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Curtailing the Executive Emergency Powers: Congress's Job, the Judiciary's Headache

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CURTAILING THE EXECUTIVE'S EMERGENCY POWERS: CONGRESS'S JOB, THE JUDICIARY'S HEADACHE

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ABSTRACT

This paper examines the expansive nature of the Executive's emergency powers and argues that Congress should act to reform these powers. The Covid-19 pandemic brought scholarly attention to this issue, but certain academics have advocated for the Judiciary to intervene in reforming Executive powers. Specifically, certain academics have asserted that the Federal Judiciary should abandon its practice of deference to the Political Branches during times of National emergency. This paper rejects this assertion and argues instead that Congress should reclaim its previously delegated powers from the Executive. Abandoning judicial deference only further upsets the Federal balance. Part I of this paper traces the historical development of the Executive's emergency powers, from the early days of the Republic, through the Civil War, and into the New Deal. Throughout this era, Congress pawned away many of its emergency powers, placing them within the grasp of the Executive. Simultaneously, the Judiciary developed and maintained its practice of emergency deference. Part II discusses the modern justifications for judicial deference and criticizes the current push for abandoning deference. Part III briefly outlines steps for Congressional intervention, suggesting reforms to the National Emergencies Act and other relevant laws. Reforms like those listed below do not disrupt the Federal balance but instead reclaim powers that Congress has previously delegated to the Executive. Altogether, this work stresses the importance of Congressional action in addressing the unchecked growth of the Executive's emergency powers. Lasting reforms must come from Congress and not the Judiciary.

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INTRODUCTION

The Covid-19 pandemic brought our Nation face to face with an unprecedented emergency. To combat this crisis, the President and Congress unsheathed many of the Federal Government's emergency powers. But whether it be eviction moratoriums, national stimulus packages, or the closures of public spaces, many people felt uneasy by the Federal Government's actions. True enough, a crisis of such magnitude surely required strong action to mitigate its harm. But what about when things return to normal? With the genie out of the bottle, can American citizens be expected to forget the awesome emergency powers of the Federal Government dangling above their heads?

This question has renewed public and scholarly interest in the Executive's emergency powers and specifically whether those powers ought to be reformed by Congress.[1] Such reforms would seek to constrict the nearly limitless scope of the President's emergency powers and impose time limits on the duration of national emergency declarations. With comprehensive reforms, Congress could reestablish its role in the mitigation of national emergencies which, as it currently stands, are largely handled by the Executive. As one recent article put it, "presidential declarations of emergency should be rare, short-lasting, and tailored to the emergency that prompts them. Unfortunately, none of these words describe the use of presidential emergency powers in the 21st century."[2]

But many doubt Congress's ability to pass substantive reforms. Political gridlock and polarization have dogged the Congress for at least the last decade, dashing for many the hope of *any* reforms. Scholars like Professor Amanda Tyler have advocated for skipping Congress altogether.[3] Indeed, Professor Tyler argues that Congress has pawned away so many of its emergency powers to the Executive that it can no longer be trusted to reclaim them. True enough, as Congress has delegated many of the emergency powers the President now enjoys. She further advocates that instead of waiting for Congress, the Judiciary should abandon its practice of deferring to the Executive during national emergencies, at least in so far as challenged emergency measures abridge constitutional rights.[4]

This paper accepts the criticism that the scope of the Executive's emergency powers has grown out of control but rejects the notion that reform should come from the Judiciary. As will be discussed, judicial deference during times of emergency dates back to the Founding. Furthermore, the very nature of the Judiciary renders it unfit to examine whether or not a state of national emergency

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[1] *See, e.g.*, Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (Jan./Feb. 2019 Issue), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.

[2] Michael Waldman, *Congress Must Rein in Presidential Emergency Powers*, BRENNAN CTR. FOR JUST. (May 24, 2023), https://www.brennancenter.org/our-work/analysis-opinion/congress-must-rein-presidential-emergency-powers.

[3] *See generally* Amanda Tyler, *Judicial Review in Times of Emergency: from the Founding through the COVID-19 Pandemic*, 109 VA. L. REV. 489 (2023) (arguing that the Judiciary should abandon its long-held practice of deference to the Executive during national emergencies).

[4] *See id.* at 593 ("Nonetheless, this Article has tried to show why, as a general matter, the application of normal standards of judicial scrutiny during times of emergency [as opposed to emergency deference] should be viewed as a welcome development.").

exists. Congress, on the other hand, possesses the necessary tools to readily reform the Executive's emergency powers and, indeed, it has done so in the past. To advocate for the abandonment of deference is to further upset the federal balance. Rather than insisting the Judiciary do something outside of its purview, the public should insist that Congress do its job to ensure the permanence of any substantive reforms.

Part I of this paper explores the history of Executive emergency powers and judicial deference in times of national emergency. As will be shown, our Nation's first President received a delegation of emergency power from Congress and adhered to its requirements steadfastly. This practice of strict Executive adherence to congressional delegations continued through the early Republic. But the crises of the Civil War set in motion a rapid expansion of the Executive's emergency powers. With the turn of the New Century and the challenges of the Great Depression and World War II, President Roosevelt further pushed the boundaries of the Executive's emergency powers. At each turn, Congress backed President Roosevelt's actions, calcifying the rapid expansion of his powers. Congress has driven the expansion of the Executive's emergency powers through a pattern of acquiescence and, at times, downright abetment. And indeed, when the Judiciary has attempted to cleave delegated powers away from the President, the Political Branches have sometimes simply ignored the judgement. Lastly, deference reflects an intrinsic role for the courts in the realm of national emergencies. To be clear, courts should defend the Constitution and the Rights enshrined therein. But most challenges to Executive emergency action occur before the regulation has been enforced. This means that, at the time of filing, the courts lack many crucial facts necessary to the assessment of the national emergency. On the other hand, the Political Branches possess these facts. Thus, as will be expanded upon, emergency deference may be all but compelled by Article III.

Part II discusses the current state of judicial deference and the unique role of each branch during national emergencies. Article III provides a specific and narrowly tailored role for the Judiciary in the federal balance of power. Unlike Article I and Article II, Article III does not provide any power attendant to the safeguarding of national security, except insofar as may result from the protection of individual rights. Because of this, the courts lack the tools required to determine whether or not a state of emergency exists. Instead, Congress and the President bear this responsibility and are held accountable to the polity through elections. For these reasons, judicial deference has long ensured that the Judiciary does not upset the balance of federal power or compromise the national security. These justifications remain relevant today and, thus, deference should not be abandoned. But, as will be discussed, the Supreme Court has recently shifted its deference jurisprudence. In a series of pre-enforcement review cases brought during the Pandemic, the Court applied a novel strict scrutiny test to the Executive action and refused to defer to the Executive's assertion of national exigency. This paper asserts that this shift in the Court's jurisprudence reflects a fundamental misunderstanding of emergency deference. Courts often face the question of deference in light of a plaintiff request for a preliminary injunction. At that early stage, the record lacks fulsome factual developments, and naked legal questions lie before the court. But the resolution of

those questions could have profound impacts upon the national security. Thus, deference, at least in the realm of temporary relief, should be treated as an *equitable* doctrine: weighing the plaintiff's request for temporary relief against the risks to the Nation. But the Supreme Court's novel strict scrutiny test treats deference as an impermissible *constitutional* doctrine. This wrongheaded view of deference places the national security squarely in the hands of the politically insulated courts, instead of the political branches. Thus, the Supreme Court's recent shift reflects the largely dangers of trusting the courts to reform the President's emergency powers. Instead, Congress must act to reform the Executive emergency powers.

Part III briefly details what actions Congress may take to curtail the Executive's powers. Since many of the emergency powers the President now enjoys were delegated by Congress, Congress may legitimately reclaim those powers from the President without disturbing the balance of federal power. This paper will take Elizabeth Goitein's position that Congress should first act to reform the National Emergencies Act[5] in order to bolster its own strength to handle national emergencies.[6] Congress should then embark upon a measured reform of several other laws to reestablish its control over the emergency powers and to ensure that national emergencies do not last for extended periods of time.

Undoubtedly, the Executive's emergency powers have grown out of control and must be curtailed sooner rather than later. But reform should not come from the courts. Indeed, too much hangs in the balance: the legitimacy of the courts, the balance of federal power, and the security of the Nation. Instead, Congress should undertake the work of reclaiming its power from the Executive. Corrupting the courts' mission to compensate for the dereliction of the legislature only serves to rot another leg of the three-legged stool upon which sets the Federal Government. Congress must do its job.

I. HISTORY, EXPANSION, AND CONGRESSIONAL CAPITULATION

To understand the Executive's modern emergency powers, one should first examine their historical scope. The Supreme Court, Congress, and the Executive have jostled since the beginning of our Nation to define the ill-defined edges of the Executive's national security powers. Undeniably, the Executive Branch's power in this area has expanded dramatically since the beginning of the Republic. Along the way, certain catalysts contributed to this burgeoning power, such as the American Civil War and the Second World War.

Under the modern statutory framework, the President gains access to a spate of previously delegated powers upon the declaration of a national emergency. Since the passage of the National Emergencies Act ("NEA") in 1976,[7] our society has experienced a relative normalization of the Executive's frequent utilization of these emergency powers. The NEA delegates directly, or by reference, at least 123

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[5] National Emergencies Act, Pub. L. No. 94–412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651 (2018)).

[6] *See generally* Goitein, *supra* note 1 (arguing Congress should act to curtail the President's emergency powers by amending the National Emergencies Act).

[7] *Id.*

distinct statutory emergency powers to the President.[8] An additional 13 emergency powers become available should Congress also declare an emergency.[9] But this has not always been the case. Indeed, during the early Republic, the Federal Government held a much humbler view of the Executive's emergency powers. Furthermore, even when the President did exercise his emergency powers, Congress expected him to adhere closely to Congress's prescribed statutory scheme.

Truth be told, emergency powers did not garner much attention at the Constitutional Convention of 1787,[10] and no such creation of inherent Executive emergency powers exists explicitly within the Constitution. However, constitutional law scholars and judges alike have long asserted on the existence of certain "implied" powers that may be read into the Constitution to grant the Executive such abilities.[11] Congress's own emergency powers may be inferred from Article I, Section 8's grant of authority to "provide for the Common Defense and general Welfare;"[12] the Commerce Clause;[13] the War and Defense Powers;[14] and the Necessary and Proper clause.[15]

These powers, which Congress holds, may be delegated to the Executive and, indeed, the practice of delegation has existed since the early days of our Republic. However, congressional delegations of emergency powers once took more constrained forms. Indeed, in looking at early congressional delegations, a markedly conservative image of Executive power begins to emerge beginning with the Whiskey Rebellion of 1794. As one of our Nation's earliest domestic crises, the Whiskey Rebellion confronted President Washington with an existential threat of the kind one might expect to bring with it a cavalier exercise of Executive power. But instead, President Washington's actions reveal the image of a careful Executive, possessing only a limited view of its own power. Thus, constrained by the Calling Forth Act of 1792, President Washington demonstrated a meticulous adherence to Congress's prescribed procedures.

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[8] *See generally A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE (Feb. 8, 2023), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use

[9] *Id.*

[10] L. ELAINE HALCHIN, CONG. RSCH. SERV., RL98-505, NATIONAL EMERGENCY POWERS 1 (2021).

[11] For a thorough examination of the Executive's implied powers, *see generally* Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019). It should also be noted that emergency powers have long been a source of interest for classical political theorists, such as John Locke, whose writings had a profound impact upon the Founding Fathers. Locke viewed the Executive's power to meet emergencies as paramount to a successful republic and wrote that the Executive ought to be vested with broad discretion to meet and mitigate such emergencies. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 203–07 (Thomas I. Cook ed., 1947); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 147–48 (NYU Press, 1957) (explaining Locke's influence upon the Founding Generation).

[12] U.S. CONST. art. I, § 8, cl. 1.

[13] U.S. CONST. art. I, § 8, cl. 3.

[14] U.S. CONST. art. I, § 8, cls. 10–17.

[15] U.S. CONST. art. I, § 8, cl. 18.

Professors Andrew Kent and Julian Davis Mortenson provide a useful history of the Rebellion.[16] In early 1791, Secretary of the Treasury Alexander Hamilton proposed an excise tax "upon spirits distilled within the United States, and for appropriating the same."[17] The tax constituted a key aspect of Secretary Hamilton's fiscal strategy for the national government.[18] The following March, Congress adopted the tax and implemented it across the Nation. However, Congress faced a sudden outpouring of vehement opposition from those living in the then-frontier of western Pennsylvania. To be sure, citizens across the young Country opposed the tax, but the true "seat of opposition was in the four western counties of Pennsylvania . . . its inhabitants were individualistic, true sons of the American Revolution who opposed the tyranny of the Federalist as they had opposed that of the Tories."[19]

Despite Congress's attempts to lessen the blow of the tax,[20] opposition remained fierce. In 1794, opposition turned to flat-out armed rebellion across western Pennsylvania.[21] The urgency of this situation for the Washington administration can hardly be overstated. No doubt, the scars and anxieties of the American Revolution still loomed over the nascent United States and the American experiment still seemed far from successful. If the United States wished to survive this ordeal, then the Federal Government would need to respond swiftly without confirming the fears of anti-federalists, themselves still leery of the new National Government.

As Professors Kent and Mortenson observe, President Washington's ability to respond to the insurrection was controlled by the Calling Forth Act of 1792.[22] Indeed, before President Washington could commandeer and mobilize the state militias to put down the rebellion, (1) the State of Pennsylvania had to petition the Federal Government for assistance;[23] (2) a federal judge needed to certify that "the

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[16] Andrew Kent & Julian Davis Mortenson, *The Search for Authorization: Three Eras of The President's National Security Power*, *in* THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION (2018), FORDHAM L. LEGAL STUD. RSCH. PAPER NO. 2824416.

[17] "28 January 1791," Journal of the Senate of the United States of America, 1789–1793.

[18] Indeed, the proposed whiskey tax would account for the second largest source of Federal revenue. RON CHERNOW, ALEXANDER HAMILTON 468 (Penguin Books 2004).

[19] Jacob E. Cooke, *The Whiskey Insurrection: A Re-Evaluation*, 30 PENNSYLVANIA HISTORY: A JOURNAL OF MID-ATLANTIC STUDIES 316, 317.

[20] Congress reduced the tax on distillers in cities, towns, and villages from twenty-five cents per gallon to eighteen cents per gallon. Act of May 8, 1792, ch. 32, 1 Stat. 267.

[21] See THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION, at 3 (Oxford 1986) ("[S]ome 7000 western Pennsylvanians advanced against the town of Pittsburgh, threatened its residents, feigned an attack on Fort Pitt and the federal arsenal there, banished seven members of the community, and destroyed the property of several others. Violence spread to western Maryland, where a Hagerstown crowd joined in, raised liberty poles, and began a march on the arsenal at Frederick. At about the same time, sympathetic 'friends of liberty' arose in Carlisle, Pennsylvania, and back-country regions of Virginia and Kentucky. Reports reached the federal government in Philadelphia that the western country was ablaze and that rebels were negotiating with representatives of Great Britain and Spain, two of the nation's most formidable European competitors, for aid in a frontier-wide separatist movement.").

[22] Act of May 2, 1792, ch. 23, 1 Stat. 264 ("Calling Forth Act"), codified as amended at 10 U.S.C. § 334.

[23] Calling Forth Act § 1.

laws of the United States [had been] opposed, or the execution thereof obstructed . . . by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals";[24] and (3) the President had to "by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time."[25] Even so, the Act did not guarantee the President the broad use of State militias but, instead, only granted the mobilization of the local militias from the areas nearest to the insurrection.[26]

But, despite the clear and immediate threat posed by the rebellion, President Washington complied meticulously with the Act's requirements. As Professors Kent and Mortenson write:

> Far from defying [the Calling Forth Act's comprehensive requirements] in a moment of crisis, Washington satisfied their every requirement in scrupulous detail. He submitted a statement to Justice James Wilson of the Supreme Court describing the situation in Pennsylvania and requesting statutory certification. He waited to muster the troops until Wilson had issued a letter reciting the requisite statutory language (after first requiring the President to come back with authentication of underlying reports and verification of their handwriting). And Washington issued the requisite proclamation ordering the Whiskey Rebels to disperse. Nor did his compliance with statutory restrictions cease once his forces were in the field. Since Congress had not been in session when he issued the call-up order, Washington was authorized by statute to mobilize militias from other states besides Pennsylvania—but only "until the expiration of thirty days after the commencement of the ensuing [congressional] session." When it became clear that the Pennsylvania campaign would take longer than that, Washington went back to Congress to petition for extension of the statutory time limit that would otherwise have required him to disband his troops. The story of the Whiskey Rebellion, in short, is one of a famously vigorous leader adhering to statutory limits in exacting detail, regardless of the inconvenience involved.[27]

After complying with the Act, President Washington federalized the militias of New Jersey, Maryland, and Virginia[28] and marched upon western Pennsylvania. In a short time and with few casualties, President Washington's federalized troops ended the Whiskey Rebellion and restored a lasting peace.

One may speculate as to why President Washington felt the need to proceed with such caution in adhering to the onerous requirements of the Calling Forth Act.

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[24] *Id.* at § 2.
[25] *Id.* at § 3.
[26] *Id.* at § 2.
[27] *See* Kent & Mortenson, *supra* note 16, at 7–8.
[28] *Id.* at note 20.

Perhaps President Washington, remembering the strong hand of the Crown, knew the threat that a strong, centralized Federal Government posed to the constituent states. Indeed, his power to federalize the militias would have seemed a grim portent of that which the anti-federalists resisted so strongly. Perhaps President Washington recalled the fiery debates that occurred during that hot summer in Philadelphia and how fears of an omni-powerful Federal Government nearly stalled the creation of the new Constitution. Or maybe, President Washington felt that strong-arming the state militias into putting down an interior rebellion would only serve to agitate further insurgencies. Whatever the reason, President Washington set an example of a moderate Executive with a self-restricting philosophy of Executive power even during emergencies.

Consequently, President Adams later adopted President Washington's limited view of the Executive's emergency powers upon France's attempts to foment war on the high seas. After a period of escalating tensions between the French First Republic and the United States, French vessels began interdicting American merchant ships. President Adams sought to preserve peace between France and the United States, despite the obvious temptation of strong Executive retaliation for the seizures. At his inauguration, President Adams announced that his priority was "to maintain peace" and neutrality in the face of war in Europe.[29] Importantly, President Adams identified this policy decision as having been "solemnly sanctioned by both Houses of Congress" and declared that such policy shall remain until another "be otherwise ordained by Congress."[30]

Furthermore, President Adams noted that if peace with France did not remain an option, then he would "lay the facts before the Legislature, that they may consider what further measures the honor and interest of the Government and its constituents demand."[31] When French attacks on American ships increased, President Adams called Congress into special session to "determine on such measures as in their wisdom shall be deemed meet for the safety and welfare" of the Country.[32] In all, President Adams stressed that such decisions "remain[ed] for Congress" to make.[33]

A. The Early Supreme Court and the Role of Deference

The early Supreme Court viewed its role in matters of national security as decidedly limited, treating Executive emergency actions with special solicitude. For example, in *Martin v. Mott*,[34] the Supreme Court addressed whether people could contest their conscription into the militia following President Madison's declaration

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[29] *Inaugural Address of President John Adams (March 4, 1797)*, *in* 1 JAMES D. RICHARDSON, ED., A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 218, 221 (Bureau of Nat'l Literature, Inc., 1897).
[30] *Id*. at 221–22.
[31] *Id.*
[32] *Proclamation of the President of the United States, March 25, 1797*, in *id*. at 222, 223.
[33] *Id.*
[34] 25 U.S. (12 Wheat.) 19, 20 (1827).

of an imminent British invasion.[35] Like President Washington, Madison relied upon the 1795 Calling Forth Act, which provided:

> [W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose . . .[36]

But when the Governor of New York called up the militia under Madison's proclamation, Jacob E. Mott declined to report for duty.[37] After being fined and having some personal items seized,[38] Mott successfully sued in state court and the matter headed up to the Supreme Court of the United States.

Writing for the Court, Justice Story observed first that the Congress could rightfully delegate its authority to repel invasions to the President.[39] But, as Justice Story noted, the Calling Forth Act delegated this power to the President only in the event of "actual invasion, or of imminent danger of invasion."[40] This meant that the real question for the Court to decide was, who gets to determine whether an invasion is actually occurring or imminent: Congress, the Court, or the President? Justice Story answered: "[w]e are all of opinion, that the authority to decide whether the exigency has arisen, *belongs exclusively to the President, and that his decision is conclusive upon all other persons*."[41] Thus, the Supreme Court had no power to second guess the President or his exercise of the congressionally delegated emergency power. *Mott* paints a strong image of judicial deference to the Executive branch and its concomitant determination of facts. Justice Story's opinion not only placed the Executive action beyond the scope of judicial review, but also placed the factual determinations pertaining to the asserted exigent national circumstances exclusively within the purview of the Executive.

Importantly, the challenged Executive action at issue in *Mott* rested upon delegations made to the Executive by Congress. Therefore, the President's action could have been reviewed and reversed by the Court only if he had exceeded the statutory grant of power contained within the statute. Thus, *Mott* affirms the validity of the President's emergency powers as delegated by Congress and the Court's preference to defer to determinations made under such a delegation to mitigate emergencies.

This is all to say that the early Supreme Court understood the role of the Executive, even within the maelstrom of national emergencies, to be limited by

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[35] *Id.* at 20.
[36] Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424.
[37] *Mott*, 25 U.S. (12 Wheat.) at 22.
[38] *Id.* at 23.
[39] *Id.* at 29.
[40] *Id.*
[41] *Id.* at 30 (emphasis added)

Congress. The Supreme Court did not view its own role as the intermediary in that relationship, provided the President remained within the bounds of Congress's delegation. *Mott* should therefore be read as an opinion blessing the constitutionality of certain congressionally delegated powers to the President and not as a blessing of freestanding, independent Executive emergency powers. The Supreme Court's view of delegated emergency powers harkens back to the example set by President Washington when he himself acted under the very same statute. But this model would not last. Instead, the American Civil War brought to bear the first true national dispute over the power of the President to take emergency action, Congress's willingness to pawn away its powers to the Executive, and the Court's power (or lack thereof) to remedy Executive overreach.

B. The Civil War and the Abandonment of Washington's Example

President Lincoln assumed office amidst national pandemonium. By the time of his swearing in, seven States had announced their secession,[42] the Confederate government had been established,[43] Jefferson Davis elected president of the Confederacy,[44] and the Confederate army raised.[45] President Lincoln, like President Washington, looked down the barrel of a great national crisis. But, unlike the Whiskey Rebellion, President Lincoln did not face a small group of ragtag farmers in western Pennsylvania but instead faced millions of people living in roughly half of the country. No doubt, this explains President Lincoln's decision not to wait for Congress but to, instead, lay hold of the Legislature's powers himself.

On April 19, 1861, President Lincoln issued an order to blockade the ports of the secessionist states,[46] a decision which many considered plainly violative of the Constitution and the law of nations.[47] President Lincoln then ordered the expansion of the Navy and extended the blockade to the ports of Virginia and North Carolina, without congressional input.[48] President Lincoln even increased the size of the Army by direct order, a power explicitly reserved to the Congress by Article I.[49]

Indeed, the President could not have delivered his orders with congressional approval even if he wanted to as the body was out of session until the summer.[50]

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[42] *See* LIBR. CONG., *Timeline of the Civil War January 1861–March 1861*, (last visited Nov. 16, 2023), https://www.loc.gov/collections/civil-war-glass-negatives/articles-and-essays/time-line-of-the-civil-war/1861/.

[43] 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA 1861–1865, Washington, Govt. print. off., 1904-05.

[44] *Id.*

[45] *See generally* BRITANNICA, *The Confederacy at War*, (last visited Nov. 14, 2023) (explaining how the Confederacy began to organize and equip an army "[i]mmediately" after secession) https://www.britannica.com/topic/Confederate-States-of-America/The-Confederacy-at-war.

[46] RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, vol. 7, pp. 3215–16.

[47] CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 225 (1963).

[48] RICHARDSON, *supra* note 46 at 3216.

[49] *Id.* at 3216–3217.

[50] THOMAS H. LEE & MICHAEL D. RAMSEY, THE STORY OF THE PRIZE CASES: EXECUTIVE ACTION AND JUDICIAL REVIEW IN WARTIME, in PRESIDENTIAL POWER STORIES 53, 56–57 (Christopher H.

When Congress did reconvene in July of 1861, it passed a host of legislation to retroactively affirm the President's unilateral actions.[51] But before Congress reconvened to pass the enabling legislation, the Navy seized four ships, *The Brig Amy Warwick*, *The Schooner Crenshaw*, *The Barque Hiawatha*, and *The Schooner Brilliante*, after each attempted to run the blockade. Because they were seized before Congress's legislation, the ships were detained solely under the powers of the Executive.[52] The ships' owners brought claims against the Federal Government for the takings, raising questions about their legality in the absence of Congress's assent. These claims would bring the Supreme Court face to face with a difficult question: what emergency powers does the President possess when he acts on his own?

The ships *Amy Warwick* and *Crenshaw* were owned by citizens of the United States who swore loyalty to the Union.[53] The other two merchant ships belonged to private citizens of neutral countries—the *Hiawatha* belonging to a British subject and the *Brilliante* belonging to a Mexican citizen.[54] The ships' owners made several arguments in court to challenge the seizures and condemnations of their vessels. The ships owned by the Union loyalists argued that the takings were not governed by the law of armed conflict or other international laws, but rather by the Fifth Amendment.[55] Thus, the Unionists ought to have been entitled to just compensation. The loyalists also argued that the Federal Government failed to provide sufficient notice of the blockade.[56] These arguments both tacitly assumed the legality of the blockade itself but raised what amounted to as-applied challenges to their particular case. In contrast, the *Brilliante's* owner challenged the very legality of the blockade itself, asserting that no "state of war" existed under international law at the time of the taking and, thus, the President lacked the power to declare the blockade.[57] All claimants lost in federal district court and appealed to the Supreme Court.

But the claimants' arguments at the district court were not without merit. In his initial blockade order, President Lincoln asserted that he had acted under "the Acts of Congress for suppressing insurrection and repelling invasion."[58] However, this reasoning was dubious at best. Indeed, before Congress's ex post legislation, there was no specific congressional authorization for seizure or blockade, and of

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Schroeder & Curtis A. Bradley eds., 2009) ("Congress was not in session when Sumter fell, nor was it schedule to reassemble for some time. Lincoln called for Congress to meet for a special session on July 4, over three months away. That gave him time to formulate an initial response on his own authority, which he did quickly and forcefully. Lincoln raised an army.").

[51] *Id.* at 59 ("Congress approved in just over a week an array of wartime measures, including funding and authorizing an expanded army and navy. Congress also approved continuation of the blockade by giving the President power to declare portions of the country in 'insurrection' and to interrupt commerce to and from them.").

[52] *See The Prize Cases*, 67 U.S. 635, 643 ("This seizure took place before Congress had convened to act in the premises. It was made during that period when the President").

[53] *Id.* at 637–38, 651.

[54] *Id.* at 637.

[55] *Id.* at 671–74.

[56] *Id.* at 637–38.

[57] *Id.* at 641–50.

[58] *Id.* at 643.

course, no declaration of war. True enough, existing legislation did empower the President to respond with armed force against enemies, foreign and domestic, who might invade or incite an insurrection against the Government of the United States.[59] But the blockade had seized vessels belonging to foreign neutrals and Union loyalists alike. While President Lincoln perhaps had a colorable argument for defensive deployment of the blockade, the underlying statutes at the time of the seizure did not countenance such an obviously offensive use of armed force against foreign nationals or loyal, non-rebelling citizens.

At the Supreme Court, the Government advanced a series of groundbreaking and consequential arguments. First, in response to the lack of a congressional declaration of war, the Government argued that such a declaration was not necessary because "[w]ar *is a state of things*, and not an act of legislative will."[60] Thus, the argument went, regardless of whether the Congress has declared war or not, a state of war may very well exist and, if it does, the Constitution empowers the President to respond. Furthermore, the Government argued that international laws of war authorized the taking of enemy goods, even if the individual owners were not part of the hostilities (or, in the case of the *Amy Warwick* and the *Crenshaw*, outright opposed to the rebellion).[61] The Government argued that the Supreme Court should import this principle of international law to govern "internal wars."[62]

The Supreme Court largely agreed with the Government's arguments. Justice Grier, writing for a five-justice majority, wrote that the President alone "has no power to initiate or declare a war," but if war is made by another party, then he is "bound to resist force by force . . . without waiting for any special legislative authority."[63] As for the question of internal wars, the Court noted that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents, claims sovereign rights as against the other."[64] Furthermore, despite acknowledging Congress's later affirmation of the President's action as persuasive, the Supreme Court noted that "[t]he President was bound to meet [the war] in the shape it presented itself, without waiting for Congress to baptize it with a name."[65] With this sweeping decision, the Supreme Court blessed the argument that the President's Executive powers offered him sweeping unilateral capabilities in times of national emergency.

The impact of this decision on the scope of the Executive power can hardly be overstated. Indeed, as Professor Stephen Vladeck wrote, it would seem that "all three branches of the federal government were complicit during the Civil War in

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[59] *Id.* at 668 (citing Act of Mar. 3, 1807, Ch. 38, 2 Stat. 443 (current version at 10 U.S.C. §§ 331–335 (2006)) and Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (current version at 10 U.S.C. §§ 331–335 (2006))).
[60] *Id.* at 659.
[61] *Id.* at 650–51.
[62] *Id.* at 654–56.
[63] *Id.* at 668.
[64] *Id.*
[65] *Id.* at 669.

fairly radical changes to the law of war."[66] But, to push against Professor Vladeck's assertion, it is not altogether obvious what other choice the Court had in the *Prize Cases*. Deference in the face of national emergencies had long been the Court's established practice and, no doubt, the Civil War constituted a profound national emergency. Perhaps the Court could have issued a more narrowly written opinion. But even if the Court had more narrowly tailored its opinion, Congress blessed the President's unilateral actions and delegated the power to further pursue his policies should the war require it.[67] One can only speculate as to what the Court would have written had Congress not passed subsequent enabling statutes or, perhaps, even reversed the President's action before hearing the case. Whatever the case, the *Prize Cases* themselves do not stand for a totally radical proposition: the President has the power to defend against invasion or hostility.

What is profound about the *Prize Cases* is Congress's willingness to capitulate to a President who has absconded with the Legislature's powers. To be clear, the President acted without Congress's approval, upon assumed emergency powers, and Congress let him do it. Indeed, time and again, President Lincoln acted first and assumed (correctly) that Congress would rubberstamp his actions after the fact. The growth of these assumed powers would continue through the Civil War and Reconstruction, albeit constrained broadly to the realm of wartime exigencies. However, the 20th century would bring with it a host of new challenges and, likewise, further expansion of the Executive's emergency powers.

C. New Deal Era Executive Powers and Lincoln's Lasting Influence

Both President Wilson and President Roosevelt relied extensively upon assumed emergency powers to confront a variety of domestic and international challenges. On February 5, 1917, President Wilson issued the Nation's first National Emergency Proclamation to address the transportation of water for the war effort in Europe.[68] Before the declaration, Congress had not delegated any specific power to President Wilson to control transportation of resources for the War. This emergency order would remain in place until its termination by Congress in 1921.[69]

President Roosevelt issued a new National Emergency Proclamation within 48 hours of assuming office and used the proclamation as a means to aggressively confront the Great Depression, often dragging Congress behind him.[70] For

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[66] Stephen I. Vladeck, *Re-Rethinking the Prize Cases: Some Remarks in Response to Professor Lee*, 53 ST. LOUIS U. L.J. 85 (2008).

[67] *See* LEE & RAMSEY, *supra* note 50 ("Congress approved in just over a week an array of wartime measures, including funding and authorizing an expanded army and navy. Congress also approved continuation of the blockade by giving the President power to declare portions of the country in 'insurrection' and to interrupt commerce to and from them. With Congress fully behind him, Lincoln directed the first large-scale military offensive against the South, sending 30,000 troops to seize the town of Manassas, Virginia (culminating in the disastrous Union defeat at Bull Run on July 21, 1861, and setting the course for an agonizing fight to the finish). Congress also took up a proposal to ratify in specific terms Lincoln's prior actions, including building up the army and declaring the blockade.").

[68] 39 Stat. 1814.

[69] 41 Stat. 1359.

[70] 48 Stat. 1689.

example, on March 6, 1933, President Roosevelt declared a "bank holiday" and halted a huge number of financial transactions by closing all banks.[71] Of course, the Constitution did not grant any power to the President to unilaterally close the banks. But consistent with the example set during the Lincoln administration, Congress subsequently delegated the President the power to declare bank holidays with the passage of the Emergency Banking Act.[72] Perhaps, emboldened by Congress's passivity, President Roosevelt would go on to promulgate a "limited" national emergency order in 1939,[73] and an "unlimited" National Emergency Proclamation in 1941.[74] These emergency orders existed without congressional approval either before or after their announcement, and remained in place upon their own power.

These orders radically altered the balance of Federal power. Up until this point, Presidents had taken the trouble to at least pay lip service to some underlying statutory delegation in the exercise of emergency powers. This is to say, when President Wilson enacted the first National Emergency Proclamation, he allegedly did so (if not superficially) under the auspices of the Shipping Act of 1917.[75] True enough, President Lincoln had acted initially *without* congressional assent but, after Congress passed retroactive legislation, he continued taking action under the enabling statutes. But President Roosevelt's general, unlimited Emergency Proclamation meant that he could act broadly under *any* existing enabling statute without a declaration of intent to act under any one in particular. In other words, the President's order created a morass of Executive power that allowed him to act vaguely under previously enacted statutes, assuming his actions could actually be sorted under any of them. After President Roosevelt's general declaration, the United States spent the majority of the years from 1941–1972 in some state of general national emergency.[76]

During this time, the Judiciary continued its practice of deference. As Congress expanded the definition of a national emergency to include economic crises, the Supreme Court too adjusted its deference. One such example is *Home Building & Loan Ass'n v. Blaisdell*.[77] During the Great Depression, Minnesota, acting in concert with President Roosevelt's national economic policies, enacted a law that allowed debtors to skip payments on their loans without penalty, subject to certain conditions.[78] Several creditors brought an action against the State of Minnesota alleging that the law violated the Contracts Clause of the United States Constitution, which prohibits the States from enacting laws that "impair[] the Obligation of Contracts."[79] Minnesota responded to the lawsuit by pointing to the President's national policy agenda.

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[71] 40 Stat. 411.
[72] 48 Stat. 1.
[73] 54 Stat. 2643.
[74] 55 Stat. 1647.
[75] 39 Stat. 728.
[76] *See* HALCHIN, supra note 10, at 6–7 (detailing the numerous emergency declarations issued by the Roosevelt, Truman, and Nixon Administrations).
[77] 290 U.S. 398 (1934).
[78] *Id.* at 415–18.
[79] U.S. CONST. art. I, § 10, cl. 1.

The Supreme Court upheld the Minnesota law. Writing for the majority, Chief Justice Hughes likened the President's responsibility in combating the Great Depression to the Executive's wartime powers, noting that the power to wage war "is [the] power to wage war successfully."[80] Chief Justice Hughes observed that "[e]mergence[ies] [do] not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."[81] "But," he added, "where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."[82] Thus, because the Contracts Clause afforded the Supreme Court wide interpretive latitude, the Court chose to construe the provision narrowly so as to permit the Minnesota law. In doing so, the Court also accepted the Executive's assertion that the financial crises constituted an emergency sufficient to foreclose a wider interpretation of the Contracts Clause. Perhaps *Blaisdell* might be viewed as complicity by the Supreme Court, but deference had long been the Judiciary's role in matters of national emergency. The Founders had not intended the check on the Executive's emergency powers to come from the Judiciary but from Congress. Thus, as Congress widened its definition of what constituted a national emergency for delegation purposes, so too did the Court sympathetically adjust its view of the scope of the Executive's emergency powers.

Indeed, President Roosevelt's actions and Congress's backing of those actions most powerfully fomented the modern schema of expansive Executive emergency powers. To wit, like President Roosevelt's unlimited emergency declarations, the modern NEA grants the President a spate of emergency powers upon the Executive's unilateral declaration of a national emergency.[83] The President then wields these powers without additional regulation or check by the Congress, mirroring President Roosevelt's self-appointed view of Executive powers in that the threshold issue for the exercise of such powers resides ultimately in the President's own determinations. This model of Executive power rests entirely upon whether or not the Executive itself declares an emergency and not, as in Washington and Adams time, upon the pre-ordination of Congress.

Put bluntly, Congress has given away the lion's share of its emergency powers to the Executive branch. This means the President, upon the declaration of a national emergency, now unilaterally possesses the powers envisioned by the Founders to be dispersed across two branches. Now in times of Emergency, not only does the President gain access to novel sources of funding,[84] he may also seize industry,[85] detain individuals for substantive criminal offences designated by the

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[80] *Blaisdell*, 290 U.S. at 426.
[81] *Id.* at 425.
[82] *Id.* at 426.
[83] *See* BRENNAN CTR. FOR JUST., *supra* note 8.
[84] *See* 33 U.S.C. § 2293 (permitting the Secretary of the Army to terminate or defer any Amry civil works project and reapply the resources, including funds, personnel, and equipment, to authorized civil works, military construction, and defense projects essential to the national defense, regardless of any other provision of law).
[85] *See, e.g.*, 50 U.S.C. 98f (a)(2); 7 U.S.C. §1332 (c); 50 U.S.C. 4533 (a)(7).

Executive,[86] and even suspend statutory wage-rate requirements for public contracts, such as Federal employee salaries.[87]

All the while, the Judiciary has been forced into the awkward position of continued deference to the Political Branches. But it is not the Judiciary's view of emergency powers that has changed but the Political Branches'. To be sure, the Supreme Court has expanded its deference doctrine since the Civil War, but this expanse has been driven by the Executive's ever burgeoning powers granted by Congress. Thus, when viewed at a proper level of abstraction, the Judiciary's deference doctrine seems more static: deference is still the proper judicial role in times of national emergency. But Congress and the President have continued to shoehorn more and more situations under that heading. The sympathetic relationship between deference and national emergencies thus has dragged the Judiciary behind the Political Branches down this road. In short, the problem of the President's capacious Executive powers lies squarely at the feet of Congress. As such, Congress should act. But patience is growing thin, even at the Supreme Court.

II. MODERN JUSTIFICATIONS FOR DEFERENCE AND THE NEED FOR CONGRESSIONAL ACTION

The Covid-19 pandemic brought with it a host of challenges to Executive emergency action. Many of these challenges went unnoticed as the Court continued to defer to the Executive during the national crisis. But a surprising trend began to emerge in the dissents to these opinions. Professor Amanda Tyler noted that after the pandemic had been underway for some time, the Supreme Court began to refuse to defer to the Executive in a number of high-profile Free-Exercise cases.[88] Instead, the Court began to apply strict scrutiny.

The headwaters of the novel strict scrutiny model may be traced back to Justice Kavanaugh's dissent in *S. Bay United Pentecostal Church v. Newsom*.[89] There, a church sought emergency injunctive relief to prevent the enforcement of a pandemic-era state law that would have limited churches' abilities to host indoor worship.[90] The application argued on Free Exercise grounds that the state law discriminated unfairly against churches because certain institutions, like bars and movie studios, were allowed to remain open without similar restrictions.[91] The Court denied the request for injunctive relief.

Concurring in the denial, Chief Justice Roberts acknowledged the unique challenges presented by the pandemic.[92] Because injunctive relief is only

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[86] *See* 18 U.S.C. § 793 ("Criminal provision of the Espionage Act extends to prohibited places designated by the President where anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored").
[87] *See* 40 U.S.C. § 3147 ("The President may suspend the provisions of this subchapter during a national emergency.").
[88] *See* Tyler, *supra* note 3, at 582–94.
[89] 140 S. Ct. 1613 (2020).
[90] *Id.*
[91] *Id.*
[92] *Id.* ("The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than

appropriate where "'the legal rights at issue are indisputably clear' and even then, 'sparingly and only in the most critical and exigent circumstances,'" the Chief Justice believed that the church failed to meet its burden for three main reasons.[93] First, "[s]imilar or more severe restrictions appl[ied] to comparable secular gatherings."[94] Second, the church's request for injunctive relief presented "dynamic and fact-intensive" questions while governmental officials "[were] actively shaping their response to changing facts on the ground."[95] Finally, Chief Justice Roberts noted that the "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' "[96] Crucially, the Chief Justice noted that when political officials undertake the task of protecting the public health, "'in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'"[97] Déjà vu all over again. The Chief Justice's concurrence reflects the basic model of deference the Supreme Court has long employed in times of emergency.

But the dissent would have granted the church's request for injunctive relief.[98] Rejecting the Chief Justice's deferential treatment of the facts, Justice Kavanaugh applied a strict scrutiny test to assess the constitutionality of California's capacity limitations: "[t]o justify its discriminatory treatment of religious worship services, California must show that its rules are 'justified by a compelling governmental interest' and 'narrowly tailored to advance that interest.'"[99] For Justice Kavanaugh, California's capacity limitations impaled itself upon the second prong. While California limited attendance at religious worship services, Justice Kavanaugh observed that the state did not cap attendance at "comparable secular businesses" like "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florist, hair salons, and cannabis dispensaries."[100] In his view, California's regulation impermissibly discriminated against religious worship services. Because of this, Justice Kavanaugh would have granted the injunction. Shortly thereafter, the Court again denied injunctive relief to a church challenging Nevada's capacity limitation.[101] Once more, the dissent, now authored by Justice Alito, highlighted the regulation's lack of narrow tailoring.[102] Justice Alito stressed that the constitutional

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100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.").

[93] *Id.* (quoting Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 17.4, at 17-9 (11th ed. 2019)).

[94] *Id.*

[95] *Id.* at 1613–14.

[96] *Id.* at 1613 (citing Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).

[97] *Id.* (citing Marshall v. United States, 414 U.S. 417, 427 (1974)).

[98] *Id.* at 1614 (Kavanaugh, J., dissenting) ("I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.").

[99] *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531–32 (1993)).

[100] *Id.*

[101] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (denying injunctive relief to a church seeking to avoid compliance with Nevada's capacity restrictions during the Pandemic).

[102] *Id.* at 2604–05 (Alito, J., dissenting from denial of application for injunctive relief, joined

defect of Nevada's limitations appeared all the more obvious as casinos were more likely than churches to promote disease communication.[103]

But with Justice Barrett's addition to the Court, the dissenters would soon turn the tide. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[104] the Roman Catholic Diocese of Brooklyn and Agudath Israel of America challenged an "Executive Order issued by the Governor of New York" that imposed "severe" attendance limitations at religious services in certain areas with high rates of infection.[105] Signaling a decisive shift from the long-held deference model to the novel strict scrutiny model, the Court enjoined New York's regulations.[106] Embracing the reasoning from the dissents in *S. Bay United Pentecostal* and *Calvary Chapel*, the Court held that the regulations lack of neutrality[107] warranted the application of strict scrutiny.[108] The Court agreed that confronting the pandemic "is unquestionably a compelling interest," but held that New York failed to narrowly tailor the regulations and, thus, violated First Amendment Free Exercise rights.[109] Justice Kavanaugh, now amongst the prevailing Justices, concurred separately to add that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."[110] Also concurring, Justice Gorsuch wrote that during emergencies, "[e]ven if the Constitution has taken a holiday, it cannot become a sabbatical."[111]

The Chief Justice, now in the minority, dissented to defend against Justice Gorsuch's charge that the dissenters advocated "cutting the Constitution loose during a pandemic."[112] Instead, Chief Justice Roberts asserted that the dissenters "simply view[ed] the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution."[113] He would

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by Thomas & Kavanaugh, JJ.) (noting that Nevada's capacity limitation more severely limited church attendance than it did casino attendance).

[103] *Id.* at 2605 ("For Las Vegas casinos, 50% capacity often means thousands of patrons, and the activities that occur in casinos frequently involve far less physical distancing and other safety measures than the worship services that Calvary Chapel proposes to conduct. Patrons at a craps or blackjack table do not customarily stay six feet apart. Casinos are permitted to serve alcohol, which is well known to induce risk taking, and drinking generally requires at least the temporary removal of masks. Casinos attract patrons from all over the country.").

[104] 592 U.S. 14 (2020).

[105] *Id.* at 16.

[106] *Id.* at 15 ("Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought.").

[107] Like the regulations at issue in *Calvary Chapel*, the New York regulations limited church capacities but permitted larger gatherings within "bus stations and airports, in laundromats and banks, in hardware stores and liquor shops." *Id.* at 23 (Gorsuch, J., concurring).

[108] *Id.* at 18 ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest.") (quoting *Church of Lukumi*, 508 U.S. at 546).

[109] *Id.*

[110] *Id.* at 30 (Kavanaugh, J., concurring).

[111] *Id.* at 23 (Gorsuch, J., concurring).

[112] *Id.*

[113] *Id.* at 32–33 (Roberts, C.J., concurring).

have denied the request for injunctive relief, citing the Governor's subsequent decision to loosen capacity regulations.[114] But the sea change had occurred. The Majority had abandoned the Court's longstanding practice of emergency deference and, by Spring 2021, "routinely applied strict scrutiny to limitations on religious worship during the pandemic and increasingly concluded that such limitations no longer survived such scrutiny."[115]

The Court's decision to embrace a strict scrutiny model, at least in the realm of pandemic-era Free Exercise challenges, seems to vindicate the values expressed by Justice Gorsuch in *Roman Catholic Diocese of Brooklyn*: that the Constitution may not be set aside in times of emergency. Noble as this argument may be, it nonetheless mischaracterizes the equitable nature of emergency deference. The Supreme Court should stop short of applying its novel strict scrutiny model to other pre-enforcement challenges during national emergencies. To be sure, the scope of the Executive emergency powers has grown to a gross and frightening caricature of its original intent. But judicial deference in times of emergency is as old as the Republic and seems baked into the very fabric of Article III. Deference recognizes the reality that in our tri-partite Federal Government, the Judiciary is most poorly suited to respond to national emergencies. Thus, reform ought to come from Congress.

But the Supreme Court's shifting deference jurisprudence reflects doubts that Congress actually possesses the competence to execute large-scale reforms. Admittedly, Congress's ineptitude certainly creates problems for the constitutional scheme. Such concerns ought not be glibly dismissed. Therefore, this question must be answered: if Congress will not fix the problem of run-away Executive emergency powers, then why not the Court?

A. The Supreme Court's Long Held Justifications for Deference

As previously explored, the Judiciary has long deferred to the Political Branches in times of emergency, somewhat irrespective of the emergency's specific nature. To understand why the Court should *not* abandon deference, one must first understand why the Judiciary adopted the practice in the first place. Conventional wisdom holds that deference is appropriate in matters of national emergency for at least four reasons.[116] First, the Judiciary exists as a constituent part of the National Government, notwithstanding its independence. Thus, in matters that would tend to imperil the national security, the Judiciary ought to be inclined to more readily uphold (or at least look sympathetically upon) the government's asserted interests.[117]

Second, the Judiciary simply lacks the tools to accurately assess the scope of an asserted emergency and should therefore rely upon the other Branches'

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[114] *Id.* at 31.
[115] Tyler, *supra* note 3, at 534.
[116] *See generally* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2570 (2003) (explaining four central justifications for judicial deference in times of emergency).
[117] *Id.*

judgement. The Legislative Branch possesses the power to make laws,[118] conduct investigations,[119] fund armies,[120] and declare war.[121] Furthermore, Congress bears the will of the People of the United States and is accordingly held accountable through elections. The Executive may respond to attacks,[122] set policy objectives,[123] engage in foreign and domestic espionage,[124] and work with the Congress to create treaties.[125] Similarly, the President is held accountable through national elections. But none of these powers reside within the unelected Judiciary. Because of this deficiency, the Judiciary's assessment of national emergencies places the most on the line with the least amount of information. Indeed, a court reviewing Executive emergency action has access only to the record as presented by the parties and is not necessarily privy to the same sorts of information available to the Legislative and Executive Branches. This renders the reasoning and ultimate decision of the Judiciary incomplete in times of emergency.[126]

Third, the Judiciary has historically employed emergency deference to protect its own legitimacy.[127] As the unelected, counter-majoritarian branch, the Judiciary's political capital is at its lowest ebb when it invalidates the acts of the Elected Branches. This problem is compounded when the Legislative and Executive Branches have acted in concert on a particular matter. Thus, when the Executive takes emergency action under powers granted to it by Congress, the Judiciary stands in a particularly precarious position. Were the Court to strike such

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[118] U.S. CONST. art. I, § 8, cl. 18.

[119] *Id.* The Supreme Court has long held that art. 1, § 8, cl. 18 implies Congress's ability to conduct hearings and investigations into matters of public interest. *See* McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.").

[120] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").

[121] U.S. CONST. art. I, § 8, cl. 11 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

[122] U.S. CONST. art. II, § 2, cl. 1.

[123] U.S. CONST. art. II, § 1, cl. 1.

[124] U.S. CONST. art. II, § 2, cl. 1.

[125] U.S. CONST. art. II, § 2, cl. 2.

[126] It should be noted here the inverse problem presented by the judiciary's lack of investigative abilities. The Executive branch often possesses a wealth of information that it may choose to classify, depriving opposing counsel of the ability to respond or challenge its veracity. A glaring example of such Executive malfeasance may be found in Korematsu v. United States, 323 U.S. 214 (1944). Famously, the Supreme Court deferred to the military's claim of necessity as justification for Japanese interment, despite the government presenting patently false and inaccurate claims in the record. Indeed, the Executive's misrepresentations were later deemed so egregious that the convictions were overturned on writs of coram nobis. *See e.g.*, Hirabayashi v. United States, 828 F.2d 591, 604–08 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984).

[127] *See* Cole, *supra* note 116, at 2570–71.

action, the Political Branches may simply choose to ignore the adverse ruling as they did in *Ex parte Merryman*.[128]

There, John Merryman, a noted secessionist, was imprisoned by military order for his support of Confederate activities.[129] The commanding officer, General George Cadwalader, lacked a warrant for Merryman's arrest and Justice Roger B. Taney, sitting in the Circuit Court, issued a writ of habeas corpus.[130] However, General Cadwalader refused to release Merryman on the basis that President Lincoln had suspended the Writ.[131] In response, Justice Taney authored an opinion holding that *only* Congress could suspend the Writ of Habeas Corpus and that Merryman must be released.[132] With this, the Justice Taney acted against the explicit wishes of the President and the tacit assent of Congress. In response, President Lincoln and the Congress ignored the adverse ruling. President Lincoln continued to maintain the suspension of the Writ throughout the remainder of the war.

Of course, such a public display of disregard for the Judiciary's power injures both its legitimacy and the lasting power of its judgements. If the Judiciary is something that can be ignored, without consequence, then why should the Government ever comport with its opinions? Thus, the Judiciary must choose carefully when to strike Executive actions, careful not to overextend its hand. Deference provides a means for the Judiciary to leave the ball in the elected Branches' court. If the Judiciary is wrong to defer to the Political Branches during a particular emergency, then the Government as a whole sustains the injury to its political capital, and no hands are clean. If, on the other hand, the Judiciary strikes down the emergency actions of the Political Branches and the Nation suffers as a result, then the entirety of the blame lies upon the Judiciary: the Branch least representative of the polity.

The fourth and final justification for deference is the inverse of the above situation: the government actually *adheres* to a court's ruling to the detriment of the Nation. This scenario represents the worst possible outcome for the political capital of the Judiciary. And more intimately, no judge wishes to be remembered for

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[128] 17 F. Cas. 144 (C.C.D. Md. 1861).
[129] *Id.* at 147.
[130] *Id.*
[131] *Id.* at 148.
[132] *Id.* ("No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress . . . . Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that, upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president, and believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills, requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act, without a careful and deliberate examination of the whole subject.").

compromising the Nation's safety. Put simply, should the Judiciary make a decision that results in a ruinous public outcome, especially over the objection of the Government, the blame lies squarely at the feet of the deciding judge or justices: a "bad call" made all the worse by the Judiciary's admitted lack of proficiency in analyzing and assessing national emergencies.

These basic justifications for deference have long justified practice. The courts simply lack the tools possessed by the Political Branches to justify wading into the realm of national emergencies with the same confidence a court might wield in answering a question of law. That the courts lack these tools is a feature of the Constitutional scheme, not a bug. This is to say, the Judiciary wields an enormous amount of power and the yoke of that power falls upon the shoulders of at no time more than nine unelected individuals. To control for the potentially ruinous and anti-democratic effects of an overly active Judiciary, the Founders tethered the power of the Judiciary to the cases and controversies enumerated within Article III.[133]

Of course, the Judiciary must possess the power to adjudicate mixed questions of law and fact. And indeed, there exists no reason to doubt the competency of the courts to accomplish this task. But national emergencies present a variety of extrinsic factors that go beyond the judicial role. And indeed, Article III lacks language that empowers the courts to take into consideration those attendant facts such as national security or safety, unlike language found in Article I and Article II.

Inherently, therefore, the cognizance of the courts is at its zenith when adjudicating matters that fall within the core competencies of Article III and, alternatively, at its nadir when adjudicating matters sounding in the powers of the Political Branches. When the Supreme Court hears a matter of law it has little reason to doubt its ability to do so or the propriety of its adjudication. Likewise, facts evincing the regular run-of-the-mill situations that accompany cases likely present no further complications for adjudication. But as those facts grow more technical, the Supreme Court has long been willing to defer to sources of greater competency to determine the facts, and then upon its own abilities to determine questions of law.

Matters of national security present an extreme form of technical question in that they (1) involve issues of vast national importance; (2) implicate highly technical and nuanced questions of national security and/or public health; and (3) force the Judiciary to scrutinize the judgement of the Political Branches in the performance of their core duties. Simply put, the constitutional profile of the Judicial power seems to lack the prerequisites necessary to make most judgements

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[133] *See* U.S. CONST. Art. III, § 2, Cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

about national security during times of emergency. This being true, it would seem than Article III strongly countenances emergency deference.

B. Deference as an Equitable Doctrine: Preserving the Federal Balance and Allowing Plaintiffs to Recover

Many times, plaintiffs challenge Executive emergency action before it has been enforced. This occurs when, as in the Covid-19 cases, the Government announces a regulation that impinges upon a constitutional right, resulting in an action to enjoin the regulation before the plaintiffs must comply. Critics often argue that when deference results in the denial of a preliminary injunction, the court forces the plaintiff to suffer the harm he seeks to avoid. But this argument is often overstated as plaintiffs may still recover post-enforcement.

In this way, think of deference not as a constitutional doctrine but as an equitable doctrine. It is not that emergency deference ignores constitutional rights altogether. Indeed, Chief Justice Roberts rejected this precise characterization by Justice Gorsuch.[134] Instead, the deference model Chief Justice Roberts employs, the model this paper endorses, denies only preliminary injunctive relief upon a sufficient showing by the Government. This does not prevent recovery altogether. For example, if a group of plaintiffs were denied a preliminary injunction in a Free Exercise challenge, they could still return to court post-enforcement to seek damages under the Religious Freedom Restoration Act.[135] Moreover, relying upon *Uzuegbunam v. Preczewski*,[136] plaintiffs could pursue their claims even if the Government regulation had expired *and* the plaintiffs could not assert an injury other than for nominal damages.[137] Thus, deference reflects equitable considerations that balance a plaintiff's request for injunctive relief against the risks to national security attendant in an emergency. In short, when a court defers pre-enforcement, Plaintiffs still get their day in court.

Consider the following hypothetical. A series of crippling cyber-attacks brings the public power grid of the United States to its knees. Many States are still without power, tens of thousands of people in hospitals and clinics across the country have died, and the President has declared a national emergency with the full support of Congress. Shortly after the attack, an anonymous group releases a virtual manifesto, claiming responsibility for the attacks and espousing views held by radical Islamic separatist groups known to be operating within the New York Metropolitan area. The manifesto promises further attacks in the coming weeks.

After some investigation, the intelligence community determines that the cyber-attacks are *likely* emanating from a series of buildings in the greater New York Metropolitan Area. The President dispatches the National Guard to the area

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[134] *Roman Catholic Diocese of Brooklyn*, 592 U.S. at 32 (Roberts, C.J., dissenting) (quoting Justice Gorsuch's concurrence).

[135] *See* Tanzin v. Tanvir, 592 U.S. 43, 52 (2020) (holding that the "RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities").

[136] 592 U.S. 279 (2021).

[137] *See id.* (holding that where a plaintiff "establishes the other elements of standing," nominal damages "provide the necessary redress for a completed violation of a legal right").

and, along with local officials, authorizes the search and seizure of the computer array. While the investigation takes place, the President orders the closure of all mosques in Manhattan and extreme Northeastern New Jersey so that their grounds may be searched for clues relating to the attacks or, alternatively, the computer array itself. The closure will last for no more than 14 days. A local Jamaat brings a Free Exercise challenge in federal court to enjoin the enforcement of the President's order. In court, the Government's lawyers acknowledge the merit of the plaintiffs' arguments but present convincing evidence that, if the array is not destroyed, irreparable harm will come to the United States' power grid. Furthermore, more people will likely die. On the other hand, the plaintiffs argue forcefully that the closures of the mosques represent a violation of First Amendment Free Exercise rights and that other non-Muslim religious centers have been permitted to remain open during the Government's investigation. The court must then answer whether the Government's claim of emergency outweighs the plaintiffs' First Amendment rights.

Under the Supreme Court's novel strict scrutiny model, the court would likely grant the plaintiffs' request for injunctive relief. The Government certainly retains a compelling interest in preventing further cyber-attacks. However, following the example set by the Court in *Roman Catholic Diocese of Brooklyn*, the Government did not narrowly tailor its means of pursuing this interest. This is to say that, despite the Government's showing that the manifesto espoused jihadist rhetoric, the Government only can show that the computer array exists within *some buildings* in the greater New York Metropolitan area. The Government does not know for certain that the computer array exists within a mosque. Therefore, by closing the mosques and not other public spaces, the Government's order impermissibly discriminates against the plaintiffs' Free Exercise rights.

Of course, such a ruling implicates the identified risks of abandoning traditional deference. By enjoining the Government's action, the court would impair the Executive's ability to quickly and dynamically respond to a national crisis, imperiling both the security of the Country and the legitimacy of the Judiciary. With its choice to forego deference, the court has effectively valued the plaintiffs' Free Exercise Rights higher than the national security. To be sure, the plaintiffs' Free Exercise Rights *are* important, and this paper does not make any attempt to denigrate them. But can it really be said that the closure of certain mosques for 14 days amounts to a tragedy *worse* than a national disaster? Surely not. Notice, the strict scrutiny model abandons the wisdom of deference as an equitable doctrine. Rather than denying the injunction with the understanding that recovery might come later, the court here treats deference as an impermissible *constitutional* interpretive theory. But this is not so.

Instead, imagine for a moment if the court, embracing Chief Justice Roberts's deference model, declined to enjoin the Government and permitted the temporary mosque closures on national security grounds. Indeed, the Government's action in our hypothetical looks like the regulation at issue in *S. Bay United Pentecostal Church* and, under the deference model, could similarly be allowed to stand. Recall the Chief Justice's threshold admonition: plaintiffs deserve injunctive relief only where "'the legal rights at issue are indisputably clear' and even then

'sparingly and only in the most critical and exigent circumstances.'"[138] First, the Government did not close *all* mosques in the States of New York and New Jersey, but only those within a limited search area. True enough, other areas of worship remain open but the Government's interest in protecting from further attacks necessarily implicates the regulated mosques. Second, the mosques request for relief necessarily presents "dynamic and fact-intensive" questions while governmental officials are "actively shaping their response to changing facts on the ground."[139] Finally, and again relying upon Chief Justice Robert's deference model, the "Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"[140] Therefore, under the previously employed deference model, the court could rationally permit the temporary closures. If the court were concerned about future Government abuses, then an equitable rule could be fashioned limiting the time period for similar closures. For example, the court could create a rule that treats closures of religious institutions for more than 14 days as presumptively unconstitutional and, in turn, decline to extend deference. And recall, the plaintiffs in our hypothetical have not been left out in the cold: they may return to court and seek relief after the expiration of the Government's regulation.

Thus, emergency deference not only preserves the judiciary's legitimacy and the Nation's security, but it also leaves the door open for plaintiffs to recover after the deprivation occurs. Indeed, channeling the wisdom of the justiciability doctrines more widely, the strength of a plaintiff's claim typically improves post-enforcement, after sustaining actual injuries. As well, a plaintiff's claim benefits from the facts and evidence generated by the Government's actual enforcement. Thus, emergency deference preserves the judiciary's legitimacy and the Nation's security, while permitting plaintiff's recovery post-enforcement.

In short, abandoning deference puts too much at risk and places the court in the unprecedented position of determining questions well within the competency of the Political Branches. The Judiciary has long seen the wisdom of deference and thus, should not abandon it. True, courts could more quickly than Congress reign in the Executive's emergency powers but this is only a quick fix. Our Nation needs a permanent solution. Abandoning emergency deference would require the courts to also abandon over two-hundred years of precedent, assuming that such an end-run would even be observed by the Political Branches.[141] If change is to come, it must come from Congress.

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[138] *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (quoting Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 17.4, at 17–9 (11th ed. 2019)).

[139] *Id.* 1613–14.

[140] *Id.* at 1613 (citing *Jacobson*, 197 U.S. at 38 (1905)).

[141] Again, recall *Ex Parte Merryman* in which Congress and the President ignored the Judiciary's attempt to restrict the Executive's emergency powers.

III. CONCRETE CONGRESSIONAL INTERVENTION

A. Reform and Reclamation

So far, this paper has attempted to discuss the history of judicial emergency deference and to provide a justification for the doctrine's continued use rooted in said historical practice. Once again, this paper accepts the position that the Executive emergency powers have grown out of control. As such, this paper further concedes that action should be taken to curtail these powers and restore the Federal balance. But, as has been established, the Judiciary ought not be the vehicle of such reform. Instead, Congress should endeavor to claw back the powers it has pawned away to the Executive. Apart from this recommendation, positive endorsements of specific congressional reforms largely exceed the scope of this work. That said, it seems important to at least quickly identify a few proposed reforms to underscore their availability.

For every reason the Judiciary is unfit to curtail the President's emergency powers, Congress is more than qualified. Like the President, Congress is popularly elected and thus responsive to the polity. Congress and the Executive split the wishbone of the common defense, and both possess an array of resources to investigate matters attendant to the national security. As well, Congress itself has gifted the President the capacious powers he now enjoys. Therefore, Congress may legitimately take them back.

Elizabeth Goitein, a nationally recognized expert in this area, recently published an essay discussing how Congress might reform the Executive's emergency powers.[142] Goitein's model represents the most straightforward and efficient means of reform. As she proposes, Congress should begin by reforming the NEA to strengthen its own role in national emergency management.[143] Senator Mike Lee recently proposed legislation that would achieve this precise reform. The ARTICLE ONE Act requires any presidentially declared "national emergency to expire after 30 days unless approved by Congress."[144] If Congress approves the Presidential declaration, then the emergency declaration can remain in place for up to a year.[145] If the President wishes to extend the emergency past a year, then Congress must once again approve it.[146]

Goitein notes that Senator Lee's proposed legislation allows the President to take swift action in the event of an emergency, while also ensuring that the President cannot abscond with Congress's emergency power. Building upon Senator Lee's proposal, Goitein recommends that several other laws be reformed to curtail the President's emergency powers. These laws include the Insurrection Act, the Communications Act, and Section 212(f) of the Immigration and Nationality Act.[147] With each of these laws, Congress should pursue reforms that

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[142] Elizabeth Goitein, *Good Governance Paper No. 18: Reforming Emergency Powers* (Oct. 31, 2020), https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/.
[143] *Id.*
[144] *Id.*
[145] S. 764 - 116th Congress (2019-2020): ARTICLE ONE Act, S.764, 116th Cong. (2019).
[146] *Id.*
[147] *See* Goitein, *supra* note 142.

bolster its own strength in relation to the President's, while simultaneously establishing limited durations for emergency declarations.

These reforms do not upset the Federal balance as they represent the reclaiming of powers previously delegated by Congress. Neither do these reforms present particularly complex public policy issues. In truth, Congress could very easily draft a large reform bill (much like the NEA) that merely reclaimed administration of certain emergency programs without tampering with their substance. Congressional intervention would ensure the legitimate and lasting effects of such reforms, rather than hoping for Executive compliance with a radical doctrinal shift by the Judiciary. On the other hand, abandoning judicial deference would not save the Federal balance from Congress's inaction. Instead, it would merely represent the abrogation of yet another Branch's duties. In short, two wrongs do not make a right. Congress should take back its emergency powers from the President and not force its problems on the Judiciary.

CONCLUSION

It is hard to overstate the urgent need for Congress to rein in the Executive's emergency powers. The Covid-19 pandemic, a crisis of unprecedented scale, laid bare the need for thoughtful reforms to ensure the appropriate balance of Federal power and to protect the Nation's security. While some argue for judicial intervention to curb these Executive excesses, a historical examination reveals that the root of this issue lies in the actions of Congress. The call for reforms should not then deviate towards the Judiciary but, instead, focus on restoring Congress's role in the management of National emergencies.

Part I traced the historical trajectory of Executive emergency powers, emphasizing the role of Congress in delegating and inflating these powers. Part II underscored the unique functions of each branch during emergencies, asserting that the judiciary's role, as defined by Article III, does not extend to determining the existence of a state of emergency. Part II also examined the Supreme Court's recent doctrinal shifts in the realm of executive emergency powers and attempted to explain the flaws in these recent developments. Finally, Part III briefly outlined actionable steps Congress might take to curtail the Executive's emergency powers, placing the responsibility squarely on the shoulders of the Legislative branch.

In advocating for Congress to reclaim its rightful powers, this paper aligns with the belief that the solution lies in the institution entrusted with crafting and amending laws. The path to reform should be paved by Congress, with careful consideration of historical precedent and a commitment to restoring the delicate balance of Federal power. The legitimacy of the courts, the constitutional structure, and the National security all hinge on Congress's willingness act.