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Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies

DANIEL A. FARBER[†]

President Trump has used emergency powers to achieve key parts of his policy agenda, exemplified by his travel ban, funding for the border wall, and tariffs on many imports. He has also declared the 2020 coronavirus pandemic a national emergency, but has taken relatively little action under this declaration to date. This Essay examines how the Administration has invoked emergency powers in these and other settings, along with the responses of the courts. This Essay also considers how these actions could be used as precedents by future Presidents, such as declaring a climate change emergency. Finally, this Essay discusses the risks of normalizing the use of emergency powers, along with the forces that may impel Presidents in that direction. Although overuse of emergency powers is the problem that has received most attention, Trump's response to the coronavirus illustrates the possibility for abusing discretion in the opposite direction. The discretion inherent in emergency powers may sometimes prevent needed government actions when taking them would be politically unpalatable to the President. Thus, whether a power is exercised or not, reposing unlimited discretion in the President comes with serious risks as well as possible benefits.

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INTRODUCTION

Some of President Trump's most dramatic policy decisions have been justified on the basis of emergencies or national security—exceptional circumstances that circumvent normal restrictions on executive power. The Trump Administration has also sought to take advantage of exceptions from normal legal requirements in more mundane circumstances, such as suspending Obama-era regulations without providing notice or an opportunity to comment.¹ Bold executive action, though in opposing directions, was a feature of preceding administrations.² But Trump has greatly intensified the use of emergency powers and has openly used these measures to defy Congress and evade judicial review. Moreover, although it is hard to be sure of Trump's subjective beliefs, many observers might view some of the claims of emergency or national security threats to be pretextual.

The Trump Administration has faced some pushback on its use of these powers.³ Lower court decisions have at least delayed some of the actions and led to their narrowing. Yet courts have consistently refused to look past the claim of exceptional circumstances when made by the President. Claims of exceptional circumstances to justify actions by agencies, as opposed to the President, have been less successful.

Although we cannot be sure of this, Trump's relative success in advancing his domestic policy agenda through use of emergency powers could well set a precedent for future Presidents, whether or not they are ideological soulmates. There is certainly room for future exploitation of national security and emergency powers, given that there are almost three thousand statutes referencing one or the other.⁴ Congress has very rarely attempted to define national security, and then only in the broadest terms.⁵ Given emergency powers,

1. Memorandum from Reince Priebus, Assistant to the President and Chief of Staff, to the Heads of Exec. Dep'ts and Agencies, Regulatory Freeze Pending Review (Jan. 20, 2017), <https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/>.

2. See Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018). Mashaw and Berke concluded:

In general, this study finds in both administrations bold attempts to accrete executive power; presidential administration insinuating itself more and more into areas where proponents of presidentialism have cautioned against aggressive use of presidential directive authority; and the rise of organizational techniques, like policy czars and "shadow cabinets," that institutionalize presidential control in the absence of specific presidential directions.

Id.

3. See *infra* Part II.

4. Amy L. Stein reports over 2100 statutes referring to national security and over 800 referring to national emergencies. Nearly 400 refer to presidential national security powers. Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018). Of these, a "significant number" of presidential delegations lack "any discernible limits." *Id.* at 1195.

5. Stein located only three examples of statutes defining the term. The definitions were "national defense and foreign relations of the United States" and "the national defense, foreign relations, or economic interests of the United States." *Id.* at 1197. For further discussion of the definitional problem, see *id.* at 1197–1203.

as Justice Robert Jackson once intimated, presidents have every incentive to identify situations as emergencies where they can use those powers.⁶

Part I of this Essay will examine the Trump Administration's efforts to use extraordinary powers in contexts ranging from an international travel ban to saving coal-fired power plants. What is notable is not just the invocation of these extraordinary powers, but the extent to which they have been used to implement high-profile, controversial politics. In addition, Trump has made little effort to conceal the extent to which the official justifications for these actions deviate from their actual purposes. In contrast, in the face of what seems to be a genuine emergency, Trump has been timid about using emergency powers to address the 2020 coronavirus outbreak.

To provide a basis for a more balanced assessment of this type of presidential action, Part II sketches out how a progressive President might use the same strategies to address climate change. The purpose of that exercise is to provide a more balanced appraisal of the systemic implications of Trump's actions, by separating the process issues from the substance of his decisions.

Part III then assesses the pros and cons of using emergency powers to achieve domestic policy goals. From the perspective of a President using this strategy, the advantages are fairly obvious. It allows for rapid action with minimum procedural requirements and reduced judicial oversight. It also dramatizes the President's action, not only gratifying the President's supporters but perhaps helping to persuade others of the need for action. One downside is the possibility of backlash from Congress or the public. Another downside is that emergency measures can be repealed just as easily by the next President, leading to serious policy instability.

The most significant issues about aggressive use of emergency powers, however, involve the implications for democratic governance. Given congressional gridlock, a cumbersome regulatory process, and courts that are often unfriendly to major regulatory innovations, use of extraordinary powers may offer the only available option for responding to urgent policy needs. Moreover, direct action by the President, as opposed to administrative agencies, increases political accountability—if you don't like the border wall or the travel ban, you know who to blame. But the negative implications for governance are also serious. The President's use of extraordinary powers is, at most, loosely guided by statutory criteria and subject to attenuated judicial review. This poses a threat to the rule of law, shortcuts public deliberation and expert analysis, and undermines the separation of powers. On the whole, use of extraordinary powers to make policy seems best avoided except in cases of necessity, but that precept may do increasingly little work if other policymaking mechanisms are blocked.

The coronavirus outbreak illuminates another potential problem with vesting highly discretionary emergency powers in the President. A President's

6. Jackson said the Framers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation[.]" adding that "[w]e may also suspect that they suspected that emergency powers would tend to kindle emergencies." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

failure to make full use of these powers, when circumstances call for more aggressive action, may also reflect similar problems: a closed decision-making process in which expert analysis is undervalued, and in which Congress is sidelined. Presidential leadership is undoubtedly crucial in responding to emergencies, but relying so heavily on any single individual's unguided discretion carries both the risk of overreliance on emergency powers and the risk of under-reliance on them when they are really needed.

I. CASE STUDIES

President Trump and his Administration have relied heavily, though by no means exclusively, on claims of exceptional circumstances to fulfill key campaign promises quickly and with minimal procedural hurdles. This strategy has been used under diverse circumstances, sometimes successfully and sometimes less so. Most notably, courts generally have been extremely reluctant, even in the face of constitutional claims, to probe claims that an emergency or national security crisis exists. Below, we consider five case studies in which the Administration has invoked extraordinary circumstances as a basis for statutory powers.

A. GRID RELIABILITY

During his campaign, Trump emphasized his support for the coal industry. Yet, coal-fired power plants have continued to close during his presidency.⁷ As one of several responses, the Administration considered the use of emergency powers. Under section 202(c) of the Federal Power Act, the Secretary of Energy can take emergency action to maintain the operation of the electric grid. The Defense Production Act, a statute dating from the Korean War era, allows the President to use a variety of economic tools as needed for national defense, which Trump argued applied to his efforts to prop up the coal industry. There were legal issues, however, with the application of these statutes.⁸

7. See Scott DiSavino, *U.S. Coal-Fired Power Plants Closing Fast Despite Trump's Pledge of Support for Industry*, REUTERS (Jan. 13, 2020, 4:10 AM), <https://www.reuters.com/article/us-usa-coal-decline-graphic/us-coal-fired-power-plants-closing-fast-despite-trumps-pledge-of-support-for-industry-idUSKBN1ZC15A>; Michael Grunwald, *Trump's Love Affair with Coal*, POLITICO MAG. (Oct. 15, 2017), <https://www.politico.com/magazine/story/2017/10/15/trumps-love-affair-with-coal-215710>.

8. As I explained at the time:

The plan was to use one or more of a trio of emergency provisions. The first is a section of the Federal Power Act that authorizes the Department of Energy to order generators to run during wars or other emergencies, including grid emergencies. Both DOE precedent and a D.C. Circuit case say this doesn't apply to fuel supply issues. The second statute, which traces back to the Korean War allows the President to prioritize performance of defense contracts over civilian contracts and allocate materials, services and facilities to promote the national defense. But it doesn't seem to provide authority to force companies to buy these items. It also contains loan and subsidy provisions, but they seem to be limited to \$50 million in any one year. The final statute, another section of the Federal Power Act, authorizes DOE to issue emergency measures in response to a grid security emergency. These measures last only fifteen days at a time.

Dan Farber, "*National Security*" *Coal-Bailout Collapses*, LEGAL PLANET (Oct. 16, 2018), <https://legal-planet.org/2018/10/16/national-security-coal-bailout-collapses/>. For more extensive discussion of the statutory issues,

Nevertheless, coal advocates, including then-Secretary of Energy Rick Perry, argued that the government should use these powers to keep coal-fired plants running. The theory behind this argument is that other sources of power might fail due to a lack of energy supply—renewables because of weather, or natural gas because of failures or sabotage of gas pipelines. Coal plants, on the other hand, keep an inventory of coal on-site.

In June of 2018, the White House directed Secretary Perry to take “immediate steps” to halt the loss of coal-fired plants.⁹ A draft memo suggested the parameters of the plan:

The Energy Department would exercise its emergency authority to order grid operators to give preference to plants “that have a secure on-site fuel supply” and that “are essential to support the Nation’s defense facilities, critical energy infrastructure, and other critical infrastructure.” Only coal and nuclear plants regularly keep fuel on site.¹⁰

The plan ran into strong headwinds. As one member of the Federal Energy Regulatory Commission (FERC) put it, “FERC does not pick winners and losers in the market. Instead we create an environment where the market can pick the winners and losers.”¹¹ By October 2018, *Politico* reported that the “White House has shelved the plan amid opposition from the president’s own advisers on the National Security Council and National Economic Council.”¹² Some of the resistance may have been based on concerns over weakly grounded national security rationales or interference with competitive electricity markets. But more specific concerns were that Perry had not succeeded in identifying individual coal plants in danger of closing whose operations were critical to grid reliability, and the plan would have caused cost increases that no one wanted to absorb.¹³

see SHARON B. JACOBS, GETCHES-WILKINSON CTR. NAT. RES., ENERGY, & ENV’T, & ARI PESKOE, HARVARD LAW SCH. ENVTL. & ENERGY L. PROGRAM, ENERGY EMERGENCIES VS. MANUFACTURED CRISES: THE LIMITS OF FEDERAL AUTHORITY TO DISRUPT POWER MARKETS (June 3, 2019), <https://eelp.law.harvard.edu/wp-content/uploads/Energy-Emergencies-vs-Manufactured-Crises-FINAL.pdf>.

9. Statement from the Press Secretary on Fuel-Secure Power Facilities (June 1, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/>. The statement explains:

President Donald J. Trump believes in total energy independence and dominance, and that keeping America’s energy grid and infrastructure strong and secure protects our national security, public safety, and economy from intentional attacks and natural disasters.

Unfortunately, impending retirements of fuel-secure power facilities are leading to a rapid depletion of a critical part of our Nation’s energy mix, and impacting the resilience of our power grid.

Id.

10. Steven Mufson, *Trump Orders Energy Secretary Perry to Halt Shutdown of Coal and Nuclear Plants*, WASH. POST (June 1, 2018, 10:58 AM), https://www.washingtonpost.com/business/economy/trump-officials-preparing-to-use-cold-war-emergency-powers-to-protect-coal-and-nuclear-plants/2018/06/01/230f0778-65a9-11e8-a69c-b944de66d9e7_story.html.

11. John H. Cushman, Jr., *There’s No Power Grid Emergency Requiring a Coal Bailout, Regulators Say*, INSIDE CLIMATE NEWS (June 12, 2018), <https://insideclimatenews.org/news/12062018/ferc-no-power-grid-national-security-emergency-trump-perry-coal-subsidy-energy-regulators-congress>.

12. Eric Wolff & Darius Dixon, *Rick Perry’s Coal Rescue Runs Aground at White House*, POLITICO (Oct. 15, 2018, 7:52 PM), <https://www.politico.com/story/2018/10/15/rick-perry-coal-rescue-trump-850528>.

13. *Id.*

B. THE BORDER WALL

Another important Trump campaign pledge involved immigration. “We will build a great wall along the southern border—and Mexico will pay for the wall . . . 100 percent. They don’t know it yet, but they’re gonna pay for the wall.”¹⁴ The funding problem proved more difficult than expected, however. After several bitter disputes with Congress over funding for the wall, Trump issued a declaration that a national emergency existed at the southern border.¹⁵ His Acting Chief of Staff, John Michael (“Mick”) Mulvaney, had telegraphed that this move would be forthcoming unless Congress provided the funding:

The president is going to build the wall . . . You saw what the Vice President said there, and that’s our attitude at this point, is we will take as much money as you can give us and then we will go find money someplace else legally in order to secure that southern barrier. But this is going to get built with or without Congress.¹⁶

Mulvaney added that an emergency declaration was “absolutely on the table.”¹⁷

The statutory basis for the emergency declaration was the National Emergencies Act.¹⁸ The Proclamation conceded that “[t]he problem of large-scale unlawful migration through the southern border is long-standing,” but contended that “the situation has worsened in certain respects in recent years.”¹⁹ Specifically, “recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending.”²⁰ Consequently, many of these “family units” allegedly disappear into the general population and are not available for later deportation.²¹ In response to this situation, the Proclamation calls for additional support by the Armed Forces at the border. In particular, the Proclamation invokes two statutory provisions that authorize the diversion of service members and defense funding from other construction projects.²²

14. Nolan D. McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO, <https://www.politico.com/story/2016/08/donald-trump-immigration-address-arizona-227612> (last updated Aug. 31, 2016).

15. Proclamation No. 9844, 84 Fed. Reg. 4,949, 4,949 (Feb. 20, 2019).

16. Gregg Re, *Border Wall Talks Break Down Ahead of Second Possible Government Shutdown*, FOX NEWS (Feb. 10, 2019), <https://www.foxnews.com/politics/talks-on-border-wall-break-down-ahead-of-second-possible-government-shutdown>.

17. *Id.*

18. 50 U.S.C. §§ 1601–1651 (2018). The provision enabling emergency declarations is 50 U.S.C. § 1621. It does not specify any criteria for determination whether an emergency exists.

19. Proclamation No. 9844, 84 Fed. Reg. at 4,949.

20. *Id.*

21. *Id.*

22. *Id.* Trump invoked 10 U.S.C. sections 12302 and 2808. Under section 12302(a), the Secretaries of the military departments can pull any service member from any unit into the “Ready Reserve” for active duty. Section 2808(a) provides:

In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to

Even on its face, the Proclamation does not make much of a case that an “emergency” exists in the ordinary sense of the word. The basic situation is said to have existed for considerable time, and even the changed circumstances have apparently occurred during recent years. If an emergency is supposed to be sudden and unexpected, the Proclamation’s description of border conditions fails to meet the bill. Moreover, the movement of troops to the border seems to serve simply as creating a predicate for transferring construction funds to the wall, as much as it allows for use of military skills or equipment. Given that Congress had recently turned down the Administration’s funding request for wall construction, there was understandable suspicion about the bona fides of the Proclamation. Both Houses of Congress passed resolutions disapproving the emergency declaration, but were unable to override a presidential veto.²³ In vetoing the resolution, Trump continued to insist that conditions on the border constituted an emergency.²⁴

According to the Congressional Research Service (CRS), the number of declared national emergencies has risen steadily in the past twenty years to around thirty declarations as of 2019.²⁵ On average, the emergency declarations studied by CRS remained in effect for about a decade, and one has remained in effect for forty years.²⁶ Some of the emergency declarations relate to chronic issues such as cybersecurity, rather than specific crises.²⁷ Thus, while it may not correspond to the ordinary understanding of the word, Trump’s designation of chronic immigration as an emergency was not entirely unprecedented.

Yet the Proclamation gave rise to several lawsuits. *California v. Trump* challenged funds appropriation for the border wall.²⁸ The primary allegation was that the President’s reallocation of funds under section 2808 violated the Appropriations Clause because it failed to meet the criteria of a valid re-

undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

10 U.S.C. 2808(a) (2018).

23. Emily Cochrane, *House Fails to Override Trump’s Veto, Preserving National Emergency Order*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/us/politics/national-emergency-vote.html>.

24. Memorandum from President Donald J. Trump to the U.S. Senate, S.J. Res. 54 Veto Message (Oct. 15, 2019), <https://www.whitehouse.gov/presidential-actions/s-j-res-54-veto-message/>. The memorandum stated:

The southern border, however, continues to be a major entry point for criminals, gang members, and illicit narcotics to come into our country. As explained in Proclamation 9844, in my veto message regarding H.J. Res. 46, and in congressional testimony from multiple Administration officials, the ongoing crisis at the southern border threatens core national security interests. In addition, security challenges at the southern border exacerbate an ongoing humanitarian crisis that threatens the well-being of vulnerable populations, including women and children.

Id.

25. CHRISTOPHER A. CASEY ET AL., CONG. RESEARCH SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 20 fig.4 (2019).

26. *Id.* at 18.

27. *Id.* at 20.

28. *California v. Trump*, 407 F. Supp. 3d 869, 877 (N.D. Cal. 2019).

appropriation under that section.²⁹ In addition, the plaintiffs alleged that the selection of projects to defund was arbitrary and capricious and that an environmental impact statement was required.³⁰ The court held that the declaration of a national emergency requiring use of armed forces was nonjusticiable.³¹ In contrast, the court concluded that the transfer of funds did present a justiciable issue under the Appropriations Clause.³² Moreover, the plaintiffs had standing due to injuries to their environmental, professional, aesthetic, and recreational interests.³³

On the merits, the District Court concluded that the border wall did not qualify as a military construction project under the funds-transfer statute.³⁴ Section 2808 was not being carried out with respect to “military installation[s],” defined as “a base, camp, post, station, yard, center, or other activity.”³⁵ The term “other activity” had to be construed in the context of the more specific items, and the wall was not similar in nature or scope to base, camp, post, station, yard, or center.³⁶ Nor was it “necessary to support use of armed forces.”³⁷ In reality, the appropriation was merely intended to provide more efficient and effective support to the Department of Homeland Security (DHS), a civilian agency.³⁸ Finally, the court rejected the claim that the choice of projects was arbitrary and capricious, since they were selected “to provide [the Department of Defense (DoD)] time to work with Congress to determine opportunities to restore funds” for military construction projects that were defunded in order to divert funds to pay for border barrier construction.³⁹ The court agreed, however, that an environmental impact statement would be required.⁴⁰ The court issued a permanent injunction against the use of military funds for the border wall.⁴¹

In a second case, *Sierra Club v. Trump*, the District Court held that reprogramming the construction funds violated the Defense Appropriations Act of 2019.⁴² Section 8005 provides that such funding transfers cannot be made

29. *Id.*

30. *Id.* at 878, 900.

31. *Id.* at 890.

32. *Id.* at 888.

33. *Id.* at 885–86.

34. *Id.* at 889.

35. *Id.*; see also 10 U.S.C. § 2801(a), (c)(4) (2018) (defining the terms “military construction” and “military installation,” respectively).

36. *California v. Trump*, 407 F. Supp. 3d at 892.

37. *Id.* at 869.

38. *Id.* at 897.

39. *Id.* at 899.

40. *Id.* at 901. The U.S. Government’s unlawful invocation of military construction funds statute barred their exemption from NEPA. Section 2808 permits the Secretary of Defense to undertake military construction projects without regard to NEPA’s EIS requirement. But the President unlawfully invoked the statute to divert funds for military construction projects in order to build wall on southern border. Thus, the statutory provision, “without regard to any other provision of law,” was not triggered. *Id.*

41. *Id.* at 902.

42. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 928 (N.D. Cal. 2019); see also Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that the Secretary of Defense may transfer money to the DoD, subject to certain restrictions).

“unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress.”⁴³

The Ninth Circuit declined to stay the injunction pending appeal.⁴⁴ In the court’s view, the government had failed to make a strong showing that it was likely to succeed on the merits. Congress had denied funding for the same wall construction projects.⁴⁵ As the court observed:

President Trump has made numerous requests to Congress for funding for construction of a barrier on the U.S.-Mexico border.

. . . .

The situation reached an impasse in December 2018. During negotiations with Congress over an appropriations bill to fund various parts of the federal government for the remainder of the fiscal year, the President announced his unequivocal position that “any measure that funds the government must include border security.” . . . On December 20, 2018, the House of Representatives passed a continuing resolution that allocated \$5.7 billion in border barrier funding. But the Senate rejected the bill. The President could not reach an agreement with lawmakers on whether the spending bill would include border barrier funding, triggering what would become the nation’s longest partial government shutdown.⁴⁶

The dispute between the House and the President led to a lengthy government shutdown.⁴⁷ During the negotiations, “the President made clear that he still intended to build a border barrier, with or without funding from Congress,” indicating that he would use emergency powers to do so if necessary.⁴⁸ Ultimately, Congress appropriated less than a quarter of the amount the President requested. At the same time that he signed the bill, he issued the emergency declaration to enable fund transfers for building the wall.⁴⁹

The court found that the organizations bringing the suit possessed Article III standing to invoke separation of powers principles to seek to enjoin the proposed “reprogramming” of funds.⁵⁰ In addition, the court found that the reprogramming was reviewable under the Administrative Procedure Act, and that the organizations fell within the zone of interests protected by the Appropriations Clause.⁵¹ Finally, the balance of interests favored the injunction given the government’s constitutional violation.⁵²

The government turned to the Supreme Court for a stay of the district court’s order. The Court granted the stay, saying that “[a]mong the reasons is that the Government has made a sufficient showing at this stage that the

43. Department of Defense Appropriations Act § 8005, 132 Stat. at 2999.

44. *Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019).

45. *Id.* at 689.

46. *Id.* at 677–78 (citations omitted).

47. *Id.* at 678.

48. *Id.*

49. *Id.* at 679.

50. *Id.* at 696–97.

51. *Id.* at 700–04.

52. *Id.* at 704–07.

plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005."⁵³

Two other efforts were made to challenge the funding transfer. In *El Paso County v. Trump*, the challenge was brought by entities (the county and an organization) who would have benefited from the defunded projects due to the executive order.⁵⁴ Like the California district court, the Texas district judge held that the transfer violated the appropriations bill in which Congress had provided only limited funding for the wall.⁵⁵ The Texas judge's theory was a bit different, however. He argued that the specific appropriation of limited funds for the wall overrode the more general provisions allowing fund transfers.⁵⁶ He also relied on section 739 of the Appropriations Act, which prohibits transfers of funds to increase the funding for any appropriation unless authorized by an appropriations act, whereas the provision the President relied on was not enacted as part of an appropriations act.⁵⁷ On December 19, 2019, the judge issued a declaratory judgment and permanent injunction against the transfer.⁵⁸ The court of appeals issued a stay based, among other reasons, on "the substantial likelihood that appellees lack Article III standing."⁵⁹ In *U.S. House of Representatives v. Mnuchin*, the district court held that the House lacked standing to defend its constitutional appropriations prerogatives.⁶⁰ At the time of this writing, the appeal in the case is scheduled to be heard en banc in the D.C. Circuit.⁶¹

Quite apart from their merits, these cases involved some procedural perplexities. Who, if anyone, had standing to challenge the shift in funding? Could the suit be brought under the Administrative Procedure Act, or do federal courts otherwise have authority to hear actions to enjoin unconstitutional actions? The Supreme Court's stay order suggests that it believes that the answer to that question is no. On the merits, the cases presented not only significant statutory interpretation issues, but the more perplexing issue of when a misinterpretation of an appropriations law translates into a violation of the Appropriations Clause.

53. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

54. *El Paso Cty. v. Trump*, 408 F. Supp. 3d 840, 845 (W.D. Tex. 2019).

55. *Id.* at 857–58.

56. *Id.* at 859–60.

57. *Id.* at 859. Section 739 provides that:

None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

Consolidated Appropriations Act, Pub. L. No. 116-6, § 739, 133 Stat. 13, 197 (2019).

58. *El Paso Cty. v. Trump*, 407 F. Supp. 3d 655, 660–61 (W.D. Tex. 2019).

59. *El Paso Cty. v. Trump*, No. 19-51144, slip op. at 2 (5th Cir. Jan. 8, 2020).

60. *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 13 (D.D.C. 2019).

61. *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477, at *1 (D.C. Cir. Mar. 13, 2020).

Perhaps feeling vindicated by the litigation, President Trump is reportedly now planning to make similar transfers in 2020. According to news reports, the current plan is “to take \$3.7 billion in military construction funding, slightly more than the \$3.6 billion diverted in 2019.”⁶² In February 2020, the President gave formal notice to Congress of intent to transfer the funds.⁶³ Two weeks later, the American Civil Liberties Union filed suit to challenge the transfer.⁶⁴

C. TARIFFS

Protecting American industry by limiting imports was another key theme of the 2016 campaign.⁶⁵ The mechanism for doing so turned out to be section 232 of the Trade Expansion Act of 1962. Section 232 provides a process whereby the President can limit the imports of any product for national security reasons based on a report from the Secretary of Commerce.⁶⁶ If the President agrees that imports pose a threat to national security, the President must “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”⁶⁷ This provision was used in twenty-four proceedings between its passage and 1994.⁶⁸ In the past twenty-five years, there have been only seven proceedings, five of them under Trump.⁶⁹

On March 8, 2018, President Trump made use of this authority to impose tariffs on imports of aluminum and steel.⁷⁰ As the basis for this action, the declaration of a national emergency invoked factual findings made by the Commerce Secretary. As recounted in the President’s Proclamation, those findings were:

[T]he present quantities of aluminum imports and the circumstances of global excess capacity for producing aluminum are “weakening our internal economy,” leaving the United States “almost totally reliant on foreign producers of primary aluminum” and “at risk of becoming completely reliant on foreign producers of

62. Nick Miroff, *Trump Planning to Divert Additional \$7.2 Billion in Pentagon Funds for Border Wall*, WASH. POST (Jan. 13, 2020, 4:35 PM), https://www.washingtonpost.com/immigration/trump-planning-to-divert-additional-72-billion-in-pentagon-funds-for-border-wall/2020/01/13/59080a3a-363d-11ea-bb7b-265f4554af6d_story.html.

63. Emily Cochrane, *Administration to Divert Billions from Pentagon to Fund Border Wall*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/border-wall-funds-pentagon.html>.

64. *ACLU Challenges New Border Wall Funds Transfer*, ACLU (Feb. 28, 2020), <https://www.aclu.org/press-releases/aclu-challenges-new-border-wall-funds-transfer>.

65. Nick Corasaniti et al., *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html> (“Mr. Trump, by contrast, has made blistering attacks on trade his primary economic theme. In his address he rejected the standard view that countries benefit by importing goods, arguing that globalization helped ‘the financial elite,’ while leaving ‘millions of our workers with nothing but poverty and heartache.’”).

66. 19 U.S.C. § 1862(b) (2018).

67. *Id.* § 1862(c)(A)(1)(ii).

68. Simon Lester & Huan Zhu, *A Proposal for “Rebalancing” to Deal with “National Security” Trade Restrictions*, 42 *FORDHAM INT’L L.J.* 1451, 1456 (2019).

69. *Id.*

70. Proclamation No. 9704, 3 C.F.R. 39 (2018); Proclamation No. 9705, 3 C.F.R. 46 (2018).

high-purity aluminum that is essential for key military and commercial systems.” Because of these risks, and the risk that the domestic aluminum industry would become “unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production,” and taking into account the close relation of the economic welfare of the Nation to our national security, the Secretary concluded that the present quantities and circumstances of aluminum imports threaten to impair the national security⁷¹

Section 1862(d), which the Proclamation cites, follows a sentence about national defense needs and requires the President to further consider the relationship between national security and various economic factors.⁷² The same day, the President issued a similar proclamation covering imports of steel.⁷³ In January of 2020, Trump issued an additional proclamation expanding the tariffs because the earlier efforts had been less successful than expected in expanding the domestic industries.⁷⁴

Steel industry members challenged the constitutionality of section 232 on the grounds that it provided no limits on the President’s discretion in determining the existence of a threat or devising an appropriate remedy. The Court of International Trade rejected this claim. The court did agree with the government that Congress had committed these issues to the President’s discretion and thereby “precluded an inquiry for rationality, fact finding, or abuse of discretion.”⁷⁵ This holding seems to be in line with the general reluctance of the courts to review emergency or national security declarations.⁷⁶ Admittedly, the court said, “the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach.”⁷⁷ Although in theory a presidential action could be reversed if it was

71. Proclamation No. 9704, 3 C.F.R. 39, 39–40 (2018).

72. 19 U.S.C. § 1862(d) contains the following language regarding economic factors:

In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d).

73. Proclamation No. 9705, 3 C.F.R. 46 (2018). The steel and aluminum tariffs were part of a slew of tariff increases by the Trump Administration. See BROCK R. WILLIAMS ET AL., CONG. RESEARCH SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS (SECTIONS 201, 232, AND 301): FREQUENTLY ASKED QUESTIONS 2 (2019), <https://crsreports.congress.gov/product/pdf/R/R45529>.

74. Proclamation No. 9980, 85 Fed. Reg. 5,281, 5,283 (Jan. 29, 2020).

75. *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1343 (Ct. Int’l Trade 2019). The Court of International Trade is an Article III court with jurisdiction over all cases involving trade rules. Its judgments can be appealed to the U.S. Court of Appeals for the Federal Circuit. *About the Court*, U.S. COURT OF INT’L TRADE, <https://www.cit.uscourts.gov/about-court> (last visited June 28, 2020).

76. See *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 109 (2d Cir. 1966); *United States v. Amirnazmi*, 645 F.3d 564, 581 (3d Cir. 2011); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1080 (9th Cir. 1982).

77. *Am. Inst. for Int’l Steel*, 376 F. Supp. 3d at 1344.

based wholly on factors other than national security, “identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President’s motives nor a review of his fact-finding.”⁷⁸ And indeed, the national security rationale seems to have been flimsy. The Secretary of Defense had expressed concern about the effect of the tariffs on allies and noted that defense use was only a tiny fraction of domestic production.⁷⁹ In addition, the President’s informal comments on the tariffs focused on trade policy more generally, rather than national security.

Although the court seemed sympathetic to the concern over excessive delegation, its rejection of the nondelegation argument seems all but inescapable. In an earlier case involving section 362, the Supreme Court had squarely rejected any possible nondelegation argument:

It establishes clear preconditions to Presidential action—*inter alia*, a finding by the Secretary of the Treasury that an “article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can act only to the extent “he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.” And § 232(c) . . . articulates a series of specific factors to be considered by the President in exercising his authority under § 232(b).⁸⁰

In July 2018, the Republican Senate passed a resolution calling for limits on the use of section 232.⁸¹ Trump was clearly undaunted. On August 10, 2018, he modified the original March 8, 2018 Proclamation by increasing tariffs on steel from Turkey to fifty percent.⁸² Turkey had been listed in the Secretary of Commerce’s prior report as one of several countries that might be given a higher tariff if the President determined that not all countries should face the same tariff.⁸³ The Proclamation explained that “imports have not declined as much as anticipated and capacity utilization has not increased to that target level,” and that the Secretary of Commerce had advised the President that raising the tariff on Turkey would be a “significant step toward ensuring the viability of the domestic steel industry.”⁸⁴ Consequently, the President had “concluded that it is necessary and appropriate in light of our national security interests to adjust the

78. *Id.* at 1344–45.

79. Lester & Zhu, *supra* note 68, at 1458.

80. Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976).

81. Peter Bettencourt, “Essentially Limitless”: Restraining Administrative Overreach Under Section 232, 17 GEO. J.L. & PUB. POL’Y 711, 717 (2019). Bettencourt criticizes such use of section 232 on several grounds, including that “designating imports from strategic allies as threats to national security harms important security relationships.” *Id.* at 719. This was not the only modification Trump made in the original tariffs, but it was the only one relevant to the litigation.

82. Proclamation No. 9772, 3 C.F.R. 204 (2018).

83. *Id.*

84. *Id.*

tariff imposed by previous proclamations.”⁸⁵ No explanation was given for imposing the higher tariff solely on Turkey.

On May 16, 2019, the press reported that the “U.S. announced a rollback of steel tariffs against Turkey that it originally levied in August as trade and diplomatic relations deteriorated because of Turkey’s economic crisis and a row over the Turkish government’s detention of an American pastor.”⁸⁶ The rationale was that “imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48 percent in 2018, with the result that the domestic industry’s capacity utilization has improved at this point to approximately the target level recommended in the Secretary’s report.”⁸⁷

Then on October 14, 2019, Trump withdrew from trade negotiations with the Turkish government and said he would again increase the tariff to fifty percent. The proposed increase was due to the Turkish incursion into Kurdish-controlled areas of Syria. Trump said: “The United States will aggressively use economic sanctions to target those who enable, facilitate and finance these heinous acts in Syria.”⁸⁸ He added that he was “fully prepared to swiftly destroy Turkey’s economy if Turkish leaders continue down this dangerous and destructive path.”⁸⁹ Ten days later, Trump lifted all sanctions, “declaring success for his policy despite a widespread belief among lawmakers of his own party and foreign policy experts that the U.S. withdrawal from the region has been a victory for Turkey and Russia.”⁹⁰ It does not appear that any action had been taken under section 232 in the interim. However, Trump announced a national emergency regarding the situation in Syria and authorized sanctions against individuals.⁹¹

The following month, the Court of International Trade placed limits on Trump’s authority.⁹² The plaintiff argued that Trump’s tariff increase violated both the Equal Protection Clause and section 232. As to the Equal Protection claim, the court noted that the Proclamation was subject only to the extremely lenient rational basis test, but nevertheless that the plaintiff had enough of a claim to survive dismissal: “Given this standard, it is difficult to imagine

85. *Id.*

86. Joe Deaux, *Trump Cuts Tariffs on Turkish Steel Imports in Half, to 25%*, BLOOMBERG (May 16, 2019, 6:08 PM), <https://www.bloomberg.com/news/articles/2019-05-17/trump-cuts-tariffs-on-turkish-steel-imports-in-half-to-25>.

87. Proclamation No. 9886, 84 Fed. Reg. 23,421, 23,421–22 (May 16, 2019).

88. Alan Rappeport & Michael Crowley, *Trump Imposes Sanctions on Turkey as Syria Conflict Intensifies*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/us/politics/trump-turkey-tariffs.html>.

89. *Id.*

90. Noah Bierman, *Trump Lifts Turkey Sanctions, Declaring Success in Syria as Turkey and Russia Fill Void*, L.A. TIMES (Oct. 23, 2019), <https://www.latimes.com/politics/story/2019-10-23/trump-lifts-sanctions-against-turkey>.

91. Exec. Order No. 13894, 84 Fed. Reg. 55,851, 55,851 (Oct. 17, 2019). This executive order cited a raft of statutory authority, including “the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code.” *Id.*

92. *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1274–76 (Ct. Int’l Trade 2019).

Presidential action in connection with section 232 where one would be at a loss to conjure a rational justification; yet, the reality of this case proves otherwise. Defendants submit no set of facts that justify identifying importers of steel from Turkey as a class of one.”⁹³ As the court explained, the government’s claim that “it is rational to ‘confront the national security threat from imports from all countries by specifically targeting countries’ with high import volumes or numerous AD/CVD orders, does not explain what differentiates Turkey from other similarly situated countries—for the President to target alone.”⁹⁴ The court pointed out that, according to the Secretary of Commerce’s original report, five countries had higher volumes than Turkey of steel imports into the United States.⁹⁵

The court also held that the President could not increase or extend tariffs after the statutory deadline for action on the Secretary of Commerce’s report:

The procedural safeguards in section 232 do not merely roadmap action; they are constraints on power. The Supreme Court has made clear that section 232 avoids running afoul of the non-delegation doctrine because it establishes “clear preconditions to Presidential action.” The time limits, in particular, compel the President to do all that he can do immediately, and tie presidential action to the investigative and consultative safeguards. If the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action. However, Congress affirmatively linked the investigative and consultative safeguards to Presidential action, and Congress strengthened that link when it imposed time limits on the President’s discretion to take action.⁹⁶

Despite this decision, the President continued to issue proclamations adjusting the tariffs set by the March 2018 proclamations. In January 2020, the President extended tariffs to certain products made with aluminum and steel in order to prevent circumvention of the earlier tariff proclamations for these metals.⁹⁷

D. THE TRAVEL BAN

At the beginning of Trump’s presidency, he imposed a ban on travel from certain countries.⁹⁸ Litigation resulted in two further iterations of the ban. Each

93. *Id.* at 1272.

94. *Id.* at 1273.

95. *Id.* at 1272.

96. *Id.* at 1275–76 (citations omitted). A concurring opinion pointed to the case as illustrating the excessive delegation made section 232, referring to a prior *dubitante* opinion by the same judge.

I respectfully suggested that section 232, lacking ascertainable standards, “provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress,” in violation of the separation of powers. “[T]he fullness of time” and “real recent actions” may provide an empirical basis to revisit assumptions and inform understanding of the statute.

I submit that the case before us may well yield further evidence of the infirmity of the statute. *Id.* at 1277 (Katzmann, J., concurring) (alteration in original) (citations omitted) (quoting *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1352 (Ct. Int’l Trade 2019) (Katzmann, J., *dubitante*)).

97. Proclamation No. 9980, 85 Fed. Reg. 5,281, 5,283 (Jan. 29, 2020).

98. Mashaw and Berke succinctly describe the issuance of the order and its aftermath:

of these bans was issued pursuant to authority vested in the President by section 212(f) of the Immigration and Nationalization Act of 1952:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.⁹⁹

Added by a later amendment to the 1952 Act, section 1182(a)(3) requires that immigration officials bar entry into this country to an alien for whom there is “reasonable ground to believe” that he or she “is likely to engage after entry in any [specifically defined] terrorist activity.”¹⁰⁰

In reviewing Trump’s executive orders to halt travel from designated countries, the lower courts cast doubt on his invocation of national security as a basis for the orders. In *International Refugee Assistance Project v. Trump*, the Fourth Circuit concluded that the actions were motivated by religious animus toward Muslims and consequently violated the Establishment Clause.¹⁰¹ The court quoted extensively from Trump’s statements as a candidate and from statements by himself and his advisors after he took office.¹⁰² The Ninth Circuit took a different approach in *Hawaii v. Trump*, holding that the orders were defective because Trump had failed to articulate a bona fide national security justification for his sweeping action.¹⁰³ The Supreme Court stayed part of the lower court orders but allowed them to stand to the extent they applied to individuals with significant ties to the U.S.¹⁰⁴

Trump pushed back against the lower court rulings, not only through legal channels but on social media. When a lower court judge issued a temporary stay of his travel order, Trump denigrated him on Twitter as a “so-called judge” and

The nation’s airports were filled with “confusion and chaos and protests” as immigrants and refugees with previously valid travel documents were detained at U.S. airports, while others were prevented from boarding planes into the United States. The chaotic implementation stemmed at least in part from the furtive and rushed legal process behind the order. Allegedly, neither the DHS secretary nor the Secretary of Defense was involved in any legal review of the original EO. Instead, a “small White House team” led by Steve Bannon drafted the Order in relative secrecy. Even Republican congressmen criticized the dearth of legal process.

Mashaw & Berke, *supra* note 2, at 569 (footnotes omitted) (first quoting Yeganeh Torbati et al., *Chaos, Anger as Trump Order Halts Some Muslim Immigrants*, REUTERS (Jan. 28, 2017, 7:48 AM), <https://www.reuters.com/article/us-usa-trump-immigration-chaos/chaos-anger-as-trump-order-halts-some-muslim-immigrants-idUSKB N15C0LD>; then quoting Michael D. Shear & Ron Nixon, *How Trump’s Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html>).

99. 8 U.S.C. § 1182(f) (2018).

100. *Id.* § 1182(a)(3)(B)(i)(II).

101. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.) (en banc), *vacated and remanded by* 138 S. Ct. 353 (2017) (mem.).

102. *Id.* at 575–77.

103. *Hawaii v. Trump*, 859 F.3d 741, 755–56 (9th Cir.) (per curiam), *vacated and remanded by*, *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.).

104. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

said the ruling “essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”¹⁰⁵ He followed up by saying: “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”¹⁰⁶ Such comments were sufficiently unusual to prompt his own nominee at the time for the Supreme Court, Neil Gorsuch, to refer to them as “disheartening” and “demoralizing.”¹⁰⁷

The final version of Trump’s order was issued in September of 2017.¹⁰⁸ It imposed severe limits on entry into the United States by residents of seven countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.¹⁰⁹ The limits were based on deficiencies in their “identity-management and information-sharing capabilities, protocols, and practices.”¹¹⁰ By the third iteration, the process within the Administration had become more regularized and the ban was more carefully drafted, but that was an after-the-fact response to litigation. In *Trump v Hawaii*, this third iteration of the ban was challenged as beyond the President’s statutory authority and a violation of the Establishment Clause due to anti-Muslim motivation.¹¹¹

The majority dismissed each of these challenges. The language of the statute, in the Court’s view, “exudes deference to the President in every clause.”¹¹² The Court also noted that in “borrowing ‘nearly verbatim’” from an earlier statute, “Congress made one critical alteration—it removed the national emergency standard”¹¹³ The plaintiffs also relied on a provision that was added to the Immigration Act in the 1960s. Congress amended the INA in 1965 to eliminate the “national origins system as the basis for the selection of immigrants to the United States.”¹¹⁴ Section 1152(a)(1)(A) provides that: “[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”¹¹⁵ The plaintiffs argued that this made nationality alone an insufficient basis for exclusion. But this, too, the Court found unpersuasive. Entitlement to a visa does not guarantee admission into the country.¹¹⁶

105. Brian Bennett, *Trump Attacks Federal Judges in Unusually Personal Terms*, L.A. TIMES (Feb. 8, 2017, 2:45 PM), <http://www.latimes.com/politics/la-na-pol-trump-travel-ban-20170208-story.html>.

106. *Id.*

107. Abby Phillip et al., *Supreme Court Nominee Gorsuch Says Trump’s Attacks on Judiciary Are “Demoralizing”*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/politics/supreme-court-nominee-gorsuch-says-trumps-attacks-on-judiciary-are-demoralizing/2017/02/08/64e03fe2-ee3f-11e6-9662-6eedf1627882_story.html?utm_term=.4b45b2355eac.

108. Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161 (Sept. 27, 2017).

109. *Id.* at 45,163.

110. *Id.* at 45,161.

111. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2406 (2018).

112. *Id.* at 2408.

113. *Id.* at 2412.

114. H.R. REP. NO. 89-745, at 8 (1965).

115. 8 U.S.C. § 1152(a)(1)(A) (2018).

116. *Trump v. Hawaii*, 138 S. Ct. at 2414.

The Court then turned to the Establishment Clause issue. Importantly, the Court made no effort to minimize the evidence of discriminatory intent. It acknowledged a series of statements by the President or his aides demonstrating anti-Muslim animus:

1. [W]hile a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”
2. Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.”
3. Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.”
4. [When the first version of the travel ban was issued,] one of the President’s campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”
5. [After issuing the second version of the ban,] the President expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.”
6. Shortly before the release of the final version of the ban, “he stated that the “travel ban . . . should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.”
7. More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos.¹¹⁷

Due to the deference given to the President in foreign affairs and national security, however, the majority held that its review was limited to determining whether the Proclamation set forth a rational basis for the action, and concluded that it did.¹¹⁸ The Court held that the policy might be considered overbroad and ineffective in serving national security. Yet the Court declined to rule on that basis, stating, “[We] cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which ‘are delicate, complex, and involve large elements of prophecy.’”¹¹⁹

In defending his actions, the President enjoyed several advantages: the breadth of the statutory language, the tradition of deference in foreign affairs and national security, and the general weakness of constitutional constraints on immigration policy. Thus, his ultimate victory in the Supreme Court was not shocking. What made the case distinctive, however, was just how blatant the pretextual nature of the purported security justification (inadequate vetting) was.

117. *Id.* at 2417 (citations omitted). On the general issue of how courts should evaluate the relevance of presidential statements, see Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017). Shaw views such speech as legally relevant under some circumstances, including “where presidential speech touches on matters of foreign affairs, or where government purpose is a component of a legal test and presidential statements may supply relevant evidence of that purpose.” *Id.* at 77.

118. *Trump v. Hawaii*, 138 S. Ct. at 2420.

119. *Id.* at 2421 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

Even so, it is notable that by the time the case got to the Supreme Court, the Administration had been forced to refine both the order itself and the supporting justification considerably—and even so, it won only by a single vote.

E. PROCEDURAL REQUIREMENTS AND DEREGULATION

The next study involves a more frequent but less dramatic situation. The Administrative Procedure Act requires that before issuing a rule, an agency provide notice and an opportunity to comment.¹²⁰ However, it may skip these procedural steps “when the agency for good causes finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹²¹ The Trump Administration has made numerous efforts to suspend or delay regulations without engaging in notice and comment.¹²² Many of these efforts were prompted by a January 20, 2017 memorandum from then-White House Chief of Staff Reince Priebus directing agency heads to “temporarily postpone [the] effective dates for 60 days” of regulations that had been promulgated but not yet taken effect.¹²³ The Priebus Memorandum also directed agency heads to “consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period.”¹²⁴

In many cases, the purported good cause was that there was no time to engage in notice and comment before the effective date of a regulation adopted during the Obama Administration.¹²⁵ Other regulatory suspensions were said to be urgent because of the need for industry to plan effectively.¹²⁶ Other reasons for dispensing with notice and comment included limited resources and staff to conduct a fuller procedure,¹²⁷ and the interest of a new Administration in reconsidering actions taken by the law.¹²⁸

The judicial reception of these arguments has been somewhat chilly. *NRDC v. National Highway Traffic Safety Administration* involved the delay of an inflation adjustment to penalties for violating fuel efficiency rules.¹²⁹ The court summarized the applicable legal standard as applying in three circumstances: (1) “emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety,” (2) insignificant routine matters, and (3) when “the use of notice and comment must actually harm the public interest.”¹³⁰ The court rejected the agency’s attempted justifications. True, the court said, the

120. 5 U.S.C. § 553(b) (2018).

121. *Id.* § 553(b)(B).

122. See Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POL’Y REV. 13, 35 (2018).

123. Memorandum from Reince Priebus, *supra* note 1.

124. *Id.*

125. See Heinzerling, *supra* note 122, at 35 n.123 (citing numerous examples).

126. *Id.* at 37.

127. *Id.* at 39.

128. *Id.* at 41.

129. *NRDC v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018).

130. *Id.* at 114.

effective date of the pending inflation adjustment was imminent, but that was only because of the agency's prior delays. The court stressed the importance of notice and comment as a basis for reasoned decision making.¹³¹ "That a regulated entity might prefer different regulations that are easier or less costly to comply with," the court observed, "does not justify dispensing with notice and comment."¹³² In short, there was no "emergency or other extraordinary circumstance" justifying the failure to observe procedural requirements.¹³³

*East Bay Sanctuary Covenant v. Trump*¹³⁴ arose in a more dramatic setting. Rather than being a challenge to a delay of some existing rule, it involved a stringent restriction on asylum seekers. Issued in tandem with a presidential proclamation, the rule in question made asylum unavailable to any alien seeking refuge in the United States after entering the country from Mexico outside a lawful port of entry.¹³⁵ The court rejected the argument that there was good cause to dispense with notice and comment.¹³⁶ The government argued that announcing a proposed rule would result in a surge of illegal border crossings.¹³⁷ The court considered this implausible:

[W]e would need to accept the Government's contention that the "very announcement" of the Rule itself would give aliens a reason to "surge" across the southern border in numbers greater than is currently the case. Absent additional evidence, this inference is too difficult to credit. Indeed, even the Government admits that it cannot "determine how . . . entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter." Because the Government's reasoning is only speculative at this juncture, we conclude that the district court's holding is correct.¹³⁸

131. The court explained that:

Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking. These premises apply with full force to this case. This is not a situation of acute health or safety risk requiring immediate administrative action. And it is not a situation in which surprise to the industry is required to preempt manipulative tactics.

Id. at 115.

132. *Id.*

133. *Id.*

134. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 755 (9th Cir. 2018).

135. *Id.* at 754–55; *see also* Proclamation No. 9822, 3 C.F.R. 284 (2019); 8 C.F.R. §§ 208, 1003, 1208 (2019).

136. *East Bay Sanctuary Covenant*, 932 F.3d at 777–78.

137. *Id.* at 777. The government also argued that its finding of urgency was entitled to judicial deference because "courts cannot 'second-guess' the reason for invoking the good cause exception as long as the reason is 'rational.' But an agency invoking the good cause exception must 'make a sufficient showing that good cause exist[s].'" *Id.* at 778 n.16 (alteration in original) (quoting *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003)).

138. *Id.* at 777–78 (footnote omitted) (citation omitted). The dissenter saw more need for urgent action:

The Attorney General articulated a need to act immediately in the interests of safety of both law enforcement and aliens, and the Rule involves actions of aliens at the southern border undermining particularized determinations of the President judged as required by the national interest, relations with Mexico, and the President's foreign policy.

Id. at 780 (Leavy, J., dissenting in part).

This rejection of Administration claims of exceptional circumstances is echoed in other judicial opinions.¹³⁹ As two recent commentators summarize the litigation, “[m]ultiple agencies issuing these suspensions failed to follow the requirements established by law and the courts have repeatedly ruled against the Trump administration after finding both procedural and substantive violations,” including having “no excuse for failing to go through notice and comment for the suspensions.”¹⁴⁰ They also note that “in several cases, the Trump administration withdrew suspensions issued without notice and comment after being sued.”¹⁴¹

F. THE CORONAVIRUS PANDEMIC

The coronavirus outbreak in the United States erupted while this Essay was already in the publication process. At present, both the pandemic and the federal response are still on-going stories. This Section will discuss how emergency powers have figured in the federal response through early April of 2020.

A new form of viral pneumonia was first reported to the World Health Organization’s Chinese office on New Year’s Eve of 2019.¹⁴² Three weeks later, the first U.S. case was reported.¹⁴³ Within ten days after that, the first person-to-person spread had been confirmed,¹⁴⁴ and a month later, the first case of community spread was reported.¹⁴⁵ The exponential spread of the virus had begun. By the end of the following month, March 2020, over fifty thousand cases of infection had been detected, and over seven hundred Americans had died.¹⁴⁶

For a considerable period of time, President Trump downplayed the seriousness of the health threat. In a January 22 interview, he said, “[W]e have it totally under control. It’s one person coming in from China, and we have it

139. See, e.g., *California v. Azar*, 911 F.3d 558 (9th Cir. 2018); *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 572 (E.D. Pa. 2017), *aff’d sub nom. Pennsylvania v. President U.S.*, 930 F.3d 543, 567 (3d Cir. 2019), as amended (July 18, 2019), *cert. granted sub nom. Trump v. Pennsylvania*, 140 S. Ct. 918 (2020) (mem.). In *Pennsylvania v. President U.S.*, the government now contends that the lack of notice and comment was subsequently cured. Reply Brief for Federal Appellants at 2–3, *Pennsylvania v. President U.S.*, 930 F.3d 543 (2019) (Nos. 17-3752, 18-1253, 19-1129, and 19-1189).

140. Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 39 (2019).

141. *Id.* Noll and Revesz emphasize the sloppiness of the Trump Administration’s efforts and argue that “[a]gencies under Trump tripped up on basic procedural rules such as notice-and-comment requirements.” *Id.* at 41.

142. *Rolling Updates on Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last updated June 17, 2020).

143. Press Release, CDC, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

144. Press Release, CDC, CDC Confirms Person-to-Person Spread of New Coronavirus in the United States (Jan. 30, 2020), <https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html>.

145. Sarah Moon et al., *The CDC Has Changed Its Criteria for Testing Patients for Coronavirus After the First Case of Unknown Origin Was Confirmed*, CNN, <https://www.cnn.com/2020/02/27/health/us-cases-coronavirus-community-transmission/index.html> (last updated Feb. 28, 2020).

146. *Cases in the US*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated June 28, 2020). By late June 2020, as this Essay goes to press, more than 2.5 million cases have been detected, and over 125,000 Americans have died. *Id.*

under control. It's going to be just fine."¹⁴⁷ In early March, he continued to insist that there was little problem, saying, "It's very mild," "I'm not concerned at all," and "It will go away. Just say calm. It will go away."¹⁴⁸ Trump also touted his own innate ability as an epidemiologist: "I like this stuff. I really get it. People are surprised that I understand it. Every one of these doctors said, 'How do you know so much about this?' Maybe I have a natural ability. Maybe I should have done that instead of running for president."¹⁴⁹

Trump was reluctant to invoke emergency powers in response to the growing public health crisis. By March 13, there were over 1600 confirmed cases and over forty deaths, accompanied by a ten percent single-day drop in the stock market.¹⁵⁰ Even so, Trump suggested that declaring a national emergency was not a significant step. Doing so, he said, could be useful for "some of the more minor things at this point. But, you know, look, we're in great shape. Compared to other places, we are in really good shape, and we want to keep it that way."¹⁵¹ Trump's reluctance to issue a declaration was attributed in part to a division among his top advisors (none of whom were disaster relief or public health experts), and partly to an unwillingness to court the embarrassment of calling an emergency after long denying the magnitude of the problem.¹⁵² On February 19, he told a television station, "I think the numbers are going to get progressively better as we go along."¹⁵³

Nevertheless, Trump did ultimately declare emergencies under both the National Emergencies Act¹⁵⁴ and the Stafford Act.¹⁵⁵ The National Emergencies

147. David Leonhardt, *A Complete List of Trump's Attempts to Play Down Coronavirus*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

148. *Id.*

149. *Id.*

150. James Hohmann, *The Daily 202: Democrats Want Trump to Declare the Coronavirus Outbreak a National Emergency. He's Hesitating*, WASH. POST (Mar. 13, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2020/03/13/daily-202-democrats-want-trump-to-declare-the-coronavirus-outbreak-a-national-emergency-he-shestitating/5e6b2586602ff10d49acacc8/>.

151. *Id.*

152. *Id.*

153. Leonhardt, *supra* note 147.

154. Proclamation No. 9994, 85 Fed. Reg. 15,337, 15,337 (Mar. 18, 2020). The basis for the emergency was that, while hospitals and medical facilities had the duty of being prepared to "surge capacity and capability," "[a]dditional measures . . . are needed to successfully contain and combat the virus in the United States." *Id.*

155. Section 501(b) of the Stafford Act authorizes the President to declare an emergency "when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority." 42 U.S.C. § 5191(b) (2018). Section 502(1) defines an "emergency" as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

42 U.S.C. § 5122(1) (2018). President Trump's emergency declaration under the Stafford Act is contained in a letter to state governors. Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act (Mar. 13, 2020), <https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/>. The asserted ground for the emergency declaration was as follows:

Act was discussed earlier. The Stafford Act is primarily concerned with disaster relief after natural disasters, but declaring an emergency under the Act did unlock some federal funds to assist states.¹⁵⁶

One consequence of the declaration under the National Emergencies Act is to authorize the President to make use of the Defense Production Act (DFA),¹⁵⁷ a Korean War-era law that gives the government the ability to control production and distribution of vital material during a national emergency. President Trump did issue a proclamation that the Act was in effect on March 18, 2020.¹⁵⁸ Until March 2020, however, he had refused to take any action under the DFA, despite the pleas of state and local officials.¹⁵⁹ He finally invoked the DFA to require General Motors to supply ventilators on March 27.¹⁶⁰

In addition, to declare a national emergency under the Stafford Act, President Trump later issued “major disaster” declarations under the Act for

Only the Federal Government can provide the necessary coordination to address a pandemic of this national size and scope caused by a pathogen introduced into our country. It is the preeminent responsibility of the Federal Government to take action to stem a nationwide pandemic that has its origins abroad, which implicates its authority to regulate matters related to interstate matters and foreign commerce and to conduct the foreign relations of the United States.

Id.

156. For detailed discussion of the operation of the Stafford Act, see DANIEL A. FARBER ET AL., *DISASTER LAW AND POLICY* (3d ed. 2015).

157. 50 U.S.C. §§ 4501–4658 (2018). The Congressional Research Service summarizes the Act as follows:

Congress has found that “the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United States.” Through the DPA, the President can, among other activities, prioritize government contracts for goods and services over competing customers, and offer incentives within the domestic market to enhance the production and supply of critical materials and technologies when necessary for national defense.

MICHAEL H. CECIRE ET AL., *CONG. RESEARCH SERV., R43767, THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 1* (updated Mar. 2, 2020), <https://fas.org/sgp/crs/natsec/R43767.pdf> (footnote omitted) (quoting 50 U.S.C. § 4502(a)(1)).

158. Executive Order No. 13909, 85 Fed. Reg. 16,227, 16,227 (Mar. 23, 2020). The order states that:

To ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID-19, it is critical that all health and medical resources needed to respond to the spread of COVID-19 are properly distributed to the Nation’s healthcare system and others that need them most at this time.

Authority to implement the executive order is delegated to the Secretary of Health and Human Services. *Id.*

159. Jeanne Whalen et al., *Scramble for Medical Equipment Descends into Chaos as U.S. States and Hospitals Compete for Rare Supplies*, WASH. POST (Mar. 24, 2020, 5:08 PM), https://www.washingtonpost.com/business/2020/03/24/scramble-medical-equipment-descends-into-chaos-us-states-hospitals-compete-rare-supplies/?utm_campaign=wp_to_your_health&utm_content=2020_03_25&utm_medium=email&utm_source=newsletter&wpisrc=nl_tyh&wpmk=1 (“The market for medical supplies has descended into chaos, according to state officials and health-care leaders. They are begging the federal government to use a wartime law to bring order and ensure the United States has the gear it needs to battle the coronavirus. So far, the Trump administration has declined.”).

160. John Wagner & Corby Itkowitz, *Trump Orders GM to Manufacture Ventilators Under the Defense Production Act*, WASH. POST (Mar. 27, 2020, 3:21 PM), https://www.washingtonpost.com/politics/trump-raises-prospect-of-ordering-gm-ford-to-manufacture-ventilators/2020/03/27/92f82db6-7043-11ea-aa80-c2470c6b2034_story.html?utm_campaign=wp_news_alert_revere&utm_medium=email&utm_source=alert&wpisrc=al_news_alert-economy--alert-politics--alert-national&wpmk=1.

California, New York, and Washington State at the request of their governors.¹⁶¹ The governors had sought this designation because considerably more federal support can be accessed for a major disaster than for a national emergency under the Stafford Act.¹⁶² But only limited funds were released, leaving governors deeply dissatisfied, with the Governor of Washington complaining that the declaration failed to “unlock many forms of federal assistance we have requested to help workers.”¹⁶³

There is actually considerable legal doubt about whether an infectious disease can qualify as a major disaster. The legal issue is whether the definition of major disaster can include a pandemic. The statute defines a major disaster as “any natural catastrophe” that the President thinks is bad enough to require federal assistance to supplement the efforts of states, local governments, and disaster relief organizations.¹⁶⁴ But is a pandemic a “natural catastrophe”?

The term “natural catastrophe” is ambiguous. But the parenthetical immediately after the reference to catastrophes in section 5122(2) of the Stafford Act undermines the claim that infectious diseases qualify for the designation. The statute provides that “natural catastrophe” includes “any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought.” Fires, floods, and explosions are also covered, regardless of cause. This long list of examples indicates that what Congress had in mind were large-scale physical events like hurricanes and explosions. A disease may be natural and it may be a catastrophe, but it is a biological rather than physical threat. So the thrust of the language seems to be that the statute addresses something very different than diseases.

On the other hand, the statute is not completely unambiguous. It says that natural catastrophes include all of those events, which suggests that other types of events might be covered as well. Merriam-Webster’s first definition of “catastrophe” is “a momentous tragic event ranging from extreme misfortune to

161. Rebecca Rainey, *Trump Hasn’t Yet Released Disaster Unemployment Funds*, POLITICO, <https://www.politico.com/news/2020/03/24/trump-disaster-unemployment-funds-147404> (last updated Mar. 24, 2020).

162. Under the Stafford Act, declaring a major disaster unlocks greater powers than declaring a national emergency. In contrast to a disaster declaration, a national emergency “would *not* authorize grants, unemployment assistance, food coupons, crisis counseling assistance and training, or community disaster loans as would be available through a major disaster declaration.” EDWARD C. LIU, CONG. RESEARCH SERV., RL34724, WOULD AN INFLUENZA PANDEMIC QUALIFY AS A MAJOR DISASTER UNDER THE STAFFORD ACT? 2 (Oct. 20, 2008), <https://fas.org/sfp/crs/misc/RL34724.pdf>.

163. Rainey, *supra* note 161.

164. Section 5122(2) defines a “major disaster” as:

[A]ny natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

42 U.S.C. § 5122(2) (2018).

utter overthrow or ruin.”¹⁶⁵ That fits the coronavirus. However, the third definition is a “violent and sudden change in a feature of the earth” or “a violent usually destructive natural event (such as a supernova).”¹⁶⁶ The statutory examples seem closer to the third definition.

In practical terms, the legality of the disaster limitations may have limited significance. It is difficult to see how anyone would have standing to challenge a grant of funds for a major disaster. If such a challenge were brought, it is also unclear whether a court would be willing to scrutinize a presidential declaration.

Putting aside the possibility of a judicial challenge, it is easy to understand the temptation to ignore legal technicalities to provide vitally needed assistance in the course of an emergency. It might have been better, however, to seek quick authorization from Congress, along with additional funding for the Federal Emergency Management Agency (FEMA) to help it handle the additional responsibilities.

Through the crisis, Trump has had an uneasy relationship with government medical experts. As one news source put it, the “spread of the deadly virus is thrusting Trump’s science and health experts into the uncomfortable role of carefully—but clearly—contradicting him by offering warnings, grounded in science, about the risks from the disease and recommending some Americans alter their daily routines.”¹⁶⁷ For instance, on February 20, Trump told reporters that the disease was “very well under control in our country,” that the U.S. was “in very good shape,” and that “we’re fortunate so far . . . [and] we think it’s going to remain that way.”¹⁶⁸ Within a few hours, “federal health officials warned that the spread of the virus was inevitable” and advised businesses to make plans for adapting.¹⁶⁹ Dr. Anthony Fauci, the head of the National Institutes of Health division on infection diseases, found it necessary to repeatedly correct the President about medical matters at public briefing sessions; when queried by a reporter, Fauci said “I can’t jump in front of the microphone and push him down,” leaving gentle corrections as the only alternative.¹⁷⁰

As this Essay goes to press, the coronavirus is still underway. The full story of the outbreak and of the government response remains to be finished. At this point, however, the outbreak sheds light on the risks of underuse of emergency powers in a severe crisis.

165. *Catastrophe*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/catastrophe> (last visited June 28, 2020).

166. *Id.*

167. Justin Sink & Mario Parker, *Trump’s Coronavirus Claims Often Contradicted by His Own Experts*, BLOOMBERG NEWS, <https://www.bloomberg.com/news/articles/2020-03-09/trump-s-coronavirus-claims-often-contradicted-by-his-own-experts> (last updated Mar. 9, 2020).

168. *Id.*

169. *Id.*

170. Justin Wise, *Fauci on Trump Coronavirus Comments: “I Can’t Jump in Front of the Microphone and Push Him Down”*, THE HILL (Mar. 23, 2020, 7:23 AM), <https://thehill.com/homenews/administration/488961-fauci-on-trump-coronavirus-comments-i-cant-jump-in-front-of-the>.

II. LOOKING AHEAD: A CLIMATE EMERGENCY?

It is difficult to disentangle process issues from views about the merits of Trump's actions. For that reason, it is useful to think about ways that a progressive in the White House might make use of emergency powers to address an issue such as climate change. Climate change and immigration are similar on at least one dimension: Both issues involve the country's relations with the outside world, an area where presidential powers are strong. Moreover, neither of these are issues that have emerged suddenly and unexpectedly. The same is true of trade deficits and the changing energy mix on the grid.

The case for the use of emergency action to address climate is actually more easily supported than with (say) immigration. The U.S. government has already classified climate change as a serious threat to American welfare and national security, and it is a threat that is getting stronger daily. Recent science indicates that climate action is even more urgent than we thought.¹⁷¹

The Environmental Protection Agency (EPA) has made a formal finding, based on an exhaustive review of the scientific evidence, that greenhouse gases endanger human life and welfare both within the United States and globally. That finding was upheld by the D.C. Circuit.¹⁷² Moreover, national security agencies have consistently viewed climate change as a serious threat.¹⁷³ In written testimony to Congress about threats to national security, the Trump Administration's own Director of National Intelligence (DNI) discussed climate change.¹⁷⁴ His discussion did not equivocate about the reality or dangers of climate change. Rather, he took the science, and the threat, seriously:

The past 115 years have been the warmest period in the history of modern civilization, and the past few years have been the warmest years on record. Extreme weather events in a warmer world have the potential for greater impacts and can compound with other drivers to raise the risk of humanitarian disasters, conflict, water and food shortages, population migration, labor shortfalls, price shocks, and power outages. Research has not identified indicators of tipping points in climate-linked earth systems, suggesting a possibility of abrupt climate change.¹⁷⁵

Other parts of the government—though not, of course, President Trump—have also recognized the threat of climate change to national security. The military has also taken a proactive stance on climate change. Former Secretary of Defense James Mattis was clear about the impact of climate change on national security: “Climate change is impacting stability in areas of the world

171. See Mark P. Nevitt, *On Environmental Law, Climate Change, & National Security Law*, 44 HARV. ENVTL. L. REV. (forthcoming 2020) (“[T]he window to solve this climate security crisis is rapidly closing.”).

172. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) (per curiam).

173. For a fuller discussion of the linkages between national security and climate change, see Nevitt, *supra* note 171, at 6–15, 24.

174. DANIEL R. COATS, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 21–23 (Jan. 29, 2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf>.

175. DANIEL R. COATS, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 16 (Feb. 13, 2018), <https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA---Unclassified-SSCI.pdf>.

where our troops are operating today. . . . It is appropriate for the Combatant Commands to incorporate drivers of instability that impact the security environment in their areas into their planning.”¹⁷⁶ Congress has also recognized climate change as a threat to national security and more specifically to military infrastructure and activities. The most significant action was the 2017 Republican Congress’s passage of the Defense Authorization Act for Fiscal Year 2018, H.R. 2810.¹⁷⁷ The Act was a funding statute for the Pentagon. Section 335 of the Act states that “climate change is a direct threat to the national security of the United States and is impacting stability in areas of the world both where the United States Armed Forces are operating today, and where strategic implications for future conflict exist.”¹⁷⁸

What government powers would be unlocked by declaring a climate change emergency? One immediate possibility would be to use the same power that Trump has used in order to divert military construction funds to other uses—in this case, perhaps building wind or solar farms or new transmission lines to make the grid more reliable and resilient in areas containing military facilities. It also seems possible that a progressive President could use emergency tariff powers to put limits on imports of goods whose production involved high levels of carbon emissions.¹⁷⁹ It would be particularly easy to justify fees if they were used to shield U.S. firms subject to stricter carbon restrictions from competition from high-carbon jurisdictions. As we have seen, judicial review of actions by Trump using similar powers has been anemic at best.

Some other possibilities can be gleaned from a useful list of emergency powers compiled by the Brennan Center.¹⁸⁰ First, it might be possible to suspend

176. Andrew Revkin, *Trump’s Defense Secretary Cites Climate Change as National Security Challenge*, PROPUBLICA (Mar. 14, 2017, 11:17 AM), https://www.propublica.org/article/trumps-defense-secretary-cites-climate-change-national-security-challenge?utm_source=Daily+Carbon+Briefing&utm_campaign=2016c9ce4d-cb_daily&utm_medium=email&utm_term=0_876aab4fd7-2016c9ce4d-303476449. For more on the military’s response to climate change, see Sarah E. Light, *Valuing National Security: Climate Change, the Military, and Society*, 61 UCLA L. REV. 1772 (2014).

177. National Defense Authorization Act for Fiscal Year 2018, H.R. 2810, 115th Cong. (2017) (enacted).

178. *Id.* § 335(b)(1).

179. One possible limitation on the use of section 232 should be noted. In *Independent Gasoline Marketers Council, Inc. v. Duncan*, the court invalidated an import fee on oil that was intended to discourage domestic consumption. 492 F. Supp. 614, 620–21 (D.D.C. 1980). The fee was calibrated so as to raise the price of gasoline by ten cents per gallon, but the amount attributable to oil imports was then rebated to importers. *Id.* at 616. The effect was that importers were not disadvantaged compared to domestic producers. *Id.* at 617. The court considered the fee to be a tax on domestic consumption with only an incidental relationship to trade:

The statute provides for regulation of imports. A regulation on imports may incidentally regulate domestic goods. The regulation of domestic oil contemplated by PIAP, however, is not incidental to regulation of imported oil. Rather, it is a primary purpose of the program, and is essential to the goal of reducing demand for all gasoline regardless of its source. Moreover, the impact of the oil conservation fee is greater on domestically produced oil than on imported oil since the former comprises roughly sixty (60) per cent of all crude oil utilized today, and Defendants acknowledge that the PIAP’s effect on import levels will be slight.

Id. at 618.

180. BRENNAN CTR. FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE (2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf. The list does not include the many additional factors triggered by findings regarding national security rather than emergencies.

oil leases offshore or on federal lands. These leases are required to have clauses allowing them to be suspended during national emergencies.¹⁸¹ Second, the President has emergency powers to respond to industrial shortfalls in national emergencies.¹⁸² This could be used to support expansion of battery or electrical vehicle production. A related provision allows the President to extend loan guarantees to critical industries during national emergencies.¹⁸³ Third, the President may invoke the International Emergency Economic Powers Act to deal with “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States.”¹⁸⁴ That description certainly applies to climate change. According to the Brennan Center, this Act “confer[s] broad authority to regulate financial and other commercial transactions involving designated entities, including the power to impose sanctions on individuals and countries.”¹⁸⁵ Finally, declaring a national emergency would allow the President to limit exports of oil to other countries.¹⁸⁶

In addition to these tangible benefits, declaring a climate emergency might also have an intangible one. It would be a strong signal that the United States recognizes the urgent need to cut carbon emissions—a signal to the international community as well as courts and agencies in the United States. Perhaps more importantly, it could highlight the importance and urgency of the issue within

181. 43 U.S.C. § 1341 (2018). It also provides:

All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended.

Id. § (c).

182. 50 U.S.C. § 4533 (2018). After making certain findings, this provision allows the President to take a suite of actions to “create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense,” including engaging in “purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale . . . [and] development of production capabilities.” *Id.* § (1). In contrast to the norm for national security laws, this provision requires the President to make the requisite findings with “appropriate explanatory material and in writing.” *Id.* § (5).

183. *Id.* § 4531(1). It also states:

To reduce current or projected shortfalls of industrial resources, critical technology items, or essential materials needed for national defense purposes, subject to such regulations as the President may prescribe, the President may authorize a guaranteeing agency to provide guarantees of loans by private institutions for the purpose of financing any contractor, subcontractor, provider of critical infrastructure, or other person in support of production capabilities or supplies that are deemed by the guaranteeing agency to be necessary to create, maintain, expedite, expand, protect, or restore production and deliveries or services essential to the national defense.

Id. § (a)(1).

184. *Id.* § 1701(a); *see id.* §§ 1701–1707.

185. BRENNAN CTR. FOR JUSTICE, *supra* note 178, at 42.

186. 42 U.S.C. § 6212(a)(d)(1)(A) (2018). It authorizes the President to impose license requirements and export provisions for oil whenever “the President declares a national emergency and formally notices the declaration of a national emergency in the Federal Register.” *Id.* In addition to some of the provisions discussed in the text, Nevitt discusses the use of emergency transportation planning power to reduce GHG emissions from vehicles. Nevitt, *supra* note 171, at 30.

the United States.¹⁸⁷ From a newly elected President's point of view, these actions also have the advantage that they could be accomplished at the beginning of an administration without the lengthy delays involved in legislation or agency regulations.

Taken together, these actions would not amount to anything like a Green New Deal, but they could have a real impact on emissions. Because they are triggered by finding a national emergency, they involve minimal procedural requirements and limited opportunities for judicial review. For that reason, a progressive President might well find them appealing. In short, when assessing the desirability of using emergency powers, we need to keep in mind that this is a game both sides can play. If a progressive President were to follow Trump's lead by making dramatic use of these powers, we could expect to see such actions becoming the new norm. On the other hand, failure to take such actions might be seen by some progressives as a default similar to Trump's delayed response to the coronavirus outbreak.

III. UNILATERAL PRESIDENTIAL ADMINISTRATION IN PERSPECTIVE

Use of direct presidential action has to be evaluated within a broader consideration of presidential power. Expanding the President's influence over regulation has long had its advocates. Justice Elena Kagan, in her earlier career as an academic, penned an enormously influential 2001 article about the increasingly dominant role of the President in regulation, at the expense of the autonomy of administrative agencies.¹⁸⁸ The article's thesis, simply stated, was that "[w]e live in an era of presidential administration," by which she meant that the White House rather than administrative agencies had become the dominant force in controlling the direction of federal regulation.¹⁸⁹ Kagan's article did not simply document the emergence of presidential administration; it also celebrated this development. She argued that "in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."¹⁹⁰

Kagan admitted that presidential administration posed risks, but she argued that those risks were manageable. In turning to possible critiques of her position, Kagan contended that any tendency by presidents to push past the edges of

187. See Nevitt, *supra* note 171, at 30.

188. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001). According to Westlaw, the article had been cited over a thousand times in law reviews as of the end of June 2020. For some of the important contributions to the literature on this issue, see Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); Sidney A. Shapiro & Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 U.C. DAVIS L. REV. 1457 (2015); Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 19 FORDHAM L. REV. 2487 (2011); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

189. Kagan, *supra* note 188, at 2246.

190. *Id.* at 2252.

legality can be combatted by the courts.¹⁹¹ As we have seen, this is less likely to be true when Presidents invoke emergency or national security authority. She also argued that the risk of displacing agency expertise was overblown by critics, although she recognized it as a possibility.¹⁹² Still, Kagan conceded, “[f]uture developments in the relationship between the President and the agencies may suggest different judicial responses; the practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions.”¹⁹³

Kagan pointed to several advantages to presidential administration. To begin with, she argued, the President’s actions have far greater accountability than an agency’s. While bureaucracy is “the place where exercises of coercive power are most unfathomable and thus most threatening,” the presidency is the “office peculiarly apt to exercise power in ways that the public can identify and evaluate.”¹⁹⁴ Moreover, because of the President’s national constituency, “he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”¹⁹⁵ As a unitary actor, the President can “act without the indecision and inefficiency that so often characterize the behavior of collective entities,”¹⁹⁶ while the broad scope of his authority allows him to “synchronize and apply general principles to agency action in a way that congressional committees, special interest groups, and bureaucratic experts cannot.”¹⁹⁷

Finally, the President can provide energy and dynamism to the regulatory process.¹⁹⁸ Kagan argued that the general need for a vigorous executive is especially acute in the administrative context.¹⁹⁹ She asserted that “large-scale organizations, left to their own devices, exhibit over time a diminished capacity to innovate and a correspondingly greater tendency to do what they have always done even in the face of dramatic changes in needs, circumstances, and

191. *Id.* at 2349–50. Bruce Ackerman has emphasized the risk that the President “will be tempted to achieve his objectives by politicizing the administration of whatever-laws-happen-to-be-on-the-books.” Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 712 (2000). Ackerman continues, “[t]o be sure, an impartial reading of these statutes might imply that his initiative falls far beyond the limits of legal authority; but with his political partisans in charge of the administration, why shouldn’t the president encourage them to bend the law to fulfill the administration’s program?” *Id.* (footnote omitted).

192. Kagan, *supra* note 188, at 2352–55. This may also be a problem in the exercise of emergency powers, as described in Section II(F).

193. *Id.* at 2385.

194. *Id.* at 2332.

195. *Id.* at 2335.

196. *Id.* at 2339.

197. *Id.* In contrast, Lisa Heinzerling suggests that Presidents and their staff “should, more often, put down their pens and their phones and let the agencies do their work.” Lisa Heinzerling, *A Pen, a Phone, and the U.S. Code*, 103 GEO L.J. ONLINE 59, 59 (2014). Although conceding the descriptive accuracy of Kagan’s account of the expanding presidential role, Heinzerling suggests that rather than adding energy to the regulatory system, presidents at least as often obstruct the efforts of agencies to get things done. *Id.* at 60. Heinzerling also questions whether presidential involvement increases accountability. *Id.* In her experience as an Assistant Administrator at EPA, she found that many White House actions were taken under the radar with little public visibility, often at the behest of industry. *Id.* at 60–63.

198. Kagan, *supra* note 188, at 2351.

199. *Id.* at 2343.

priorities.”²⁰⁰ For that reason, she considered “torpor a defining feature of administrative agencies”²⁰¹

All of the advantages that Kagan cites seem to apply even more strongly to direct Presidential action using emergency or national security powers. They bypass much of the cumbersome machinery of government, allowing more vigorous action. They also place responsibility squarely on the President, increasing political accountability. In short, these actions amount to what you might call Presidential Administration on steroids.

All of the virtues of direct presidential action come with their corresponding vices. Such actions are high on political accountability, but potentially low in terms of expert guidance (depending on the President). It would be going too far to say that Trump has operated free of legal constraint.²⁰² Nevertheless, bypassing the cumbersome machinery of government also means bypassing safeguards like the need for congressional authorization and, to a large extent, judicial review. In short, the potential for abuse of power, or at least ill-considered decision making, is substantial.

Use of emergency powers poses these potential risks in part because judicial review of emergency actions is weak. This is not to say that judicial review is nonexistent or wholly ineffective. Although both the travel ban and the wall ultimately survived in the courts, both were delayed by litigation and the travel ban had to be substantially narrowed. Even the broad power over tariffs may turn out to have some limits. Moreover, we need to keep in mind that there were other situations in which Trump has been thwarted by the courts and others in which proposed emergency actions never saw the light of day. Still, judicial review is less vigorous where emergency actions are concerned, which does undoubtedly increase the risks that power will be abused or misdirected.

It is hard to quarrel with the general observations about presidential policy dominance in the past two Administrations:

Presidentialism that takes account of process and participatory values; is transparent and robust concerning sources, science, and data consulted or relied upon; that provides justificatory reasoning that connects policies to statutory missions and criteria; and that respects legislative prerogatives and the embedded information advantages of line agencies, is, from our perspective, good government.²⁰³

On the other hand, “[f]ailure to abide by these conventions, while sometimes justified, is generally problematic and anti-democratic.”²⁰⁴ Use

200. *Id.* at 2344.

201. *Id.*

202. Posner and Vemeule seem to go too far in their portrait of legally unconstrained executive power. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: BEYOND THE MADISONIAN REPUBLIC* 14 (2010) (arguing that the legal constraints on the President have “atrophied”).

203. Mashaw & Berke, *supra* note 2, at 612.

204. *Id.* While Mashaw and Berke see problems with some practices in both the Obama and Trump Administrations, they see the Obama Administration as “far more like government as usual, in these normatively desirable respects.” *Id.* at 613.

of emergency powers is especially prone to evasion of important aspects of good governance.

And yet, there are reasons to doubt whether future presidents will abandon the use of emergency powers as policymaking tools. Americans seem increasingly frustrated by the inability of the government to respond adequately to what they see as urgent societal problems, whether they see those problems as free trade and open borders, or wealth inequality and escalating climate change. If more conventional means of policy change through Congress or rulemaking remain clogged, there will be continuing pressure on Presidents to use any available tool to act on their own. If this trend continues, one might hope that the process could be improved to include more input from agency experts, consultation with congressional leaders, and transparency.

A separate problem, suggested by President Trump's early reactions to the coronavirus outbreak, is that emergency powers may not be utilized fully when they are most needed. Here, too, a process involving fuller reliance on agency experts, consultation with Congress, and public transparency could lead to better results.

CONCLUSION

The Trump Administration has been noteworthy for its willingness to breach existing governance norms.²⁰⁵ This has been true not least in its use of emergency or national security powers. Agency efforts to bypass normal processes based on claims of exceptional circumstances have not been notably successful. But some (though not all) presidential actions have survived litigation as well as occasional pushback efforts by Congress.

One of the saving graces—or defects, depending on your perspective—of direct presidential action is its reversibility. What one President does with a stroke of a pen, the next President can undo just as quickly. That potential for impermanence makes these actions most useful in three circumstances. The first is where the political consensus is strong enough that an action is likely to prove durable anyway. The second is where only a temporary response is called for, either because the problem itself is temporary or because action by an agency or by Congress will later be forthcoming. The coronavirus outbreak falls into this category. And the third, exemplified by Trump's wall, is where the action has results that are irreversible. It is not likely that a later President will ever bother demolishing the wall, although it may be allowed to rust into ruin.

It remains to be seen whether Trump's uses of extraordinary presidential powers will be seen in retrospect as exceptional, or whether they will become the "new normal" in our governance systems. His frequent resort to those powers could go a long way toward making emergency actions a more routine part of

205. See Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 177–78 (2018); Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205, 1205 (2019) ("President Donald Trump's flagrant and frequent violations of fundamental norms of presidential behavior undermine our constitutional democracy.").

the presidential arsenal. Moreover, Trump's failure to make aggressive uses of emergency powers amid the coronavirus outbreak could reinforce the tendency of future Presidents to make use of such powers, if Trump is later seen to have acted too timidly.

If use of emergency powers to achieve domestic policy objectives does become normalized, the outcomes will vary depending on the President. Perhaps such powers could be used to jumpstart government action against climate change. Other presidents might use the same powers to evade environmental laws. In any event, there would be a real price to be paid in terms of the safeguards that normally surround government action, and in terms of the rule of law. Yet the combination of congressional gridlock and regulatory ossification may make the temptation to use this shortcut all but irresistible.

The potential for further eroding checks on executive action is real. It, however, should not be exaggerated. As the discussion of a possible climate emergency shows, an emergency declaration would unlock some significant statutory powers. But while emergency powers are sweeping, they are far from covering the universe of actions that would be required by a serious climate policy. For better or worse, more conventional governance tools are needed for any thorough policy overhaul. The more effectively those tools work, the less need that future Presidents will feel to resort to shortcuts. But if no other options seem open, the Trump Presidency has created ample precedents for resort to emergency and national security powers as a fallback. We can only hope that the cost of good governance is not too high. At the same time, we cannot afford to eliminate emergency powers, which provide crucial authority in times of genuine crisis. The challenge will be maintaining the delicate balance between the potential for abuse and the legitimate exercise of emergency powers.