POLARIZATION AND REFORM: RETHINKING SEPARATION OF EMERGENCY POWERS

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I. INTRODUCTION

In recent decades, Congress has had an increasingly difficult time passing major legislation.[1] While the space for bipartisan compromise

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1 *See* Lee Drutman, *How Much Longer Can This Era of Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2020, 5:00 AM), https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last [https://perma.cc/EXX6-PJY3]; Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018, 10:00 AM), https://www.propublica.org/article/how-congress-stopped-working [https://perma.cc/AP2R-B9PW]; Ezra Klein, *Congressional Dysfunction*, VOX (May 15, 2015, 6:18 PM),

has not vanished entirely,[2] both parties have developed divergent partisan agendas, yet struggle to enact them through legislation.[3] As a result, presidents have faced growing pressure—and demonstrated growing willingness—to push partisan policy objectives by testing the limits of executive action.[4] Through congressional delegations of power, presidents have often had broad authority to make policy changes through executive action. Some of the broadest delegations of authority to the President exist in the context of a national emergency, during which the President can invoke sweeping powers to swiftly respond to a crisis, yet there are often few limitations on when many emergency powers may be invoked.[5] Given the scope of these latent emergency powers available to the President, there is growing alarm that emergency authority could be abused to create policy absent a real emergency, or even used for illiberal ends.[6] Even more concerning, at the point of an emergency, there may be very little Congress can or will do to intervene.[7]

Relative to Congress—a large body premised on the deliberation of its members—the President and the executive branch may be better positioned to react quickly in a crisis. Following that logic, Congress has passed several laws conferring broad authority on the President in the event of an emergency. Emergency powers have been used in various crises throughout American history, and Congress has at times

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https://www.vox.com/2015/1/2/18089154/congressional-dysfunction [https://perma.cc/DPA3-3LZ4].

2 James M. Curry & Frances Lee, *Congress is Far More Bipartisan than Headlines Suggest*, WASH. POST (Dec. 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/20/congress-is-far-more-bipartisan-than-headlines-suggest/ [https://perma.cc/M7FH-N659].

3 *See*, *e.g.*, Robert Pear, Thomas Kaplan & Maggie Haberman, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html [https://perma.cc/FEY4-EUDU].

4 *See infra* note 148.

5 *See* BRENNAN CTR. FOR JUST., A GUIDE TO EMERGENCY POWERS AND THEIR USE (2019).

6 *See* Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations—And What to Do About It*, 44 HARBINGER 95, 97–98 (2020). *See*, *e.g.*, Jonathan Swan & Zachary Basu, *Bonus Episode: Inside the Craziest Meeting of the Trump Presidency*, AXIOS (Feb. 2, 2021), https://www.axios.com/trump-oval-office-meeting-sidney-powell-a8e1e466-2e42-42d0-9cf1-26eb267f8723.html [https://perma.cc/37CK-7LUT] (based on anonymous sources, reporting that advisors to the President contemplated the use of emergency powers, although lacking specifics, to remain in office following an election loss).

7 *See infra* Sections II.B, III.

changed the terms of its delegations to have more influence over how the President exercises them.[8] The concept of emergency power is generally premised on the notion that emergencies are acute and short in duration. Yet in practice, emergency declarations tend to be surprisingly enduring.[9] As concerns about the use and abuse of emergency powers have grown, Congress appears ill-positioned and unequipped to rein in the President under current laws.[10] The status quo has prompted many to call for reform; but while adjusting the emergency power framework may constrain the President, any successful reform effort must respond to and reflect how party polarization has shaped the modern Congress.[11]

In Part II of this Note, I review the historical and legal underpinnings of presidential emergency power and summarize the landmark, or so it seemed, reform enacted at a historical low point in the American presidency. In Part III, I argue that party polarization and partisanship has fundamentally shaped Congress and its role in the separation of powers. In Part IV, I evaluate recent proposals to reform presidential emergency powers given high levels of partisanship in Congress. I then argue that a shift away from the current framework, to one where emergencies expire without congressional approval and Congress regularly reviews and reauthorizes underlying emergency, would best foster deliberation between Congress and the President over the terms of emergency delegations.

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8 *See infra* notes 24–30 and accompanying text.

9 Of a total of sixty-two declared national emergencies, thirty-seven remain in effect as of October 2020. L. ELAINE HALCHIN, CONG. RSCH. SERV., 98-505, NATIONAL EMERGENCY POWERS 11–14 (2021).

10 *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2316, 2319–22 (2006). *See also infra* notes 84–85 and accompanying text.

11 *See, e.g.*, Billy Binion, *Justin Amash Introduces Bill to End Forever National Emergencies*, REASON (Dec. 21, 2020, 1:59 PM), https://reason.com/2020/12/21/justin-amash-introduces-national-emergencies-reform-act/ [https://perma.cc/B6MC-CRC8]; Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Mar. 19, 2020), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/ [https://perma.cc/6FXC-5357]; The Editorial Board, *Fix America's National Emergencies Law. And Not Just Because of Trump*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/trump-national-emergency.html [https://perma.cc/62VU-87WP]; Press Release, Mike Lee, U.S. Sen., Sen. Lee Introduces ARTICLE ONE Act to Reclaim Congressional Power (Mar. 12, 2019).

II. BACKGROUND

The delegation of emergency authority to the United States President is an important example of how Congress and the President share authority in the national security sphere; but it also highlights the challenges of the separation of powers. This Note will trace the history of Congress's delegation of emergency authority and the challenges the institution has faced in attempts to constrain presidents who have pushed the boundaries of those powers. This history culminated in a wholesale effort to reform emergency authority in the 1970s. That reform attempt, however, was limited and its shortcomings contribute to the imbalance in the separation-of-powers system today.

Both Congress and the President have clear constitutional roles in the national security and foreign policy contexts. Among other things, the Constitution grants Congress the power to declare war, regulate commerce with foreign nations, and regulate immigration.[12] Likewise, the President is the chief executive and commander-in-chief of the military.[13] While discussions of national security tend to center on the President, Congress's power to authorize conditional funding used by the President allows Congress to assert itself in foreign policymaking and, if necessary, challenge the President.[14] The President's powers and the nature of the office put the executive branch in a particularly strong position vis-à-vis the legislative branch in separation-of-powers conflicts.[15] Congress itself has acknowledged the unique position of the President in conducting foreign policy and has accordingly delegated the President the power to make foreign policy beyond what is enumerated in the Constitution.[16]

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12 U.S. CONST. art. I, § 8.

13 U.S. CONST. art. II §§ 1–2.

14 Deborah Pearlstein, *Foreign Policy Isn't Just Up to Trump*, ATLANTIC (Nov. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congresss-constitutional-role-us-foreign-policy/602485/ [https://perma.cc/N6KN-BBED].

15 *See* Zivotofsky v. Kerry, 576 U.S. 1, 2 (2015); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 35–36 (2017).

16 120 CONG. REC. S18356–67 (daily ed. Oct. 7, 1974) (statement of Sen. Mathias), *reprinted in* THE NATIONAL EMERGENCIES ACT SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 154 (1976) [hereinafter NEA SOURCEBOOK] ("Because it is clear that if Congress is to fulfill its responsibilities to act in time of emergency, it must make preparations in advance to do so. The actions already taken by leadership, in the view of the Special Committee [on National Emergencies], meet the needs that might reasonably be required by future emergencies.").

A. History of Emergency Powers

The origin of emergency powers in the United States date back to before the Constitution, to the Continental Congress and the Revolutionary War.[17] Emergency powers, however, were not squarely addressed at the Constitutional Convention.[18] Debates over emergency authority emerged over time and have centered on the extent of the President's implied power and the scope of the authority granted to the President by Congress.[19]

The constitutional provision that most closely resembles emergency authority is the Suspension Clause, which allows Congress to suspend the writ of habeas corpus in times of rebellion or invasion.[20] The Suspension Clause confers an extraordinary power that is to be used in narrow circumstances; it has the effect of authorizing the executive to arrest and detain individuals without the normal legal constraints.[21] The United States Supreme Court has also understood the Suspension Clause as implicitly guaranteeing the writ of habeas corpus when it has not been expressly suspended.[22] Historical practice suggests that suspending the writ may best be thought of as a specific, though expansive, type of emergency power that vests extensive detention authority in the executive.[23] The Suspension Clause is largely an exception to the Constitution's lack of provisions addressing emergency powers. Over time, Congress has created new emergency delegations by statute.

Statutes enabling emergency presidential power came early in U.S. history. In 1792, the Second Congress passed what would become known as the Calling Forth Act, which enabled the President to

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17 Harold C. Relyea, *A Brief History of Emergency Powers in the United States* 4–5 (Special Comm. on Nat'l Emergencies & Delegated Emergency Powers, U.S. Sen., Working Paper No. 36-612, 1974).

18 While some provisions of the Constitution can be understood to confer emergency authority—such as Congress' power to declare war, Congress' power to suspend *habeas corpus*, and the President's power to call a special session of Congress—the topic was not formally addressed. *Id.* at 5–6; *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("[The founders] made no express provision for exercise of extraordinary authority because of a crisis.").

19 *See* Youngstown Sheet & Tube, 343 U.S. at 650 (Jackson, J., concurring); RELYEA, *supra* note 17, at 6.

20 U.S. CONST. art. I, § 9, cl. 2.

21 *See* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 662–63 (2009).

22 *See* Boumediene v. Bush, 553 U.S. 723, 745 (2008).

23 Tyler, *supra* note 21, at 633.

call forth state militias to defend against invasions, quell insurrections, and, in exceptional cases, enforce the law.[24] Determining the scope of the President's ability to call forth militias for law enforcement purposes proved most controversial.[25] Congress ultimately resolved that dispute by adding greater procedural constraints.[26] To call forth a militia for intrastate law enforcement, the President would first need to consult with a federal judge.[27] If the President felt that it was necessary to call forth the militia from another state, he would first have to seek approval from Congress, or, if Congress was not in session, the President could invoke this authority unilaterally, but it would expire within thirty days of the start of the next session of Congress absent further authorization.[28] President Washington first invoked the Calling Forth Act and secured the requisite judicial approval to quash the Whiskey Rebellion, which involved violent protests in response to federal tax collection.[29] Following its recess, the Third Congress quickly passed a law approving of and extending the President's authority to quell the unrest.[30]

In 1795, Congress amended the Calling Forth Act to remove the requirement that the President obtain prior approval from a federal judge and the provision preventing the President from unilaterally calling forth another state's militia to enforce the law when Congress was in session.[31] In 1807, Congress extended the President's authority to include calling forth the standing army or navy to put down insurrections and even enforce the law.[32] The rules set out in the 1807 law are broadly the same as those in effect today, under what is known as the Insurrection Act.[33] Although Congress ultimately expanded the President's emergency authorities to call forth militias and the military, the early restrictions are notable, and today they can help inform debates over how Congress might set limits on emergency authorities given to the President. Moreover, these early laws conferring

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24 Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 Yale L.J.F. 610, 614–15 (2020).

25 *Id.*

26 *Id.*; Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264 (repealed 1795).

27 Calling Forth Act § 2.

28 *Id.*

29 Vladeck, *supra* note 24, at 615.

30 *Id.* at 615–16.

31 Stephen I. Vladeck, *Emergency Power and Militia Acts*, 114 Yale L.J. 149, 162 (2004).

32 Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at at 10 U.S.C. §§ 251–255); Vladeck, *supra* note 24, at 616–17.

33 *See* Vladeck, *supra* note 24, at 616; 10 U.S.C. §§ 251–55.

emergency authority to the President set out the general precedent that many subsequent laws would follow: the President declares an emergency, and in doing so, activates delegated emergency authority.[34]

Modern emergency powers took further shape in the twentieth century, as presidents invoked expansive powers to further the war efforts and address the Great Depression. Unlike today, the availability of emergency powers during this period hinged on whether the country was in a state of emergency, not whether a specific power had been invoked in response to a given crisis. Therefore, once an emergency was declared, a broad range of related and unrelated emergency authorities became available until the end of the state of emergency.[35] President Wilson was the first to declare a state of national emergency in those terms. In the months before the United States entered World War I in 1917, Wilson restricted the sale or transfer of U.S. ships under authority granted by Congress in the event of an emergency declaration.[36] Congress later terminated the state of emergency, as well as several wartime powers, by statute in 1921.[37]

Almost immediately upon taking office, President Franklin Delano Roosevelt issued the second national emergency proclamation, creating a bank holiday, and Congress quickly ratified his authority to do so three days later.[38] That legislation, the Emergency Banking Act, gave the President sweeping powers over financial institutions and transactions in times of war or national emergency.[39] President Roosevelt also issued two emergency declarations in the lead-up to and during World War II to establish a condition of emergency.[40] After the war, in 1947, Congress passed laws terminating certain war-related statutory provisions and emergency authorities associated with the war

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34 HALCHIN, *supra* note 9, at 4.

35 *Id.* at 7 ("The United States was in a condition of national emergency four times over, and with each proclamation, the whole collection of statutorily delegated emergency powers was activated.").

36 Proclamation No. 1354 (Feb. 5, 1917); NEA SOURCEBOOK, *supra* note 16, at 1; *see also* Halchin, *supra* note 9, at 5.

37 NEA SOURCEBOOK, *supra* note 16, at 1.

38 *Id.*

39 118 CONG. REC. S18367 (daily ed. May 23, 1972) (statement of Sen. Mathias); NEA SOURCEBOOK, *supra* note 16, at 13 (noting that Congress' expansion of emergency authority beyond wartime to times of national emergency was a marked change in the situations when the President can exercise emergency authority).

40 Proclamation No. 2352, 4 Fed. Reg. 174 (Sept. 8, 1939); Proclamation No. 2487, 6 Fed. Reg. 105 (May 29, 1941).

effort granted to the President.[41] Subsequent laws passed by Congress led to the formal end of the war against Germany and the ratification of a peace treaty with Japan.[42] The legal end to the war also resulted in the end of the state of emergency, but Congress separately extended the state of emergency, which lasted until President Truman formally ended two emergency declarations made by his predecessor.[43] Truman's proclamation ending prior emergencies, however, specifically excluded a 1950 emergency that he had declared in response to the conflict in Korea.[44] The continuance of the 1950 declaration, which would last until 1978, became an important target for reformers in Congress and ultimately spurred an overhaul of the emergency powers framework.[45]

B. The Modern Era and the National Emergencies Act

Although presidents have invoked emergency authority since the beginning of the United States, Congress became increasingly concerned by the longevity of the existing state of emergency in the 1970s. Senator Charles Mathias of Maryland, one of the strongest proponents of reform, realized during the escalation in Vietnam that the President already possessed broad emergency powers even without a war declaration.[46] This authority existed in part because of President Truman's 1950 emergency declaration regarding Korea.[47] As Congress investigated presidential emergency powers, members realized that there were actually four concurrent national emergencies that granted

41 The joint resolution repealed a range of provisions and authorities that were put in place to fight the war and manage the economy. Examples include authorities given to President and cabinet officials to reduce requirements for certain military positions, and even the authority to suspend the operation of statutes of limitation for certain insurance agreements until after the war. Joint Resolution to Terminate Certain Emergency and War Powers, Pub. L. No. 80-239, 61 Stat. 449 (1947); S. REP. NO. 80-42, at 17, 89 (1947).

42 H.R.J. Res. 289, 82d Cong., 65 Stat. 451 (1951); Proclamation No. 2974, 17 Fed. Reg. 3813 (Apr. 30, 1952), *reprinted in* 66 Stat. c31 (1952).

43 66 Stat. at c31; NEA SOURCEBOOK, *supra* note 16, at 2.

44 66 Stat. at c32.

45 NEA SOURCEBOOK, *supra* note 16, at 3.

46 *To Terminate Certain Authorities with Respect to National Emergencies Still in Effect, and to Provide for Orderly Implementation and Termination of Future National Emergencies: Hearing on H.R. 3884 Before the H. Subcomm. on Admin. L. & Gov't Rel. of the Comm. on the Judiciary*, 94th Cong. 20 (1975) (statement of Sen. Charles Mathias).

47 *Id.*

sweeping powers to the President.[48] Existing statutes authorized expansive presidential power in times of national emergency, with the 1933 Emergency Banking Act responsible for two hundred such powers alone.[49]

In 1972, Congress created the Special Committee on the Termination of the National Emergency, which eventually expanded its focus to reforming emergency powers more generally.[50] The legislation produced by the Committee, the National Emergencies Act of 1976 ("NEA"),[51] sought to accomplish several goals: (1) to end the emergencies currently in effect; (2) to create a formal procedure for declaring a national emergency and invoking emergency powers; (3) to provide Congress with a means to restrain the President's use of emergency powers; and (4) to review and repeal certain delegations of emergency authority that Congress viewed as unnecessary.[52]

Initial iterations of the NEA would have: (1) let all existing emergency powers expire following a transition period after enactment; (2) repealed forty-nine emergency authority-conferring provisions from existing statutes; (3) defined and narrowed the conditions under which a President could declare an emergency; and (4) provided that future emergencies would lapse after six months absent further congressional approval or prior congressional termination.[53] After debate in Congress and negotiation with President Ford, the drafters made substantive changes that weakened the role of Congress vis-à-vis the President. Instead of ending all existing emergency declarations—something Congress did not think it had the power to do, as the declarations themselves were within the President's Article II authority—Congress sought to wind down the respective delegations of authority and require new declarations to comply with the new framework.[54] With eight exceptions, the law set active emergency delegations to expire within two years of enactment.[55] While the initial draft targeted

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48 118 CONG. REC. S18367 (daily ed. May 23, 1972) (statement of Sen. Mathias), *reprinted in* NEA SOURCEBOOK, *supra* note 16, at 13.

49 *Id.*

50 Patrick A. Thronson, Note, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. Mich. J. L. Reform 737, 743–44 (2013); 121 CONG. REC. S3202 (daily ed. Mar. 6, 1975) (statement of Sen. Mathias), *reprinted in* NEA SOURCEBOOK at 285.

51 National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

52 S. Rep. No. 93-1170, at 4 (1976), *reprinted in* NEA SOURCEBOOK, at 22.

53 Thronson, *supra* note 50, at 747–50; NEA SOURCEBOOK, *supra* note 16, at 292.

54 *See* Thronson, *supra* note 50, at 747; HALCHIN, *supra* note 9, at 11.

55 National Emergencies Act § 101. The committee report on the final legislation indicated that the eight exceptions were made to allow for Congress to consider

for repeal 49 of the 470 emergency delegations identified by Congress in existing statutes, the final legislation repealed only seven.[56]

The bill's final version also contained notable changes to the process by which Congress could check the President in the emergency context. Instead of mandating that emergency powers expire six months after an emergency declaration absent express approval from Congress, the final version of the bill was changed to call for congressional review of an emergency every six months.[57] These changes were made at the request of President Ford and the Office of Management and Budget.[58] Rather than forcing emergency authorities to automatically lapse, Congress tasked itself with the responsibility of reviewing emergency declarations at least every six months.[59] The President, meanwhile, can terminate an emergency at any moment.[60] Emergency declarations may also remain in effect indefinitely as long as they are renewed by the President within a year.[61] The statute also provides that Congress could pass a concurrent resolution to terminate an emergency declaration through a fast-tracked procedure limiting debate in the Senate.[62]

The NEA also formalized a process for the President to use emergency authority.[63] A President must (1) declare a national emergency, notify Congress, and publish a notice in the Federal Register;[64] (2) specify the provisions granting the emergency authority to be invoked; [65] (3) report to Congress every six months on the total expenditures incurred by the government that are directly attributable to the exercise

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further legislation to provide substitute authorities to the executive branch. The report noted that the eight provisions were consistently used by government departments and abrupt termination would be disruptive. S. REP. NO. 94-1168, at 6–7 (1976). *See* Thronson, *supra* note 50, at 749.

56 National Emergencies Act § 501.

57 S. REP. NO. 94-922, at 9 (1976), *reprinted in* NEA SOURCEBOOK, at 41.

58 120 CONG. REC. S18356–67, *supra* note 16, at 148. Multiple executive branch agencies made clear that they opposed the automatic termination provisions that were initially proposed and retained in the House version of the bill. Instead, they supported the approach later taken by the Senate to require Congress to affirmatively vote to terminate an emergency using expedited procedures. *See* H.R. REP NO. 94-238, at 27, 34 (1975), *reprinted in* NEA SOURCEBOOK, *supra* note 16, at 209, 216.

59 50 U.S.C. § 1621(b).

60 50 U.S.C. § 1622(a)(2), (d).

61 50 U.S.C. § 1621(d).

62 50 U.S.C. § 1622(a)(1). This provision was subsequently amended to require a joint resolution. *See infra* note 70.

63 50 U.S.C. § 1621.

64 *Id.* § 1621(a).

65 50 U.S.C. § 1631(a).

of such powers and authority;[66] and (4) renew ongoing emergency declarations each year to continue them indefinitely.[67] The new notice requirements are noteworthy because before the NEA, once an emergency had been declared, the President could exercise a swath of different emergency authorities granted by statute without needing to mention each provision specifically in the emergency declaration.[68]

C. The NEA in Practice

If the NEA's purpose was to end the perpetual use of emergency powers and provide a means for Congress to check the President's use of such powers, subsequent history demonstrates that it failed to accomplish its objectives.[69] President Carter declared the first national emergency pursuant to the NEA's procedures in 1979 amid the Iranian Revolution; yet that emergency declaration has been renewed every year since and remains in effect today.[70] While Congress passed the NEA to enable it to check presidential use of emergency power, Congress has only attempted to terminate one presidential emergency declaration.[71] That effort ultimately did not succeed, as Congress twice failed to amass a sufficient number of votes to override a presidential veto.[72] What was notable about this episode was not the failure to override the President's veto but that Congress even tried in the first place.

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66 50 U.S.C. § 1641(c).

67 50 U.S.C. § 1622(d).

68 Thronson, *supra* note 50, at 750 n.91.

69 The effort leading up to the NEA started when Senator Charles Mathias introduced a concurrent resolution to create a joint committee to study the effects of terminating President Truman's 1950 declaration of a national emergency regarding Korea. Senator Mathias was eventually joined by Senator Frank Church, with whom he introduced legislation to create the Special Committee that reviewed existing emergency declarations and drafted legislation to terminate existing emergencies and set a process for ending future emergencies, which was the basis of the NEA. NEA SOURCEBOOK, *supra* note 16, at 3–6.

70 Continuation of the National Emergency with Respect to Iran, 85 FED. REG. 72,895 (Nov. 12, 2020); HALCHIN, *supra* note 9, at 12.

71 *See* Erica Werner, Seung Min Kim, Paul Kane & John Wagner, *House Passes Resolution to Nullify Trump's National Emergency Declaration*, WASH. POST (Feb. 26, 2019, 6:36 PM), https://www.washingtonpost.com/powerpost/house-sponsor-of-resolution-to-nix-emergency-declaration-acknowledges-uphill-battle-on-overriding-expected-trump-veto/2019/02/26/22104532-39d2-11e9-aaae-69364b2ed137_story.html [https://perma.cc/7XLN-7XSU].

72 Emily Cochrane, *Trump Again Vetoes Measure to End National Emergency*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/trump-veto-national-emergency.html [https://perma.cc/DV5M-QR77].

The fate of two key provisions in the NEA illustrates the broader failures of the law, as it has failed to meaningfully check the presidential exercise of emergency power. The first such provision sets forth Congress's ability to pass a concurrent resolution to terminate an emergency declaration.[73] The Supreme Court in *INS v. Chadha* held that the legislative veto—where a statute authorizes one house of Congress to pass a resolution to reverse an executive branch action—was unconstitutional, putting the NEA's congressional termination process in constitutional doubt.[74] Specifically, the Court held that a law allowing one house of Congress to pass a resolution—not presented to and signed by the President—to nullify a discretionary action of the Attorney General was unconstitutional lawmaking.[75]

Although *Chadha* dealt specifically with a House resolution and not a concurrent resolution, which requires passage by both chambers, courts have found provisions similar to the one in the NEA unconstitutional.[76] Key to the holding in *Chadha* was (1) the determination that a legislative veto of an executive action is lawmaking, and (2) the constitutional requirement that laws passed by Congress satisfy Article I's bicameralism and presentment conditions. Those conditions state that legislation must pass both Houses of Congress and be presented to the President before becoming law.[77] While a concurrent resolution would satisfy the bicameralism requirement, such resolutions are not presented to the President and therefore cannot be used to restrict executive action. As a result, Congress amended Section 202(a)(1) of the NEA to require a joint resolution for congressional termination of an emergency declaration.[78] A joint resolution follows the same process as an ordinary law: it must be passed by both chambers of Congress and signed by the President, or, in the event of a presidential veto, passed again by both chambers with a two-thirds majority.[79] Given the high likelihood of a veto to a legislative attempt to terminate a President's emergency declaration, a two-thirds majority in Congress likely

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73 National Emergencies Act § 202(a)(1), 50 U.S.C. § 1622.

74 INS v. Chadha, 462 U.S. 919, 956 (1983).

75 *Id.* at 957–58.

76 *Id.* at 938; *See* LOUIS FISHER, CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER *CHADHA* 1–2 (2005).

77 U.S. CONST. art. I, §§ 1, 7; *Chadha*, 462 U.S. at 945–49.

78 50 U.S.C. § 1622, *amended by* Pub. L. No. 99-93, § 801, 99 Stat. 405, 448 (1985); *See* Beacon Prods. Corp. v. Reagan, 814 F.2d 1, 3 (1st Cir. 1987) (finding a challenge to the NEA, on grounds that the legislative veto is unconstitutional, moot because the law had since been amended to require a joint resolution signed by the President).

79 *Beacon Prods. Corp.*, 814 F.2d at 3.

needs to support a terminating resolution, which is a high bar given increasing partisan polarization in Congress.[80]

The other key NEA provision that has not fulfilled its intended purpose is the requirement that Congress meet every six months to consider ending the emergency.[81] In fact, Congress has almost never complied with the statute's plain language requirements.[82] The statute requires that within six months, and then in every subsequent six-month period, "each House of Congress *shall meet* to consider a vote" on a joint resolution to terminate the emergency.[83] The use of "shall" indicates that the provision is mandatory, but the consequences of failing to comply are unclear from the text. Additionally, the statute says: "not later than six months," further indicating that Congress's duty to meet within six months of an emergency declaration is an obligation rather than a suggestion.[84] While the law might create an obligation for Congress to meet, it is not particularly clear on what the remedy may be if it does not fulfill that obligation.

In a 1987 opinion written by then-Judge Stephen Breyer, the First Circuit found no remedy for Congress's failure to satisfy the statute's "shall meet to consider" requirement.[85] It held that a national emergency would not automatically terminate if Congress does not meet within the specified period.[86] The court reasoned that the "shall meet" provision does not mention termination, whereas subpart (d) of the same section specifically says that a President's failure to renew an emergency within one year *will* result in the emergency's termination.[87] Therefore, the court concluded, it would be wrong to interpret Congress's failure to meet to consider the declaration as terminating the national emergency.[88] As a result, when Congress does not meet to consider whether it should terminate an emergency declaration, as

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80 *See* Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since [https://perma.cc/5RT2-QVZ3]; *see also infra* Section III.

81 50 U.S.C. § 1622(b).

82 *See* Werner, Kim, Kane & Wagner, *supra* note 71; Thronson, *supra* note 50, at 739 n.11. *See also* Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029, 1080 (2004); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1417 (1989).

83 50 U.S.C. § 1622(b) (emphasis added).

84 *Id.*

85 *Beacon Prods. Corp.*, 814 F.2d at 4.

86 *Id.*; *See also* United States v. Amirnazmi, 645 F.3d 564, 577–80 (3d Cir. 2011).

87 *Beacon Prods. Corp.*, 814 F.2d at 4; 50 U.S.C. § 1622(d).

88 *Beacon Prods. Corp.*, 814 F.2d at 4–5.

it has failed to do nearly every time an emergency has been declared, there is no legal remedy to address that failure.[89] The court also noted that Congress amended the NEA before it was passed to remove a provision that would have automatically terminated emergencies without further action from Congress, so it is more reasonable to read the "shall meet" provision as providing a means for opponents of the emergency to force a vote, rather than require automatic termination.[90]

The consequence of these changes largely explains the status quo: a system of emergency powers that a President may invoke with few safeguards and a process that requires Congress to surmount extremely high hurdles to restrain presidential abuse. To a certain extent, the main contribution of the NEA was a formalized system for declaring emergencies that may have inadvertently normalized the use of emergency declarations. Congress can exert influence over presidential declarations of emergency using tactics such as oversight, the appropriations process, and formal and informal means of negotiating with the President.[91] But when it comes to Congress's ability to limit or end a presidential emergency declaration outright, its powers are much more circumscribed. After *Chadha*, Congress can only end an emergency declaration through a joint resolution passed by both chambers of Congress, presented to the President, and subject to a presidential veto.[92] In effect, Congress is back to where it started before the NEA, where the only available option to directly constrain emergency power is by passing a new law with either the President's signature or a two-thirds majority to override a veto.[93]

III. POLITICAL POLARIZATION AND SEPARATION OF POWERS

Any discussion of emergency power, and separation-of-powers issues more broadly, would be incomplete without addressing an increasingly fundamental characteristic of the modern Congress: political polarization. Separation of powers in the U.S. constitutional system is built on the idea that by dispersing different powers among

89 *Id.*; Thronson, *supra* note 50, at 752–53.

90 *Beacon Prods. Corp.*, 814 F.2d at 4–5.

91 *See generally* Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912, 933–51 (1985).

92 *See Chadha*, 462 U.S. at 951.

93 *See* Lobel, *supra* note 82, at 1416. ("[The NEA] now provides for a termination procedure that would ordinarily be available if there were no NEA, a remarkable accomplishment given the energy spent on ensuring that Congress would have a mechanism to 'assert its ultimate authority' over emergency power.").

competing branches of government, the various actors will pursue their institutional interests to keep the other branches in check.[94] But as Professors Daryl Levinson and Richard Pildes observe, conflict between branches has been subsumed by conflict between parties, with a single party potentially controlling one or more branches of government.[95] Despite the Framers' efforts to create a system without political parties, parties emerged almost immediately and party competition has become a defining characteristic of American politics.[96] As a result, actors within the branches have come to realize that their interests are more closely aligned with their party than their institutional prerogatives. In times of unified government, with Congress and the presidency controlled by the same party, there may be little that Congress can or will do to restrain the President.[97]

How does partisanship implicate separation of powers issues in the context of presidentially declared national emergencies? First, the notion that Congress as an institution will restrain presidential excesses in this realm is belied by the power of political parties to extend across branches.[98] If one party controls the presidency and at least one chamber of Congress, which has historically been common (and low levels of split-ticket voting may cause that to increase in presidential election years), there would be little incentive for the President's copartisans in Congress to act as a check on the leader of their party.[99]

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94 THE FEDERALIST No. 51 (James Madison); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2312–13 (2006).

95 Levinson & Pildes, *supra* note 94, at 2344.

96 *Id.* at 2320.

97 *Id.* at 2346.

98 *See id.*

99 In 2016, only eight percent of districts split parties in their House and presidential races, a slight increase from six percent in 2012. *Vital Statistics on Congress*, Table 2-16, BROOKINGS INST. (Nov. 19, 2020), https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/#datatables [https://perma.cc/XF83-23TN]. *See* Nathaniel Rakich & Ryan Best, *There Wasn't* That *Much Split-Ticket Voting in 2020*, FIVETHIRTYEIGHT (Dec. 2, 2020), https://fivethirtyeight.com/features/there-wasnt-that-much-split-ticket-voting-in-2020/ [https://perma.cc/P69V-8YGT] ("The Atlantic's Ronald Brownstein estimates that Biden carried about 223 House districts — almost exactly the same as the 222-224 seats Democrats will hold in the next Congress."); Drew DeSilver, *Split-ticket Districts, Once Common, Are Now Rare*, PEW RSCH. CTR. (Aug. 8, 2016), https://www.pewresearch.org/fact-tank/2016/08/08/split-ticket-districts-once-common-are-now-rare/ [https://perma.cc/FC9Q-9G58]; Katherine Schaeffer, *Single-Party Control in Washington is Common at the Beginning of a New Presidency, but Tends Not to Last Long*, PEW RSCH. CTR. (Feb. 3, 2021), https://www.pewresearch.org/fact-tank/2021/02/03/single-party-control-in-washington-is-common-at-the-beginning-of-a-new-presidency-but-tends-not-to-last-long/ [https://perma.cc/42LM-NDRH]

Although the NEA provided for a statutory fast-track process to avoid a Senate filibuster—which would otherwise require a three-fifths, or sixty-senator, majority—after *Chadha*, there must be a supermajority in Congress willing to override the President's veto to end an emergency.[100] The one time that a simple majority in Congress opposed and sought a vote to block an emergency declaration, it was unable to meet a two-thirds, veto-proof majority necessary to terminate the emergency.[101] The effective requirement that two-thirds of Congress be united in opposition to the President, in addition to high levels of party polarization, has so far amounted to an insurmountable hurdle that has blocked Congress's ability to check the President's emergency authority.

Levinson and Pildes's critique of traditional separation-of-powers thinking largely focuses on the fear that unified party control of government can flatten institutional checks and balances.[102] Professor Josh Chafetz pushes back on their critique and argues that unified party control is often still quite divided in practice.[103] Moreover, unified government itself is rare given many features of the American political system—staggered terms for representatives, senators, and presidents make it difficult for one party to control both Houses of Congress and the presidency at the same time.[104] Rather than allowing one party to trample over separation of powers, the occurrence of unified party control might primarily be a reflection of that party's unusually deep and wide support among the electorate. In the context of restraining the President, however, unified control of Congress is not necessary to block accountability. Even when the President's party is in the minority in both houses of Congress, the high threshold required to override a veto of a joint resolution to end a presidential emergency declaration can prevent Congress from reining in potential abuses.

(showing that, with a few brief exceptions, the presidency and at least one house of Congress has been frequently held by the same party).

100 50 U.S.C. § 1622(c) (2018) (specifying limits on time for debate and therefore making the filibuster inapplicable).

101 The one time that Congress has sought to disapprove a presidential emergency declaration, Congress twice failed to override a presidential veto. *See* Cochrane, *supra* note 72.

102 Levinson & Pildes, *supra* note 94, at 2315 ("We emphasize that the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.").

103 CHAFETZ, *supra* note 15, at 28.

104 *Id.* at 34.

Political scientist Frances Lee has shown that the growth in party competition for control of Congress has strongly shaped the incentives that members of Congress face, and that has led to partisanship and polarization as a strategy.[105] Put another way, parties increasingly see the possibility of gaining or losing control of Congress in each election, which incentivizes the minority to withhold cooperation and frustrate the objectives of the majority. Lee observes that, in addition to broader forces driving polarization in American politics, competition for control of Congress has intensified in recent years, which independently shapes legislators' behaviors.[106]

Historically, one party has had firm control over Congress—Republicans following the Civil War and Democrats following 1932—but in recent years this has changed, and, importantly, members have changed how they act as a result.[107] With elections never more than two years away, members of each party act with the primary aim of retaking or maintaining a majority, and that also has become an important theme in media coverage of politics.[108] Whereas the minority party may have previously believed it would remain in the minority for the foreseeable future—so it might as well compromise with the majority to shape policy outcomes—now the minority party believes that it might win control in short order. Rather than cooperate, the minority has stronger incentives to draw distinctions between the parties and frustrate the aims of the opposition.[109]

Lee's findings on polarization and competition for control of Congress build on her earlier work on partisanship and party cohesion in the Senate. She finds that members of a party perceive and act on strong incentives to stick together as a party, which in turn shapes how polarization and party conflict work in practice.[110] An important aspect of her work focuses on the role that the President plays in party cohesion, both for the President's party and the opposition.[111] While individual ideology and political incentives undoubtedly shape

105 FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 3–5 (2016).

106 *Id.* at 8, 20.

107 *Id.* at 1–2, 20.

108 *Id.* at 39; EZRA KLEIN, WHY WE'RE POLARIZED 214–18 (2020).

109 LEE, *supra* note 105, at 5 ("The argument is that this shift altered members' partisan incentives and strategic choices in ways that help drive the sharp and contentious partisanship that is characteristic of contemporary American politics.").

110 FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 3 (2009).

111 *Id.* at 75–76.

members' actions, Lee argues that the perceived success of a president strongly shapes partisan voting patterns in the Senate.[112] When an issue becomes a part of the President's agenda, members of both parties react in ways that might not be explained by ideology or constituents' interests alone.[113] When the President takes a leading role on an issue or policy, both parties tend to take clearer positions on that issue, and polarization and party conflict increase.[114] When a policy becomes associated with the President, the incentives push co-partisans to fall in line and push the opposition to try to thwart the President's agenda wherever possible.

These findings are instructive to anticipating partisan responses to the use of emergency powers. When the President declares an emergency in response to a situation that is unambiguously a crisis, it is likely neither party will object to such a move. This has historically been the case for emergency declarations as indicated by Congress's routine failure to meet to consider whether to terminate the emergency. However, when the invocation of emergency authority is perceived to be an abuse of such power, the only members who object may be those in the opposing party. Even if some of the President's co-partisans oppose the President's decision, the two-thirds majority needed to override the President's veto remains a high hurdle.[115] There is also an important distinction between a member of the President's party staking out an issue position against the President—a move not uncommon among party moderates to demonstrate their independence—and actually casting a vote as part of a majority that would overturn a high-profile executive action. Given the institutional inertia making it difficult for Congress to challenge the President and the incentives faced by the President's co-partisans in Congress,

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112 *Id.* at 99–102.

113 *Id.* at 100 ("[M]embers' willingness to support a policy idea can depend on who proposes it, not just on what it would do. Because party images are at stake, members may be willing to support a policy idea when offered by the leader of their party but oppose it when put forward by the opposing party's leader.").

114 *Id.* at 181.

115 This was true among those who opposed President Trump's declaration of a national emergency on the southern border. *See infra* notes 119–24 and accompanying text. This amounted to a strikingly bipartisan rebuke of the President, with twelve senators from the President's party voting to terminate the emergency declaration, yet the resolution ultimately failed due to the President's veto; *See* Alex Leary & Kristina Peterson, *Trump Vetoes Congressional Disapproval of Emergency Declaration*, WALL ST. J. (Mar. 15, 2019, 5:58 PM), https://www.wsj.com/articles/trump-to-discuss-border-policy-as-he-prepares-first-veto-11552672395?reflink=desktopwebshare_permalink [https://perma.cc/NJG4-XBZU].

representatives may end up letting abuses of emergency authority go unchecked. In light of these challenges, calls for reform should recognize how increasing partisanship can prevent accountability when doing so requires members of Congress to confront the head of their party directly.

IV. POTENTIAL REFORMS

The current emergency powers arrangement has prompted calls for reform from many directions. A common objection to the status quo is that the President retains too much latent authority under the NEA and Congress is ill-equipped to provide a meaningful check on presidential power.[116] As a result, emergency power is ripe for abuse, and presidents may end up resorting to such powers more regularly to accomplish non-emergency policy objectives. Reform options range from judicially imposed restrictions on Congress's ability to delegate authority, to the imposition of new statutory safeguards, to scrapping the NEA framework altogether. Successful reform efforts must acknowledge the effect that rising partisanship has had on Congress, but reformers will also need to ensure that the President and Congress can act swiftly to address true emergencies. Such solutions will empower Congress to act rather than merely acquiesce to presidential assertions of authority. Reforms will also need to avoid, to the extent possible, politicizing emergency-power issues in a way that can exacerbate partisanship and paralysis.

A. Judicially-Imposed Restrictions: The Nondelegation Doctrine

One potential way to limit the President's exercise of emergency powers would be through restrictions imposed by the courts. While calling for reform through judicial reinterpretation might not normally be the most fruitful means for pursuing change, the Supreme Court has recently indicated that it might be willing to take a new approach to the nondelegation doctrine, which could have important implications for delegated emergency powers. The nondelegation doctrine prohibits Congress from giving legislative power to another branch of government without also providing an intelligible principle to guide the use of delegated authority.[117] The doctrine is rooted in the Court's interpretation of the Constitution's grant of legislative power to

116 *See* BRENNAN CTR. FOR JUST., *supra* note 5.

117 Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

Congress as correspondingly limiting the extent to which that power can be transferred to another branch by law.[118] With a few notable exceptions in the early twentieth century,[119] the Court's historical application of the doctrine has been particularly deferential to Congress. In *Gundy v. United States*, Justice Elena Kagan stated: "So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[120]

Recent developments at the Supreme Court, however, indicate that a majority of justices may be willing to take a more exacting approach to the nondelegation doctrine.[121] In his concurring opinion in *Gundy*, Justice Alito indicated that he disagreed with the plurality's reasoning but voted to uphold a law's arguably broad delegation.[122] He stated that if a majority of the court was willing to revisit the nondelegation doctrine, however, he would be willing to join.[123] In his dissent, joined by Justice Thomas and Chief Justice Roberts, Justice Gorsuch criticized the "intelligible principle" test regularly used by the Court as having no constitutional or historical basis.[124] Justice Kavanaugh, the fifth conservative justice on the Court at the time, did not participate in the case. Later in 2019, in a concurring opinion denying certiorari in *Paul v. United States*,[125] Justice Kavanaugh indicated his support for the approach set out by Justice Gorsuch in his *Gundy* dissent.[126] A majority, therefore, appears poised to take a stricter

118 *See id.* at 2123.

119 *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–41 (1935) (striking down a provision of the National Industrial Recovery Act which gave the Interstate Commerce Commission authority to make codes of fair competition for entire industries); Panama Refining Co. v. Ryan, 293 U.S. 388, 432 (1934).

120 *Gundy*, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

121 *See* Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. J.L. & LIBERTY 280, 281–82 (2020).

122 *Gundy*, 139 U.S. at 2130–31 (Alito, J., concurring).

123 *Id.*

124 *Id.* at 2139–40 (Gorsuch, J., dissenting); *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 366 (2021) (arguing that the nondelegation doctrine was not a part of the original public meaning of the Constitution).

125 Paul v. United States*,* 140 S. Ct. 342 (2019).

126 *Id.* at 368.

approach to statutes delegating broad authority to the President and executive branch officials.[127]

There is a reasonable argument that the NEA, in combination with the many statutes conferring emergency power under it, violates the nondelegation doctrine. First, the NEA does not define "emergency," nor does it provide much guidance at all as to when a situation rises to the level of an emergency.[128] Moreover, several of the delegated powers available after declaring a national emergency could reasonably be considered legislative in nature.

A notable, and particularly controversial, example is President Trump's declaration of an emergency on the southern border, through which the President sought to deter unauthorized immigration through increased enforcement of immigration laws and the construction of physical barriers along the U.S. border with Mexico.[129] One of the most contentious aspects of that emergency declaration was the use of delegated emergency authority to undertake military construction projects that are not otherwise authorized by law.[130] The order allowed the President to reallocate as much as $3.6 billion from Defense Department military construction projects to the construction of physical barriers.[131] Almost immediately after the declaration, opponents filed

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127 Justice Amy Coney Barrett has also since been confirmed to the Supreme Court, creating a 6–3 conservative majority that may be even more likely to revisit the nondelegation doctrine. *See* Michael D. Shear & Elizabeth Dias, *Barrett Clerked for Scalia. Conservatives Hope She'll Follow His Path*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/us/politics/amy-coney-barrett-conservatives.html [https://perma.cc/HA62-NBY4].

128 Before passing the National Emergencies Act, Congress amended the bill to remove language defining the scope of what an emergency is. It originally limited the President's authority to declare emergencies to situations where the President finds such a proclamation is "essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States. . .." *See* S. 977, 94th Cong. § 201(a) (1975). However, a senate Government Operations Committee report indicates that the language was removed from the final bill because experts felt that it was too broad and would give too much authority to the President; instead, the limits on presidential power should come from the statutes that confer such authority. S. COMM. ON GOV. OPERATIONS, REPORT TO ACCOMPANY H.R. 3884, S. REP. NO. 94-1168, at 3 (1976). *See Hearing on The National Emergencies Act of 1976 Before the H. Comm. on the Judiciary, Subcomm. on the Const.*, 116th Cong. 4–5 (2019) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice at New York University School of Law).

129 Proclamation No. 9844, 84 Fed Reg. 34, 4949–50 (Feb. 15, 2019).

130 *Id.* at 4949; 10 U.S.C. § 2808(a) (2018).

131 *President Donald J. Trump's Border Security Victory*, TRUMP WHITE HOUSE (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory/ [https://perma.cc/97YY-77ZL];

multiple lawsuits challenging the legality of the effort, including on nondelegation grounds.[132] From the perspective of a nondelegation challenge, the power to appropriate is an exclusively legislative function given to Congress, and this use of the President's emergency powers allows him to use funds designated for another purpose.[133] Indeed, what made this emergency declaration particularly controversial was the clear signal Congress had recently given to the President about funding for barrier construction projects. A dispute between the executive and legislative branches had recently caused a lapse in government funding, causing a shutdown; the negotiations failed specifically on the issue of barrier funding.[134]

Nonetheless, advancing reform using the nondelegation doctrine would be both unwise given the blunt nature of such an approach, and improbable, even if the Court was to start using a more exacting analysis of delegations under the doctrine. While the Court could strike down a delegation of emergency authority on an as-applied basis, there is also an argument that the broad delegation of emergency authority that many statutes provide pursuant to the NEA as a whole violates the doctrine.[135] Yet even strictly applying the nondelegation doctrine may not end up restricting powers to conduct foreign policy or protect national security delegated to the President. The Supreme

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JENNIFER K. ELSEA & EDWARD C. LIU, CONG. RSCH. SERV., R45908, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION 4–5 (2019).

132 *See* Plaintiffs' Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction at 19, El Paso v. Trump, 408 F.Supp.3d 840 (W.D. Tex. Apr. 25, 2019) (No. EP-19-CV-66-DB).

133 *Id.* at 30; *But see* Michael B. Rappaport, *The Selective Nondelegation Doctrine and Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001) (arguing that the nondelegation doctrine does not apply to appropriations laws but does apply to other spending laws, such as authorization laws).

134 *See* Andrew Restuccia, Burgess Everett & Heather Caygle, *Longest Shutdown in History Ends After Trump Relents on Wall*, POLITICO (Jan. 25, 2019, 7:06 PM), https://www.politico.com/story/2019/01/25/trump-shutdown-announcement-1125529 [https://perma.cc/8J4G-EKUX]; Roberta Rampton & David Morgan, *Trump Declares Emergency for Border Wall, House Panel Launches Probe*, REUTERS (Feb. 15, 2019), https://www.reuters.com/article/us-usa-shutdown-emergency/trump-declares-emergency-for-border-wall-house-panel-launches-probe-idUSKCN1Q420N [https://perma.cc/56HK-WPZD].

135 *See* Jason Luong, Note, *Forcing Constraint: The Case of Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181 (2000) (arguing that the International Economic Emergency Powers Act and the NEA violate the nondelegation doctrine because of the absence of an intelligible principle guiding the use of the delegated authority).

Court has been particularly deferential to foreign policy–related delegations. In *United States v. Curtiss-Wright Export Corp.*, the Court stated that there is an important distinction between the government's domestic affairs powers and its foreign affairs powers, with the latter being an area where the President can act with a degree of discretion not available in the former.[136] Justice Gorsuch's dissent in *Gundy* also recognized that foreign policy is an area where broader delegations may not run afoul of the doctrine given the President's relevant Article II powers.[137]

Striking down all or a substantial portion of the authority delegated to the President upon declaring a national emergency would arguably go too far in restraining the President. The nondelegation doctrine is a blunt tool for restraining the President, as it limits Congress's flexibility in structuring grants of authority to the President. It would remove without replacement an important level of discretion that the President may in fact need during an emergency. Normative critiques of presidential emergency powers focus primarily on their potential for abuse and the lack of meaningful restraint from other institutions, not, generally, their existence in the first place.[138] While there may be an argument for removing the emergency powers framework altogether, the proper way to do so is for Congress to devise and pass new legislation, not judicial intervention.

B. Sunset Provisions

Some of the most prominent proposals to reform emergency powers incorporate an idea that was present in debates over the NEA's passage: the use of expiration, or "sunset," provisions. Such provisions would mandate that a declared emergency terminate automatically after a predetermined period unless Congress specifically authorizes its continuation. Rather than requiring Congress to meet every six months—an obligation it has routinely failed to satisfy—emergencies could be set to end automatically at the six-month mark; or even within thirty days. As initially proposed, the NEA would have required

136 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936). *See* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 664 (2000); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1882 n.124 (2019) (noting that Justice Gorsuch indicated in his *Gundy* opinion that Congress may be able to make broader delegations relating to foreign affairs powers, given that many such powers are given to the President in Article II).

137 *Gundy*, 139 S. Ct. at 2144–45 (2019) (Gorsuch, J., dissenting).

138 *See Hearing on The National Emergencies Act of 1976 Before the H. Comm. on the Judiciary*, *supra* note 128, at 2.

declared emergencies to automatically end after 180 days unless Congress extended the declaration by passing a concurrent resolution.[139] Recent proposals have sought to amend the NEA to include similar language, with additional language to ensure that emergencies not approved by Congress cannot be declared again after expiration.[140] Sunset provisions avoid the pitfalls of placing the onus on Congress to act affirmatively to end an emergency, and they avoid the constitutional issues associated with legislative vetoes.[141] They also enable Congress to set the terms of emergency authority going forward—forcing the executive branch to come to the table to work with Congress and extend emergency authorities beyond their expiration date.

Sunset provisions do not affect the initiation of national emergencies and, instead, would force them to expire unless Congress specifically extends an emergency declaration or otherwise passes a law extending certain emergency authorities. With a sunset provision in place, unpopular declarations of emergency would be forced to an end and could not continue indefinitely, assuming the statutory language prevented the President from declaring a new emergency that is substantially the same as the one that expired. Still, preventing unpopular emergencies from continuing indefinitely would not prevent them from being declared in the first place or necessarily empower Congress to terminate them before the sunset date. If a President had a short-term purpose to invoke emergency authority against the wishes of Congress, Congress would still effectively need a veto-proof majority to constrain the President. Sunset provisions can undoubtedly restrain presidential abuses, particularly over time, but the automaticity of the expiration may prevent Congress from acting—allowing members to wait for the sunset rather than take a hard vote—or it may

139 *See* S. REP. NO. 93-1170, at 8 (1974), *reprinted in* NEA SOURCEBOOK, at 26.

140 *See, e.g.*, S. 764, 116th Cong. § 202(a)(1) (2019) (identifying the thirty-day sunset provision); Luong, *supra* note 135, at 1211 (sixty-day sunset provision). *See also* Michael J. Pastrick, *Reality Check: The Need to Repair the Broken System of Delegating Legislative Power Under the National Emergencies Act*, CARDOZO L. REV. DE NOVO 35 (2019), http://cardozolawreview.com/wp-content/uploads/2019/05/Pastrick_denovo_41.pdf [https://perma.cc/S9FG-ADJB].

141 Sunset provisions were not considered constitutionally questionable in 1792 and have been used by Congress since then. *See* Vladeck, *supra* note 24, at 618; Franck & Bob, *supra* note 91, at 949–50. An automatic sunset would also avoid the need for veto-proof majorities, as the President would almost certainly sign a joint resolution extending an emergency declaration that he or she made in the first place. The fast-tracked legislative procedure already in the law, 50 U.S.C. § 1622(c), ensures that even a simple majority in both the House and Senate could pass a joint resolution for the President to sign.

prompt Congress to simply rubber-stamp an extension. Much of this also depends on the duration of the sunset provision. The difference between a six-month sunset and a thirty-day sunset might significantly change the President's incentives to test the limits of emergency powers.[142] Finally, care must be taken in drafting expiration provisions to ensure that presidents cannot simply redeclare an emergency once the previous one expired.

A traditional criticism of sunset provisions is that they often have little effect in practice, with Congress rubber-stamping extensions without sufficient debate or consideration of alternatives.[143] If Congress is currently unwilling to meet within the set six-month period to consider ending an emergency, it may just as easily summarily extend emergencies on an ongoing basis. The converse may be equally as troubling: the President declares an emergency in response to a genuine crisis, yet Congress fails to extend needed powers beyond the sunset period. Given the recent rise in polarization, it is conceivable that Congress could simply fail to act even when there is nominally bipartisan support for doing so. While such a problem likely runs much deeper than whether a statute has a sunset provision, it is emblematic of the underlying barriers to meaningful Congressional restraint of presidential power.

While sunset provisions do place the burden on the President to justify emergencies to Congress, it is not clear that expiration dates alone will solve the underlying problems. Sunset provisions might push the balance of power back toward Congress, but efforts to implement such reform still run against Congress's broader institutional challenges. Proponents of sunsets acknowledge the practical political problems sitting in the way of enacting their preferred reform in the first place.[144] Professor Michael Pastrick has described this dilemma

142 For example, using emergency authority to initiate a military construction project may be less desirable and less likely to be completed if that authority will foreseeably expire after thirty days. However, if the authority is set to last for six months or a year, for example, such a construction project might be worthwhile, depending on the President's ultimate objectives.

143 Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT'L L. 29, 70–73 (2016).

144 The executive branch has a strong institutional interest in protecting its power, particularly during national emergencies, and any president would likely resist such a change. This became clear when Congress first passed the NEA, as senators removed automatic expiration provisions at the behest of President Ford. *See supra* note 51 and accompanying text. The NEA was passed at a weak moment for the presidency; President Nixon had recently resigned following the Watergate scandal

as "the practical problem with the practical solution," as it may not be politically feasible for Congress to enact reform in the face of presidential opposition and fierce party conflict.[145] Forced expirations of national emergency declarations might be a useful tool to shift the balance of power between the executive and legislative branches, but they should not be reformers' only objective.

C. Defining the Scope of "Emergency" by Statute

Another common reform proposal is to place more restrictions on when a president can invoke emergency authorities by defining the scope of what constitutes an "emergency" in the statute. Such a definition was included in the proposed NEA legislation but was subsequently removed.[146] The rationale was that defining what amounts to an emergency might end up enlarging the President's power; instead, the NEA's drafters concluded that it would be best to have the specific statutes conferring certain emergency powers to place limitations on their use.[147] An analysis by the Brennan Center for Justice identified 136 different authorities available to the President upon declaring a national emergency.[148] Of those 136, only fifteen include substantive restrictions on the conferred powers—such as requiring that the emergency relate to a certain subject—and only thirteen additionally require a congressional declaration of an emergency.[149] A narrower definition of what constitutes an emergency in the statute would address the potential for emergency powers to be abused to address non-emergency policy problems. However, confining emergency power in such a way may reduce the President's ability to respond in a genuine crisis not yet contemplated by Congress.[150]

Like the nondelegation doctrine approach, defining the scope of what can constitute an emergency moves the separation of powers conflict to courts. The question becomes a matter of statutory interpretation, asking whether the President's declaration falls within what

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and Congress was well-position to assert its institutional prerogatives, yet sunset provisions did not appear in the final bill. *Id.*

145 Pastrick, *supra* note 140, at 38–40.

146 *See supra* note 53.

147 *Id.*

148 BRENNAN CTR. FOR JUST., *supra* note 5, at 3.

149 *Id.*

150 *See* Charlie Savage, *Presidents Have Declared Dozens of Emergencies, but None Like Trump's*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/trump-presidency-national-emergency.html [https://perma.cc/J67D-NFKP].

Congress contemplated. One notable proposal of such a definition, presented by Elizabeth Goitein of the Brennan Center for Justice, would require "a significant change in the factual circumstances that poses an imminent threat to public health, public safety, or other similarly pressing national interests."[151] A definition such as this would create an initial presumption that an emergency requires both a change and an imminent threat to key public interests. But there remains a challenge in anticipating what future emergencies will look like. Such a definition risks remaining broad enough that a president might still be able to justify an emergency declaration on those terms, especially if courts take a deferential approach to presidential interpretations.

An analogous approach to defining emergency by statute is to place limitations in the statutes that grant emergency power once the President declares an emergency. In fact, this would likely be the best way to describe the current approach and the one that the drafters of the NEA likely intended.[152] Although this is appropriately deemed the current approach, there are considerable questions about how exactly this would constrain presidential emergency power. Because the true limits on presidential emergency power exist in the various statutes conferring emergency authority, rather than the NEA itself, the scope of that power has not yet been litigated or addressed by the courts.[153]

One aspect of the litigation concerning President Trump's declaration of a national emergency at the southern border focuses on efforts to repurpose funding for the construction of a border wall.[154] Specifically, one case involved a challenge to President Trump's invocation of 10 U.S.C. § 2808. The statute allows the Secretary of Defense, following a national emergency declaration "that requires the use of the armed forces," to conduct military construction projects "not otherwise authorized by law that are necessary to support such use of armed forces."[155] The Ninth Circuit held that the border wall is not "necessary to support the use of the armed forces," nor does it

151 *Hearing on The National Emergencies Act of 1976*, *supra* note 128, at 16.

152 *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 128 ("The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes. Therefore, the Committee amendment makes no attempt to define when a declaration of national emergency is proper.").

153 Sierra Club v. Trump, 977 F.3d 853, 865 (9th Cir. 2020).

154 *Id.* at 880.

155 10 U.S.C. § 2808 (2018).

qualify as a military construction project.[156] As a result, the courts have provided some clarity on the scope of § 2808, but there are more than one hundred other statutes conferring emergency authority that remain open to legal challenge in future presidentially-declared emergencies.[157]

The border wall litigation exemplifies the drawbacks in the current system from the standpoint of establishing workable limits on presidential emergency power. The case-by-case, statute-by-statute approach to defining what the President can do in an emergency provides little clarity on the true scope of presidential emergency power, particularly given the lack of case law on these issues. This ambiguity may encourage presidents to invoke statutes where such limits have not yet been established. With a highly polarized Congress, there may also be more pressure on presidents to use their unilateral authority to accomplish their policy objectives.[158] Consequently, the status quo may encourage presidents to further test the limits of emergency authority, and emergency power may become even more central to the normal means of executive policymaking.

D. The National Security Powers Act of 2021

In the context of NEA reform proposals, the recently introduced National Security Powers Act of 2021 deserves mention.[159] The bill, proposed by a cross-partisan group of senators—Democratic Senator Chris Murphy of Connecticut, Republican Senator Mike Lee of Utah,

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156 Sierra Club, 977 F.3d at 879.

157 In its review of statutes conferring expanded powers to the President following an emergency declaration, the Brennan Center for Justice identified 136 such authorities available to the President in the United States Code. Of that number, ninety-six require nothing more than a formal emergency declaration, while some place additional restrictions on when and how the emergency power can be used. The analysis divides these powers into four categories, and Section 2808 is categorized as having "substantial restrictions," which is the strictest limit short of needing Congress to declare a national emergency. BRENNAN CTR. FOR JUST., *supra* note 5, at 3, 15.

158 The use of executive action to accomplish domestic policy priorities generated significant criticism from Republicans during the Obama presidency. *See, e.g.*, Steve Holland & Richard Cowan, *Obama to Announce Go-it-alone Plan on Immigration Thursday*, REUTERS (Nov. 19, 2014), https://www.reuters.com/article/us-usa-immigration-obama-idUSKCN0J31N820141119 [https://perma.cc/FMQ9-GBDN]. This trend continued and expanded to the use of emergency authority under President Trump, whose emergency declaration to build a border wall, after Congress explicitly declined to appropriate funds for such purpose, is a particularly potent example. *See supra* note 134 and accompanying text.

159 S. 2391, 117th Cong. (2021).

and Independent Senator Bernie Sanders of Vermont—would rebalance the separation of powers in multiple national security areas, including emergency powers.[160] The legislation appears to target controversial practices from previous administrations while also structurally reshaping the use of emergency powers.

The most significant change that the National Security Powers Act would impose is the thirty-day sunset provision applying to newly declared national emergencies.[161] Emergencies would expire thirty days after being declared absent a joint resolution of approval to continue the emergency.[162] The joint resolution must approve both the proclamation of emergency as well as the specifically referenced authorities invoked to respond to it.[163] If an emergency expires, the President cannot declare a national emergency "with respect to the same circumstances" for the remainder of the President's term.[164] The bill also restricts the maximum possible duration of emergencies to five years, even when they are approved and authorized by Congress under the Act.[165] The legislation would end the thirty-nine emergency declarations identified by its sponsors, and it would ensure that all subsequently declared emergencies come to an end within five years.[166]

The sunset provision operates like other proposals addressed above but with a few important differences. Rather than limiting the scope of emergency powers by defining "emergency," this bill would restrict emergency power by requiring that the invoked authorities be related to the emergency.[167] The bill would further limit delegations to ensure that such authorities are used "only to address the national emergency."[168] This would not necessarily restrict when an emergency could be declared, but it would prevent a declared emergency from justifying the use of emergency powers on an unrelated matter. Such a provision is also necessary to prevent presidents from circumventing the thirty-day sunset provision. If Congress does not extend an emergency proclamation, the President cannot declare another

160 *See id.*

161 *See id.* § 301.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* § 302.

166 *Id.* § 302, 306; Press Release, Chris Murphy, U.S. Sen., Murphy, Lee, Sanders Introduce Sweeping, Bipartisan Legislation to Overhaul Congress's Role in National Security (July 20, 2021).

167 S. 2391 § 201(b)(2)(A).

168 *Id.* § 201(b)(2)(B).

emergency to continue using an authority that has already lapsed. Additionally, once an emergency expires, the invoked emergency authority terminates, all unobligated reprogrammed funds are returned to their original purpose, and contracts related to the emergency are terminated.[169]

The National Security Powers Act would be a major reform to emergency powers, but it confronts some of the same issues that similar reform proposals face. Like other proposed provisions, this bill will likely see executive branch pushback as it could significantly reduce the powers available to the President following the thirty-day expiration.[170] Reports indicate that the White House was not involved in the drafting of the bill, which may not bode well for its success as currently written.[171] The requirement that all emergencies end within five years, however, would have significant consequences that should not be understated. The drafters identified thirty-nine ongoing emergencies at the time of its introduction, some of which date back to the 1970s.[172] Forcing an end to these emergencies and the associated emergency powers would force Congress and the President to either legislate new authorizations for present powers or allow them to lapse altogether. The five-year cliff for declared emergencies could push Congress and the President to come to longer-term legislative solutions for ongoing national security issues.

E. Establishing a New Framework

An alternative to limiting presidential power by defining "emergency" would be to replace the NEA with a set of laws tailored to specific emergency authorities with corresponding restrictions on their use. Geoffrey Manne and Seth Weinberger advance such an approach in light of the federal response to the COVID-19 pandemic.[173] Manne and Weinberger point to this crisis as indicating that the need for an emergency framework like that in the NEA is less critical than one

169 *Id.*

170 *See e.g.*, Pastrick, *supra* note 140, at 38–40; 120 CONG. REC. S18356–67, *supra* note 16.

171 *See* Trish Turner, *Senators Propose Reclaiming National Security Powers for Congress*, ABC NEWS (July 20, 2021, 9:07 AM), https://abcnews.go.com/Politics/senators-propose-reclaiming-national-security-powers-congress/story?id=78943107 [https://perma.cc/6E8M-4LQX] ("Senate aides close to the matter say that there was no consultation with the White House or Administration officials.").

172 *See* Press Release, Chris Murphy, *supra* note 166.

173 Manne & Weinberger, *supra* note 6, at 106–08.

might think. While President Trump declared a national emergency in March of 2020 in response to this pandemic, many of the most significant actions taken by the federal government to address the crisis have been under laws such as the Defense Production Act ("DPA") and the Stafford Act, and many of the powers provided under those statutes do not require a formal emergency declaration.[174]

Manne and Weinberger argue that discarding the NEA framework and replacing it with legislation mirroring the Stafford Act and the DPA could address many of the current problems.[175] Both laws provide the President with additional authorities to respond to crises; but each law does so in a way that differs from the blank-check approach under the NEA. They note that certain powers under the DPA require specific appropriations from Congress, and both laws impose reporting requirements and limitations on direct expenditures from the executive branch.[176] Notably, the DPA itself has a sunset clause that terminates certain latent authorities under the law at a future date, which requires Congress to reauthorize them periodically.[177]

Manne and Weinberger argue that getting rid of the NEA framework in favor of emergency laws with constraints like those in the DPA and the Stafford Act would provide important limitations on presidential emergency power and an improved template for congressional oversight.[178] They note, much like Pildes and Levinson observe, that reform would require members of Congress to overcome their tendency to support executive power when it suits them.[179] This approach, however, would help depoliticize and, correspondingly, reduce partisan pressures in congressional debates over delegations of emergency authority. New restrictions on when and how a president can use certain emergency powers could prevent abuse; and, even if abuse did occur, Congress could change the terms of its delegation either immediately following a controversial presidential action or at the powers' statutory expiration date.[180]

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174 *Id.* at 107 n.69.

175 *Id.* at 107.

176 *Id.*

177 Defense Production Act, 50 U.S.C. § 4564(a) (2018).

178 Manne & Weinberger, *supra* note 6, at 108.

179 *Id.*

180 As the Brennan Center has shown in its review of emergency presidential power, there are several statutes that can be invoked under the NEA simply by declaring an emergency. Ninety-six of the 136 powers identified by the Brennan Center require only a presidential declaration of an emergency, fifteen include a substantive restriction on their use, and thirteen require action from Congress. BRENNAN CTR. FOR JUST., *supra* note 5, at 3.

By requiring certain authorities to expire periodically, Congress could rein in presidential power without requiring members of the President's party to directly disapprove of a presidentially declared emergency, which would be necessary to end an emergency declaration. The approach here is similar in many ways to sunset provisions, discussed above, but there is a crucial distinction between the two. Forcing a specific emergency declaration to sunset after a specified period is different from making a statutory grant of emergency power expire. The latter, a "reauthorization requirement," is more removed and abstracted from real-world events. Voting to disapprove or extend an emergency declaration can often put members of the President's party in direct opposition to the President's policy objective. In contrast, having Congress periodically reconsider delegations of emergency authority—but not doing so when that authority is actively in use by the President—refocuses the debate to the power itself, not the underlying emergency. Reauthorization time frames could be designed to cross presidential terms, which may prompt members of Congress to evaluate the authority when the opposing party holds the presidency. Doing so would help focus debates on the power of the presidency, rather than on an individual president. While a debate over a delegated authority may still be politicized and ideological, delay can at least help make it less personal, with the success of the President and co-partisans less central.[181] Although a given emergency authority can remain politicized long after an alleged abuse, a time differential between the use of the authority and its expiration can help lessen its political salience.

Critics of reauthorization requirements note that they may fail to live up to their promises—that Congress periodically re-evaluate delegated authorities—and may even be counterproductive.[182] But

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181 *See, e.g.*, Marianne Levine & James Arkin, *Republicans Support Trump's Wall Even After He Grabs Military Funds from Their States*, POLITICO (Sept. 11, 2019, 12:31 PM), https://www.politico.com/story/2019/09/11/republicans-border-wall-military-funding-1488818 [https://perma.cc/8PY9-TM2C] (illustrating the tension between supporting a co-partisan president and supporting separation-of-powers reforms: "Earlier this year, [Sen. Thom] Tillis published an op-ed in the Washington Post saying that he would vote against the emergency declaration but later reversed his stance and voted to back Trump after coming under pressure from within his party. Tillis said when he wrote the op-ed that he 'had less concerns with what we were doing here and more concerns with the precedent we would set for future precedents and I still stand by that.' He added that he still wants to work with Sen. Mike Lee (R-Utah) on making changes to the law governing national emergencies, even though he continues to support the current one.").

182 *See* Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L. REV. 1777 (2013) (arguing that sunset provisions for surveillance

current emergency powers are already quite entrenched, so periodic reauthorization requirements are unlikely to worsen that. Congress may simply reapprove emergency authorities, but sunsets would at least force consideration of the issue. Paired with other reforms to prevent emergencies from lasting years or even decades, the reauthorization of an authority would happen independent of its use and would focus on its underlying merits.

Adding detailed reporting requirements to the President's use of emergency authority could also improve Congress's ability to conduct oversight and prevent abuse. Reporting requirements triggered by the President's use of emergency authority can spur interbranch dialogue and foster collaborative policymaking.[183] Amy Stein argues that adding substantive and procedural restrictions to statutes delegating presidential authority can shape how presidents exercise delegated power.[184] Stein notes that procedural restraints can vary in the burden that they place on the President, and statutes with significant procedural constraints can even require consultation with Congress.[185] While limiting presidential power by adding procedural requirements is certain to face opposition from the President, such efforts likely stand on firm constitutional footing given that they are imposed on powers delegated by Congress and not on specific Article II powers.[186]

The effects of new procedural constraints on the President ultimately might depend on the courts, which have been reluctant to constrain the President in foreign affairs.[187] Stein points to the example of the International Economic Emergency Powers Act, which she describes as having strong procedural requirements that have been

authorities have failed to live up to their promise of encouraging Congress to periodically re-evaluate the authorities and may have led to their entrenchment). *But see Yes, Section 215 Expired. Now What?*, ELEC. FRONTIER FOUND. (Apr. 16, 2020), https://www.eff.org/deeplinks/2020/04/yes-section-215-expired-now-what [https://perma.cc/M9E5-Q7CV] (noting that some of the most controversial provisions of the authorities addressed by Berman have, in fact, expired, albeit long after they were initially created).

183 Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1222 (2018); 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/NM64-GEWY].

184 Stein, *supra* note 183, at 1224.

185 *Id.* at 1288.

186 *Id.* at 1235.

187 *Id.* at 1239.

watered down by the courts.[188] However, Stein also identifies notable counterexamples of the courts exercising their authority to check presidential excesses.[189] The obligation imposed on the President by these constraints—such as timing limitations, reporting requirements, and requirements that the Executive make certain factual findings before taking action—and the specific wording employed, are therefore critical to determining their efficacy. Stein proposes a sliding scale of procedural constraints that become more onerous depending on whether the threat is acute or chronic.[190] In acute crises, it may be more appropriate to have fewer procedural requirements for presidential authority to provide the President with flexibility.[191] When a problem persists, however, additional requirements and obligations can be placed on the President so that Congress can conduct oversight and play a role in the policymaking process.[192] Reporting and compliance obligations that grow over time may push the President to work with Congress on longer-term solutions.[193] While Stein's focus is on the President's broader role in foreign policy, her proposal is particularly relevant in the context of national emergencies, where the goal of delegated power to the President is to provide flexibility, prevent abuse, and ensure that Congress can perform its core constitutional obligations.

While constraining emergency authority through substantive and procedural statutory obligations may be an improvement on the status quo, doing so may ultimately not stop the President's intent to use emergency power for non-emergency ends. Substantive constraints can narrow the scope of when a certain authority may be invoked, such as the requirement that there be an imminent threat to important public interests created by a change in factual circumstances.[194] But a judicial remedy for a new question of statutory interpretation may not be timely enough to avoid abuse. Moreover, courts may remain deferential to the President's interpretation of a statute when the context is a national security emergency.

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188 *Id.* at 1228–29, 1239; Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran Contra Affair*, 97 YALE L.J. 1255, 1264 (1988).

189 Stein, *supra* note 183, at 1242–43.

190 *Id.* at 1245

191 *Id.*

192 *Id.* at 1245–46.

193 Compliance burdens can escalate to make the President consider a new legislative approach, and reporting requirements could provide Congress with enough access to surface information that could impose political costs on the President as the use of emergency power extends over time.

194 *See infra* note 141 and accompanying text.

In addition to calls for more narrowly tailored emergency authority, there is an argument that the President's need for emergency power is simply less significant than might be perceived, as Congress has shown that it can act quickly in a crisis. In the context of the COVID-19 pandemic, it is worth noting that the most significant aspect of the federal emergency response came from Congress, not the President. President Trump formally declared an emergency on March 13, 2020, while Congress had passed three pieces of legislation, including the $2.2 trillion Coronavirus Aid, Relief, and Economic Security ("CARES") Act, by the end of March of 2020.[195] It passed the first bill, funding vaccine research and public health, on March 5; the second bill, providing paid sick leave as well as funding for Medicaid, food assistance, and unemployment benefits on March 18; and the CARES Act on March 27.[196]

Given Congress's demonstrated ability to act swiftly in a crisis, the need for sweeping delegations of emergency power to the President may be exaggerated.[197] The tradeoff involved in these delegations—broad power with potential for abuse in exchange for nimble executive action—may simply not be worth it, especially if presidents begin to rely on emergency authorities more and more for nonemergent policymaking.[198] It is worth noting that the congressional response to the pandemic, while substantial, has largely relied on leveraging existing programs to increase available resources to those most

195 Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). *See* Emily Cochrane & Sheryl Gay Stolberg, *$2 Trillion Coronavirus Stimulus Bill Is Signed into Law*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html [https://perma.cc/27XR-E6M2]; Kelsey Snell, *Here's How Much Congress Has Approved for Coronavirus Relief So Far and What It's For*, NPR (May 15, 2020, 1:53 PM), https://www.npr.org/2020/05/15/854774681/congress-has-approved-3-trillion-for-coronavirus-relief-so-far-heres-a-breakdown [https://perma.cc/YJ53-BLNE].

196 *See* Snell, *supra* note 195; Claudia Grisales, *Trump to Sign $8 Billion Coronavirus Response Package Friday*, NPR (Mar. 4, 2020, 2:45 PM), https://www.npr.org/2020/03/04/812109864/bipartisan-negotiators-reach-deal-for-roughly-8-billion-for-coronavirus-response [https://perma.cc/RVD3-EFES]; Lauren Egan, *Trump Signs Off on Coronavirus Aid Bill*, NBC NEWS (Mar. 18, 2020, 10:41 AM), https://www.nbcnews.com/politics/congress/senate-plans-vote-house-coronavirus-bill-wednesday-n1162851 [https://perma.cc/YY6X-HQYS].

197 *See* Manne & Weinberger, *supra* note 6, at 106.

198 Simply repealing the NEA may revert emergency powers back to their pre-1970s status quo, with the President potentially free to use emergency authorities if a state of emergency exists. Moving away from the NEA framework involves addressing each emergency delegation separately and determining whether it is necessary, or whether Congress would be able to step in to grant the authority when the President needs it or otherwise legislate to address the crisis.

affected. If Congress decided to delegate new powers to the President, a swift response could lead to mixed results. Alternatively, the relative speed of Congress's ability to respond might support the case for even shorter durations of broad emergency delegations. Instead of delegating authority that lasts for a year or longer, Congress could give presidents broad authority to act but only for a considerably shorter period before that authority lapses absent further extension from Congress. While instituting such a sunset clause runs up against the same difficulties discussed above, advocates of such an approach could point to Congress's recent ability to act on short notice and in a highly polarized environment as a reason to be less concerned about partisanship hobbling a federal response to an acute crisis.

V. CONCLUSION

Under the NEA, the President has considerable latent power to wield in a crisis. But the broad scope of that power makes the potential for abuse more concerning. Whether an abuse of emergency authority is for illiberal ends or a way to get around congressional inaction on important— but non-emergency— issues, Congress is ill-positioned to constrain the President, and any abuse may go unchecked. Political polarization and the high, potentially insurmountable, obstacles to congressional action seeking to terminate an emergency reveal that the true constraint on presidential emergency authority may not lie in Congress. While public opinion may dissuade the President from abusing emergency powers, there is reason to think that constraint may be fading as well. Evidence of this can be seen in President Trump's emergency declaration regarding the southern border. While some, especially those in the President's party, saw the move as a response to a pressing policy issue, the declaration was primarily a reaction to Congress's refusal to act, rather than a change in circumstances on the United States-Mexico border.[199] If the incentives to accomplish signature policy objectives are stronger than the negative political consequences from abusing emergency authority, presidents may increasingly resort to emergency action in normal times.The status quo has sparked many calls for reform, but such efforts must incorporate how party polarization has shaped incentives in Congress. As close competition for control of the legislative branch has pushed parties to

199 *See* Quint Forgey, *Graham: I 'Support' Trump Emergency Declaration*, POLITICO (Feb. 16. 2019, 7:47 PM), https://www.politico.com/story/2019/02/16/graham-i-support-emergency-declaration-1173353 [https://perma.cc/KX55-J2M2]; Levine & Arkin, *supra* note 181.

become increasingly cohesive and incentivized against cooperation with the opposing party, Congress may only be poised to restrain the presidency under certain conditions. When an issue becomes closely tied to the President's agenda, the President's co-partisans in Congress will have little reason to rebuke the leader of their party. Rather than structuring accountability for abuses of emergency power as a direct vote to reprimand the President, reform should seek to provide members with sufficient political cover to act in the institutional interests of Congress.

Moving away from the NEA framework to a system in which delegations of authority to the President are periodically reauthorized will allow Congress to shape the power of the presidency without confronting a specific president. Additional prophylactic restrictions and procedural requirements could also be used to prevent abuses in the first place. Congress could seek to define an emergency by statute, or it could place significant procedural restrictions that push presidents toward collaboration with Congress rather than unilateral action. Making major changes to emergency powers would almost certainly be a weighty political task. Ultimately, the current polarization and Congressional gridlock may make large-scale reform unfeasible. Sunset provisions and attempts to do away with the NEA framework may be futile absent a momentum-generating abuse of power and the congressional will to stop it. But smaller-scale reforms may still be possible. Congress can re-evaluate individual delegations of emergency authority when passing related legislation. Instead of eliminating existing emergency delegations, Congress could set a date for certain powers to be reauthorized—enabling it to consider later whether that power should be contracted or refocused to address emerging concerns and simmering crises. Rather than confronting the presidency outright, it could begin an interbranch dialogue about what crises may emerge in the future and what authorities will be necessary to address them.