating power that would-be autocrats often manufacture them. . . . [T]hese developments should set off alarm bells. Our president is behaving like an autocrat.<sup>25</sup>

The fundamental problem is that the NEA, as it currently stands, makes it all but impossible for Congress to claw back the power that the President assumes with a declaration of national emergency. While the NEA establishes that presidential emergency declarations expire after one year, the President can extend the state of

<sup>21</sup> See, e.g., CHRISTOPHER R. HAYES, URBAN INST., IMPACT OF RISING GAS PRICES ON BELOW-POVERTY COMMUTERS 1 (2008) (noting that “poor commuters spend a much higher proportion of their wages on gas,” and that a doubling of gas prices from \$2 “takes 4.3 percent of income from below-poverty commuters and 1.0 percent from those above poverty . . .”).

<sup>22</sup> See Elaine Kamarck, *A President’s National Emergencies Are in the Eye of the Beholder*, BROOKINGS INST. (Feb. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/02/14/a-presidents-national-emergencies-are-in-the-eye-of-the-beholder/> [<https://perma.cc/LA8T-6343>] (“A Democratic president could consider any level of uninsured Americans as a public health emergency. A non-trivial number of Americans face health crises and even death each year as a result of lacking insurance or sufficient coverage. President Trump’s concern about the border includes the number of Americans who suffer or die at the hands of individuals who cross the border illegally. Another president could view similar harms, at the hands of an insufficient healthcare system, as a national emergency and act accordingly under the Trump National Emergency Precedent.”).

<sup>23</sup> Ellen Mitchell, *Lawmakers Push Back at Trump’s Pentagon Funding Grab for Wall*, HILL (Feb. 17, 2020), <https://thehill.com/policy/defense/483303-lawmakers-push-back-at-trumps-pentagon-funding-grab-for-wall> [<https://perma.cc/X8XW-D48J>].

<sup>24</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

<sup>25</sup> Steven Levitsky & Daniel Ziblatt, *Why Autocrats Love Emergencies*, N.Y. TIMES (Jan. 12, 2019), <https://www.nytimes.com/2019/01/12/opinion/sunday/trump-national-emergency-wall.html> [<https://perma.cc/8DYY-JSHX>].

emergency simply by publishing in the Federal Register and notifying Congress.<sup>26</sup> The only mechanism for ending an emergency without the cooperation of the President is through a joint resolution of Congress, which must be presented to the President for signature or veto.<sup>27</sup> Assuming that any President will inevitably object to having his or her declared emergency terminated by Congress, it will essentially *always* require supermajorities in *both* houses for Congress to override a veto to check the emergency power of the President.

To say that this constraint is effectively toothless is hardly an overstatement. Only 4.3% of vetoes (111 of 2,580) have been overturned in U.S. history.<sup>28</sup> This rate is likely to shrink in today's age of increasing partisan polarization, where supermajority agreement is nearly impossible to obtain. Meanwhile, Congress has few, if any, other tools by which it can push back against the expansion of executive power by the President: standing issues and the "political question" doctrine have historically prevented members of Congress, and even Congress as a whole, from suing the President over policy actions.<sup>29</sup>

Thus, between the all-but-impossible-to-overturn presidential veto and the ability of the President to unilaterally and indefinitely extend states of emergency, the NEA effectively amounts to an unchecked usurpation of legislative power by the executive branch—or, perhaps more accurately, an unchecked *congressional grant* of legislative power to the executive branch.

What is required is a realistic process that allows for a President to take extraordinary action when truly needed, while preserving the ability of Congress to check abusive executive action and to protect its legislative authority. As it happens, such a process was built into the original National Emergencies Act.<sup>30</sup> Following a President's emergency declaration, Congress, *with simple majorities in both houses*, could block implementation of the declaration with a concurrent resolution not subject to a presidential veto.<sup>31</sup> But the Supreme Court struck down this sort of process in the 1983 case, *INS v Chadha*.<sup>32</sup>

In *Chadha*, the Court ruled that such a process amounted to an unconstitutional "legislative veto" by enabling Congress to stop a presidential action, without allowing for a subsequent presidential veto of the concurrent resolution, in

<sup>26</sup> National Emergencies Act, 50 U.S.C. § 1622(d) (2012).

<sup>27</sup> *Id.* §§ 1622(a)(1), (c).

<sup>28</sup> *Presidential Vetoes*, U.S. House of Representatives Hist., Art & Archives (last updated Jan. 6, 2020), <https://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> [<https://perma.cc/4VVK-Y57N>].

<sup>29</sup> Thus, for example, a recent effort by the House to challenge President Trump's border wall emergency on grounds that it undermines the institution's appropriations authority (and thus the Constitution's Appropriations Clause) was tossed out on standing grounds. *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 18 (D.D.C. 2019) ("Congress may not invoke the courts' jurisdiction to attack the execution of federal laws.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)).

<sup>30</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651 (2012)).

<sup>31</sup> *Id.* § 202(a)(1) (codified as amended at 50 U.S.C. 1622 (2012)).

<sup>32</sup> See *INS v. Chadha*, 462 U.S. 919, 956-59 (1983) (striking down, for unconstitutionally circumventing the Presentment Clauses and bicameralism, a law that allowed one house of Congress to veto the Attorney General's decision not to deport a removable non-citizen).

contravention of the Constitution's Presentment Clause.<sup>33</sup> Subsequently, Congress amended the NEA to comport with the regular legislative process requiring joint resolutions to be presented to the President for signature and, thus, a two-thirds majority of both houses to override a presidential veto.<sup>34</sup> This has led to the current situation in which it is virtually impossible to navigate the process and garner the votes needed to block an emergency declaration.

And yet, according to constitutional scholar Louis Fisher, since *Chadha*, hundreds of legislative veto (or legislative-veto-like) provisions have been included in congressional acts or created through informal agreements between Congress and executive agencies.<sup>35</sup> Virtually none of these provisions have been subject to judicial review.<sup>36</sup> As a result, writes Fisher, “[t]he meaning of constitutional law in this area is evidently determined more by pragmatic agreements hammered out between the elected branches than by doctrines announced by the Supreme Court.”<sup>37</sup>

Among these are several well-known and important instruments used by either Congress or the President that include mechanisms identical or similar to the legislative veto to reallocate constitutional checks and balances. Some examples are “fast-track” trade authority (Trade Promotion Authority or TPA),<sup>38</sup> the War Powers Resolution,<sup>39</sup> the Global Magnitsky Act,<sup>40</sup> and the Exon-Florio amendment to the Defense Production Act of 1950 (which created the Committee on Foreign Investment in the United States (CFIUS)).<sup>41</sup>

TPA allows the President to negotiate trade agreements with foreign states and to present them to Congress, which may vote only yes or no on the bill and must do so on the same day the agreement is sent to Congress, essentially allowing the President to make law without the standard congressional mark-up, negotiation, and amendment process.<sup>42</sup> The War Powers Resolution allows Congress, through concurrent resolutions (which are not sent to the President), to force the President to

<sup>33</sup> See *id.* at 958 (“To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.”).

<sup>34</sup> See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93, § 801, 99 Stat. 405, 448 (1985) (codified as amended at 50 U.S.C. § 1622 (2012)).

<sup>35</sup> See LOUIS FISHER, CONG. RESEARCH SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA (2005) (describing various ways Congress inserts control and oversight over the executive into bills that delegate legislative power to that branch).

<sup>36</sup> See LOUIS FISHER, CONG. RESEARCH SERV., RL33151, COMMITTEE CONTROLS OF AGENCY DECISIONS 31 (2005) (“Moreover, these committee vetoes have not been litigated and subjected to judicial review and possible invalidation, nor is there any indication that someone is likely to gain standing to bring these committee vetoes into court.”).

<sup>37</sup> Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273, 273 (1993).

<sup>38</sup> Reauthorized most recently in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. 114–26, 129 Stat. 320 (codified at 19 U.S.C. §§ 4201–4210 (2018)).

<sup>39</sup> War Powers Resolution, 50 U.S.C. §§ 1541–1549 (2012).

<sup>40</sup> Global Magnitsky Human Rights Accountability Act, Pub. L. 114–328, 130 Stat. 2533 (2017).

<sup>41</sup> Authority to Review Certain Mergers, Acquisitions, and Takeovers, Pub. L. No. 100–418, 102 Stat. 1425 (codified at 50 U.S.C. § 4565 (2018)).

<sup>42</sup> Trade Act of 1974, 19 U.S.C. § 2191 (2018) (laying out process for Congressional approval of “trade agreements on nontariff barriers and resolutions approving commercial agreements with Communist countries”).

remove troops from a theater of war.<sup>43</sup> Global Magnitsky allows just two members of Congress—a committee chair and a ranking member—to require that the President submit to congressional oversight when the President imposes sanctions on individuals for violations of international human rights law (notably, the purpose of the majority of declared emergencies under the NEA) under the act.<sup>44</sup> Exon-Florio is perhaps the most problematic of these mechanisms as it allows the President unilaterally to regulate trade by blocking foreign investment that would give foreign owners a controlling interest in U.S. businesses involved in national security, without the action even being subject to judicial review.<sup>45</sup>

All of these instruments seem to violate both the Presentment Clause and the nondelegation doctrine—the principle of constitutional interpretation that prohibits Congress from delegating its legislative authority to the executive branch. While they operate in different (and perhaps sometimes troubling) ways, they are all limited to situations that are arguably—or at the very least *customarily*—within the scope of the relevant institution’s constitutional ambit. Thus, the executive clearly has the power to make treaties,<sup>46</sup> arguably has the power impose foreign sanctions to protect national security,<sup>47</sup> and (at least since 1934) customarily has the power to restrict international trade.<sup>48</sup> Congress, meanwhile, clearly has the power to declare

<sup>43</sup> War Powers Resolution, 50 U.S.C. § 1544(c) (2012).

<sup>44</sup> Global Magnitsky Human Rights Accountability Act, Pub. L. 114–328, 130 Stat. 2533, 2535 (2017). This obligation was singled out by President Obama as unconstitutional in his signing statement on the Act. *See* Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, 2016 DAILY COMP. PRES. DOC. 863 (Dec. 23, 2016) (“[S]ection 1263(d) purports to require me to determine whether a foreign person has committed a sanctionable human rights violation when I receive a request to do so from certain members of Congress. Consistent with the constitutional separation of powers, which limit the Congress’s ability to dictate how the executive branch executes the law, I will maintain my discretion to decline to act on such requests when appropriate.”).

<sup>45</sup> Defense Production Act, 50 U.S.C. §§ 4565(d)(1), (e)(1) (2018). The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) further expanded the President’s power over commerce by authorizing CFIUS to block (among other things) *non-controlling* foreign investments in U.S. businesses involved with merely critical technology, infrastructure, or data. *See* Defense Production Act, 50 U.S.C. § 4565(a)(4)(D)(i)(III) (2018).

<sup>46</sup> U.S. CONST. art. II, § 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . .”).

<sup>47</sup> This position is contentious. *See, e.g.,* Andrew Kent & Julian Davis Mortenson, *Executive Power and National Security Power*, in CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 261 (Karen Orren & John W. Compton, eds. 2018). But—for better or worse—there is fairly broad agreement that the President possesses important and substantial power over national security matters. *See, e.g.,* Abraham Sofaer, *Presidential Power and National Security*, 37 PRESIDENTIAL STUD. Q. 101, 120 (2007) (“The Constitution allocates powers over national security to all the branches that enable each to affect national policy. . . . [T]he executive may use his powers on national security issues with initiative, but . . . the president’s authority is subject to the exercise of Congress’s powers, and to the Supreme Court’s decisions on conflicting interpretations.”).

<sup>48</sup> This is also contentious. Under the Constitution, Congress alone has the power to “lay and collect Taxes, Duties, Imposts and Excises . . . [and t]o regulate Commerce with foreign Nations. . . .” U.S. CONST. art. I, § 8. The President has no inherent power to regulate trade. *See* United States v. Yoshida Int’l, Inc., 526 F.2d 560, 572 (C.C.P.A. 1975) (“It is nonetheless clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.”). Nevertheless, since the enactment of the Reciprocal Trade Agreement Act of 1934, 19 U.S.C. §§ 1351–1354 (2018), the President has exercised substantial leeway to impose tariffs and otherwise to restrain trade in order to protect U.S. interests. Moreover, since at least 1936, the executive has enjoyed enormous deference generally in the

war.<sup>49</sup> Moreover, each of these provisions limits the *scope* of expanded executive authority (or legislative authority, in the case of the War Powers Resolution) to specific issue areas and to relatively narrowly delineated powers.

The NEA, by contrast, delegates to the President *domestic legislative power*—something clearly reserved for Congress under the Constitution<sup>50</sup>—and does so even in circumstances where neither national security or international relations are necessarily implicated.<sup>51</sup> Moreover, the NEA allows for expanded executive power with a virtually unbounded scope and in a manner that is nearly impossible to check. Indeed, there are at least 123 distinct statutory emergency powers that become available to the President through the invocation of the NEA.<sup>52</sup>

It is possible that any problematic consequences or unconstitutionality inherent in the triggering of the above mechanisms are outweighed by the benefits of increased efficiency and efficacy, and the *relative* preservation of checks and balances each embodies. In his dissent in *Chadha*, Justice Byron White made a similar argument, stating that:

Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or, in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes.<sup>53</sup>

For Justice White—and perhaps as demonstrated by the ongoing border emergency dispute—an NEA *without* the legislative veto would do more damage to the constitutional order than would the legislative veto itself. Indeed, the current state of affairs “is a system of lawmaking that is now more convoluted, cumbersome, and covert than before. . . . In many cases, the Court's [*Chadha*] decision simply drives

realm of international relations—including from the Supreme Court. See *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319–20 (1936) (explaining—in dicta—that the executive enjoys “plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations.”).

<sup>49</sup> U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o declare War . . .”).

<sup>50</sup> U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States. . .”).

<sup>51</sup> The NEA contains no definition of “emergency,” nor does it place any substantive limitations on what constitutes an emergency under the Act. As one constitutional scholar wrote, illuminating the near-infinite scope of “emergency,” emergency conditions are those that “have not attained enough of stability or recurrency to admit of their being dealt with according to rule.” EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 3 (4th ed. 1957).

<sup>52</sup> Brennan Center for Justice, *A Guide to Emergency Powers and Their Use* (Sep. 4, 2019), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [https://perma.cc/3VXM-8G8J].

<sup>53</sup> *INS v. Chadha*, 462 U.S. at 919, 968 (1983) (White, J. dissenting).

underground a set of legislative and committee vetoes that formerly operated in plain sight.”<sup>54</sup>

Perhaps it’s time for the Supreme Court to reconsider the legislative veto, particularly in light of its ongoing use following the *Chadha* decision. One possible route by which the Court can undo the legacy of *Chadha* is to discard the argument that the legislative veto is a “law” that must adhere to the Presentment Clause. Instead, it could be considered an administrative action, used by both branches, that provides a mechanism by which Congress may safely delegate some power when efficient governance demands it—much as Justice White counseled.

In any case, given the judiciary’s apparent acquiescence to the reality of the legislative veto since *Chadha*,<sup>55</sup> Congress should reclaim some modicum of legislative authority by amending the NEA to reinsert the legislative veto and taking its chances in court. Relative to the status quo, we would then at least return to some semblance of congressional oversight of the NEA’s dangerous grant of executive power.

But, while both of these approaches are interesting in theory, there is a practical problem with them, and it is one that undergirds most of President Trump’s most troubling conduct: the current President has little respect for constitutional niceties and the norms of governance that have largely guided our federal government since the beginning of the republic. Uses of the NEA prior to President Trump’s attempt to build a border wall were relatively limited and almost entirely applied to foreign actors. But when used in the domestic arena, the NEA presents a significant opportunity for Presidents to bypass Congress. It is virtually unfathomable that President Trump would be willing to part with such power and sign the legislative veto back into being. Most likely we will have to wait for a President (and a Congress) willing to look at the big picture—if they ever arrive.

In the event that the legislative veto is reinserted into the NEA and the Court is bent on striking it down pursuant to *Chadha*, there are still ways in which a congressional concurrent resolution can play *some* role. As discussed in a recent post on *Just Security* canvassing the views of a number of experts, one possibility would be to use the concurrent resolution to demand information or reporting from the President.<sup>56</sup> If, as Jennifer Daskal argues, the concurrent resolution in Magnitsky is constitutional because it’s not inherently a legislative act but rather only “triggers reporting” by the President, a similar mechanism could be used in the NEA to require

<sup>54</sup> Fisher, *The Legislative Veto*, *supra* note 3, at 292.

<sup>55</sup> In the one case squarely addressing such informal legislative vetoes, the Federal Circuit upheld a mechanism for congressional committee review of General Services Administration sales of certain government property, reversing the lower court. *See City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984) (“There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government.”).

<sup>56</sup> Ryan Goodman, *Trump’s Invoking Obama Signing Statement as Reason Not to Report to Congress on Khashoggi Murder: A Roundup of Expert Views*, JUST SECURITY (Feb. 28, 2019), <https://www.justsecurity.org/62737/khashoggi-magnitsky-act-chadha-constitutionality-reporting/> [<https://perma.cc/J7YG-S7TN>].

the President to explain and justify his rationale for declaring an emergency.<sup>57</sup> Or, as Andy Wright claims, the concurrent resolution could provide a “sense of the Congress,” functioning as a “legislative tripwire that, if crossed by the executive branch, will arouse congressional interest and trigger interbranch dialogue.”<sup>58</sup> Of course, neither of these alternatives would block the emergency declaration. Indeed, as Richard Pildes writes, “Congress [would] be reduced to a largely symbolic role.”<sup>59</sup> But in the absence of stronger medicine, such informal methods may be all that are available.

In any case, now that the danger of largely unfettered executive power conferred by the NEA has been put in stark relief, every congressperson is on notice. President Trump is unlikely to be the last President who ignores traditional norms, exploits broad laws as a means to aggrandize him- or herself, and routes around the few remaining checks on executive power.

As Presidents, following the precedent set by President Trump, begin to use the NEA to accomplish domestic political objectives, the erosion of the legislative process threatens not just to undermine the Constitution but also to harm the most vulnerable whose interests should be taken into account, if not affirmatively protected. Congress, as the most representative and deliberative body of government, is supposed to represent all of the varied interests in the nation and balance them against one another. Yes, sometimes one group may be harmed in order to advance a wider policy objective. But, at a minimum, the deliberative process ensures that the “losers” have their voices represented in the process by which they are disadvantaged, and at least an *opportunity* for compensation and compromise.

If the constitutionally-designated process by which Congress appropriates funds and makes laws that are then spent and carried out by the executive branch must be changed, it should be done by constitutional amendment rather than through executive fiat and congressional fecklessness. Nor should we desire even “good” policy outcomes arrived at through constitutionally unsound processes. Indeed, under the Court’s “major questions” jurisprudence,<sup>60</sup> significant policy decisions may be undertaken by the executive branch only with a clear delegation of authority from Congress—no matter how desirable the policy outcomes. It is certainly

<sup>57</sup> *Id.* (“The reporting requirements do not in any way require the executive to impose sanctions, or to alter its view regarding the imposition of sanctions (or not). The requirements do not alter legal rights. And they do not in any way involve a policy decision. At the very least, it seems clear that Chadha does not, absent a further elaboration of the definition of ‘legislative,’ dictate the answer with respect to the reporting requirements in the Magnitsky Act.”).

<sup>58</sup> *Id.*

<sup>59</sup> Richard H. Pildes, *The Supreme Court’s Contribution to the Confrontation Over Emergency Powers*, LAWFARE (Feb. 19, 2019), <https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers> [<https://perma.cc/FF5L-KRJ3>].

<sup>60</sup> The major questions doctrine holds that Congress will be assumed to have delegated rulemaking authority to executive agencies over questions of great economic and political magnitude only when it does so explicitly. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000). In recent years the Court has reinvigorated the doctrine, most recently in its 2015 Obamacare decision. *See King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (declining to defer to the IRS’ interpretation of the Affordable Care Act (ACA) because it is a question of “deep ‘economic and political significance’” where Congress did not explicitly delegate interpretation authority to the IRS).

conceivable that the current Court would strike down any effort to expand the ambit of the NEA to address such major policy issues.<sup>61</sup>

Finally, it bears acknowledging that, while the complexity of the modern world *might* demand that Congress be able to delegate broad powers to the President (while ensuring some kind of ability to rein that power back in when necessary), it might also be the case that the need for a broad emergency powers law is overblown. Perhaps the most palatable solution would be repeal of the NEA entirely, and the reliance on specific delegations of power enumerated in individual acts, rather than those collectively triggered by a declaration of emergency under the NEA. A global pandemic, such as COVID-19, would seem to be exactly the kind of situation that the NEA was designed to address, but if the spread of coronavirus can be addressed through normal political processes, perhaps instead of trying to fix the NEA Congress should do away with it altogether.

While President Trump did, on March 13, 2020, declare the spreading coronavirus to be a national emergency under the NEA, the substantive actions taken in response to the crisis have virtually all been taken either (a) by Congress, or (b) pursuant to the Stafford Act or the Defense Production Act (DPA)—not the NEA (or other statutes triggered by a declaration of emergency under it).

Importantly, most of the rapid federal response to the growing pandemic—such as the \$2.2 trillion “stimulus” package—has come through traditional lawmaking by Congress.<sup>62</sup> Congress introduced its first, “Phase 1” coronavirus appropriations bill in the House on March 4, 2020. The bill was passed by the House the same day, and by the Senate the following day. It was signed into law on March 6—a week before President Trump even declared a national emergency.<sup>63</sup> “Phase 2,” the Families First Coronavirus Response Act,<sup>64</sup> was introduced in the House five days later, on March 11. It was passed by the House on March 14, passed by the Senate on March 18, and signed into law by the President the same day. The Senate passed the largest, “Phase 3” relief bill, the CARES Act,<sup>65</sup> on March 25, and the House passed the bill on March 27; the President signed it into law the same day.

<sup>61</sup> As then-Judge (now-Justice) Kavanaugh noted in dissenting from the D.C. Circuit’s denial of rehearing in a net neutrality order case, “[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action.” U.S. Telecom Ass’n v. Fed. Comm’n Comm’n, 855 F.3d 381, 421 (D.C. Cir. 2017) (emphasis in original). See also Paul v. United States, 140 S. Ct. 342, 342 (U.S. 2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (suggesting that the Court should consider the theory that Congress cannot delegate major questions to agencies even if done explicitly). It is extremely difficult to argue that the NEA “clearly authorize[s]” the executive branch to undertake the sorts of major legislative initiatives contemplated by those who would use it to address climate change, gun control, or health insurance (among other things).

<sup>62</sup> Jordan Fabian & Justin Sink, *Trump Signs \$2 Trillion Virus Bill, Largest Ever U.S. Stimulus*, Wash. Post. (Mar. 30, 2020), [https://www.washingtonpost.com/business/on-small-business/trump-signs-2-trillion-virus-bill-largest-ever-us-stimulus/2020/03/27/b89b1e1a-706c-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/business/on-small-business/trump-signs-2-trillion-virus-bill-largest-ever-us-stimulus/2020/03/27/b89b1e1a-706c-11ea-a156-0048b62cdb51_story.html) [<https://perma.cc/QR3B-P826>].

<sup>63</sup> Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020).

<sup>64</sup> Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 177 (2020).

<sup>65</sup> CARES Act, Pub. L. No. 116-136 (2020).

With respect to emergency measures taken by the President, as of the time of writing he has invoked the NEA only to direct the Secretary of the Department of Health and Human Services to “temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children’s Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule. . . .”<sup>66</sup> Virtually all of the President’s other actions have been taken pursuant to his authority under the Stafford Act<sup>67</sup> or the DPA.<sup>68</sup>

Together, the Stafford Act and the DPA suggest an alternative mechanism to the NEA for addressing emergencies. Both laws give the President expanded powers to deal with crises, but neither is dependent upon the unchecked grant of power that follows a declaration of emergency under the NEA.<sup>69</sup> And each offers a relatively constrained expansion of executive power while retaining much more effective congressional oversight over the use of that power than does the NEA.

For example, both the Stafford Act and the DPA impose various limitations and reporting requirements on direct executive branch expenditures and certain provisions of the DPA require a specific congressional appropriation of funds (beyond the annual funding of the act) before they can be implemented.<sup>70</sup> The DPA also allows the President to (among other things) expend funds in order to expedite the production of necessary materiel, including in response to an emergency, but it places limits on how that power can be used.<sup>71</sup> The Stafford Act further limits the President’s actions to those supporting state-level actions in response to natural disasters and other, similar emergencies.<sup>72</sup>

With respect to non-expenditure actions, the DPA bars the President from imposing “wage or price controls without the prior authorization of such action by a joint resolution of Congress,” and it bars using the act to circumvent rules

<sup>66</sup> Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). Notably, this was the same (and only) provision triggered directly by President Obama’s declaration of emergency in response to the swine flu pandemic. *See* Declaration of a National Emergency With Respect to the 2009 H1N1 Influenza Pandemic, Proclamation No. 8433, 74 Fed. Reg. 55,439 (Oct. 28, 2009).

<sup>67</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 (2018).

<sup>68</sup> Defense Production Act of 1950, 50 U.S.C. §§ 4501–4568 (2018).

<sup>69</sup> It is important to note that the majority of provisions in the DPA are not dependent on a declaration of emergency pursuant to the NEA and can be—and often are—activated during non-crisis times. To wit, two *New York Times* contributors note that “[t]he Defense Department estimates that it has used the law’s powers 300,000 times a year.” Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not with Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html> [<https://perma.cc/ZKX2-E3ST>]. Although some provisions of the DPA are triggered by a declaration of emergency under the NEA, there is no reason that the DPA *itself* could not provide that authority. Indeed, the Stafford Act allows the President (or Congress) to declare a disaster-related emergency without recourse to the NEA.

<sup>70</sup> *See, e.g.*, Defense Production Act of 1950, 50 U.S.C. § 4531(a)(3) (2018). Importantly, however, these limitations under the DPA are waived during declared emergencies. 50 U.S.C. § 4531(d)(1)(B)(i) (2018).

<sup>71</sup> *See* Defense Production Act of 1950, 50 U.S.C. §§ 4531–4534 (2018).

<sup>72</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 (2018).

concerning the production and testing of biological or chemical weapons.<sup>73</sup> Furthermore, there are significant legal questions as to whether companies can be ordered to make products not related to their “peace-time” operations<sup>74</sup>—the provision of the act upon which Trump has primarily relied.<sup>75</sup> Additionally, the DPA includes a sunset provision which requires Congress to reauthorize the act periodically<sup>76</sup> (it has been reauthorized 53 times in its 50 years of existence<sup>77</sup>), allowing Congress the opportunity to frequently reevaluate the utility of the law.

Using these laws as templates, Congress could replace the NEA with a suite of similar acts designed to allow the President to take needed actions, while cabining the President’s ability to essentially legislate under the NEA and retaining the ability for Congress to conduct fiscal and procedural oversight. At the very least, bringing back the legislative veto would be a reasonable, if imperfect, way to mitigate the problem of excessive executive power under the NEA as it currently stands. In order to accomplish either of these, however, members of Congress must set aside their myopic tendency to expand presidential power when it suits their preferences (or gains them votes) and to oppose it only when doing so is politically expedient. From here on out, every Congressperson and President who permits the status quo to persist is complicit in the abuse of executive power on a grand scale, and in the mistreatment of vulnerable people when that power is—inevitably—used against them.

<sup>73</sup> Defense Production Act of 1950, 50 U.S.C. § 4514 (2018).

<sup>74</sup> See, e.g., Charlie Savage, *How the Defense Production Act Could Yield More Masks, Ventilators, and Tests*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/us/politics/defense-production-act-virus.html?referringSource=articleShare> [<https://perma.cc/JSL3-6SHF>].

<sup>75</sup> See *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*, Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 23, 2020).

<sup>76</sup> Defense Production Act of 1950, 50 U.S.C. § 4564(a) (2018) (providing that the act “shall terminate on September 30, 2025 . . .”).

<sup>77</sup> JARED T. BROWN & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R43767, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 3* (2020).