

INTERPRETING AND REFORMING THE NATIONAL EMERGENCIES ACT IN LIGHT OF THE PACIFICUS-HELVIDIUS DEBATE

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I. INTRODUCTION

Ostensibly mired in a series of existential crises, the United States finds itself contending with no less than thirty-three ongoing national emergencies, some having lasted for years or even decades.¹ For example, President Carter’s Executive Order, *Blocking Iranian Government Property*, issued just ten

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1. This number considers only executive orders expressly invoking the NEA. BRENNAN CTR. FOR JUSTICE, DECLARED NATIONAL EMERGENCIES UNDER THE NEA (2019), <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>; See generally Emily E. Roberts, *Declarations under the National Emergencies Act, Part I: Declarations Currently in Effect*, LSB10253 CONG. RES. SERV. (2019) (listing the national emergency declarations in effect as of February 15, 2019).

days after the Iranian hostage crisis, has been in effect since 1979.² President Clinton's 1995 Declaration, *Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process*,³ includes one organization that has been inactive since 1999.⁴ But, despite this seemingly endless bleak state of affairs, there is no need to panic. The emergencies declared pursuant to the National Emergencies Act (NEA) are no more than a misnomer. Whereas emergencies in common parlance connote an extraordinary state of circumstances demanding urgent action,⁵ the NEA inverts this understanding by permitting the President to transform any situation into an emergency under the NEA.⁶ Under this legal regime, the President has nearly plenary power to declare and continue a national emergency, drawing upon a reservoir of powers that would not otherwise be available.⁷ This regime distorts the proper separation of powers by diluting Congress's lawmaking prerogative across the board.⁸ The President has no lawmaking authority

2. Continuation of the National Emergency With Respect to Iran, 84 Fed. Reg. 61,815 (Nov. 13, 2019).

3. Prohibiting Transactions With Terrorists Who Threaten to Disrupt the Middle East Peace Process, 60 Fed. Reg. 5079 (Jan. 23, 1995) (to be codified at 31 C.F.R. pt. 595).

4. *Abu Nadal Organization (ANO)*, COUNCIL ON FOREIGN REL. (last updated May 27, 2009), <https://www.cfr.org/background/abu-nidal-organization-ano-aka-fatah-revolutionary-council-arab-revolutionary-brigades>.

5. *Emergency*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/emergency> (last visited June 4, 2020).

6. See Peter E. Harrell, *How to Reform IEEPA*, LAWFARE BLOG (Aug. 28, 2019, 11:49 AM), <https://www.lawfareblog.com/how-reform-ieepa> (noting that "presidents have used the IEEPA aggressively and innovatively" and that "procedural checks have become largely toothless.").

7. There is no explicit statutory provision under the NEA restricting the President's authority to actually declare an emergency. See 50 U.S.C. § 1621(a) (2018) ("[T]he President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress"). The Brennan Center provides an in-depth analysis on all the powers flowing from an emergency declaration under the NEA. BRENNAN CTR. FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE (2019), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

8. President Trump's *Declaring a National Emergency Concerning the Southern Border of the United States* serves as a stark example of one such conflict between Congress and the President's competing domestic objectives. Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

and may only execute the law;⁹ to hold otherwise would be to violate a fundamental tenet of the U.S. constitutional system.¹⁰ However, the NEA contradicts this basic tenet by permitting the President to declare an emergency, thereby changing the state of the law within the United States. This note is not an attack on congressional authority to delegate its power or an attempt to overturn the NEA on a non-delegation theory. Rather, this note will focus on the manner in which the NEA impedes and contravenes Congress's own prerogative to craft legislation, specifically as it pertains to foreign matters.

That the President is the primary governmental actor in shaping U.S. foreign policy and engaging with other governments and international bodies is uncontested.¹¹ However, the current legal regime for emergencies only perpetuates the current imbalance between executive and legislative authority in this crucial sphere. Indeed, nearly all the events deemed emergencies under the NEA pertain to some foreign state, foreign entity, or external threat,¹² and as such grant the President enormous leeway in influencing foreign affairs above and beyond any explicit constitutional mandate. For example, under the current legal regime, a President could use statutory emergency powers to continue a sanctions regime against a country without the express consent of Congress or even in the face of serious congressional opposition. This ability to designate emergencies of indeterminable perpetuity is inconsistent with basic conceptions of executive and legislative authority and necessitates reform. One clear solution is to limit the President's authority to continue a national emergency under the NEA, thereby decreasing the probability that any one emergency declaration will cast an alarming shadow over U.S. legal and political institutions.

9. *See, e.g.*, *Ex parte Milligan*, 71 U.S. 2, 139 (1866) ("The power to make the necessary laws is in Congress; the power to execute in the President.").

10. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Jackson, J., concurring) ("In the framework of our Constitution, the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

11. *See, e.g.*, *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936) (emphasizing the President's primacy in conducting international affairs).

12. *See* BRENNAN CENTER, *supra* note 1 (listing national emergencies declared pursuant to the NEA).

Curtailing the President's ability to indefinitely continue an emergency under the NEA is grounded in concern for restoring the proper separation of powers as envisioned by the Founding Fathers.¹³ The current legal regime of the NEA is consistent with the general trend of increasing presidential power.¹⁴ While there are multiple causes and consequences of this trend,¹⁵ this note is more modest in its scope. Rather than provide a comprehensive picture of metastasized presidential power within our constitutional order, this note will address the relatively narrow issue of the NEA, arguing that the declaratory and continuation powers therein are excessive and accordingly inconsistent with basic constitutional precepts.

The critical source framing this note's discussion and demonstrating the NEA's excessive grant of presidential power is the *Pacificus-Helvidius* debate of 1794. Although the validity of Washington's Neutrality Declaration of 1793 was not the central focus of the debate between Hamilton and Madison during the conflagrations of the French Revolution,¹⁶ it served

13. See, e.g., Harold C. Relyea, *Declaring and Terminating a State of National Emergency*, 6 PRESIDENTIAL STUD. Q. 36, 43 (1976) (asserting that a hypothetical Emergency Powers Procedure Act would "serve[] to check [the President's emergency] power, both protecting the separation of powers principle and maintaining democratic practices."); Cindy Cohn & Shahid Buttar, *National Emergencies: Constitutional and Statutory Restrictions on Presidential Powers*, ELECTRONIC FRONTIER FOUND. (Feb. 14, 2019), <https://www.eff.org/deeplinks/2019/02/national-emergencies-constitutional-and-statutory-restrictions-presidential-powers> ("When a president threatens to exercise the power to declare a national emergency, our system of checks and balances faces a crucial test.").

14. See William Hebe, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688, 711–12 (1972) (detailing the relationship between the increased use of executive orders and corresponding expansion of presidential power); see generally Bruce Ackerman, *The Tanner Lectures on Human Values at Princeton University: The Decline and Fall of the American Republic* (Apr. 7–8, 2010), in 30 TANNER LECTURES ON HUMAN VALUES 5, 18–20 (Suzan Young ed., 2011) (discussing the change in form and structure of the presidency in the twenty-first century and attendant trend of increased presidential power).

15. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103–14 (2013) (detailing the varied sources and causes for the expansion of presidential power).

16. William R. Casto, *Pacificus and Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 613 (2001) ("Neither Jefferson nor Madison seriously controverted the President's authority to issue the proclamation.").

as a catalyst for the exploration of topics ranging from the power to declare war to the power to suspend treaties. This discourse between Hamilton and Madison provides readers intricate insight into their understandings of the structural foundation of the United States' government and the proper separation of powers. Particularly for the purposes of this note, the basic arguments and philosophies underpinning the debate directly inform our understanding of the validity, or lack thereof, of the President's authority under the NEA.¹⁷ In fact, a close reading of the *Pacificus-Helvidius* debate indicates that presidential authority under the NEA has far exceeded the original boundaries first envisioned by Madison and Hamilton.

Hamilton and Madison's discussion of the power to declare war demonstrates that both subscribed to congressional supremacy in the formal act of declaring, and the ancillary power to conclude, wars.¹⁸ This recognition of ultimate congressional supremacy implies substantive limits on the President's ability to begin and end wars. Given the similar nature of wars and national emergencies, Hamilton and Madison's views on declaring war are easily transposed to declaring emergencies. As a result, their consensus on imposing substantive limitations on the President's power to declare wars provides a compelling case for reforming the President's current statu-

17. Although Hamilton and Madison discuss principles derived from the U.S. Constitution and Congress has delegated its constitutional authority to declare national emergencies to the President via the NEA, the arguments outlined in the debate are nevertheless decisive in framing the President's statutory authority.

18. Compare Alexander Hamilton, *Pacificus Number I* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON: JUNE 1793–JANUARY 1794 42 (Harold C. Syrett, ed., digital ed., U. Va. Press 2011) [*hereinafter Pacificus Number I*] ("It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution."), with James Madison, *Helvidius Number I* (Aug. 24, 1793), reprinted in THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES VOL. XV: MARCH 1793–APRIL 1795 69 (J.C.A. Stagg ed., digital ed., U. Va. Press 2010) [*hereinafter Helvidius Number I*] ("It must be further evident that, if these powers be not in their nature purely legislative, they partake so much more of that, than of any other quality, that under a constitution leaving them to result to their most natural department, the legislature would be without a rival in its claim.").

tory authority to declare emergencies, or at least the authority to continue or renew emergency declarations.

The *Pacificus-Helvidius* debate therefore demands the reformation of the NEA by restoring Congress' prerogative to end emergencies. This can best be accomplished by altering § 1622(d) of the U.S. Code, which calls for the automatic termination of a declared emergency after a set period of time,¹⁹ so that an emergency declaration may be continued only with the express approval of Congress. Specifically, the most practical solution is to invert the process for the automatic termination of emergencies. Rather than grant the President plenary power to continue a national emergency without the need for congressional oversight or approval, the NEA should provide that an emergency automatically terminates unless both Congress and the President agree to renew it.

This modest reform would comport with the basic principles outlined in the *Pacificus-Helvidius* debate, as it would better ensure that the powers granted under the NEA conform to Hamilton and Madison's original conception of presidential power. Furthermore, this proposed reform would not deny or discount the very real threats posed by foreign adversaries, whose existence may very well extend for a protracted period of time and require prompt presidential action. Rather, it is one small step in turning back the trend of presidential aggrandizement within the realm of foreign affairs and restoring to equilibrium the separation of powers envisaged by Hamilton and Madison.

II. NEUTRALITY PROCLAMATION AND THE ENSUING DEBATE

A. *Background*

By 1793, Europe was engulfed in war between Republican France, replete with revolutionary fervor and energy, and her royal rivals, Great Britain and Spain.²⁰ Upon hearing of France's declaration of war against Great Britain in early April, George Washington summoned his Cabinet to Philadelphia to

19. 50 U.S.C. § 1622(d) (2018).

20. Patrick J. Garrity, *The Pacificus-Helvidius Debates*, CLAREMONT REV. BOOKS (Sept. 23, 2013), <https://www.claremont.org/crb/basicpage/the-Pacificus-Helvidius-debates/>.

determine the appropriate response for the young nation.²¹ Despite Hamilton's fondness for the English and Jefferson's penchant for the French,²² the Cabinet was generally in agreement that the security and well-being of the United States depended upon a policy of neutrality.²³ However, they sharply disputed the means of implementing such a policy, with Hamilton openly advocating for an official proclamation and Jefferson favoring a furtive silence.²⁴ Ultimately, Hamilton and his faction won the favor of President Washington, who issued the Proclamation of Neutrality on April 22, 1793.²⁵ A short one-page announcement, the Proclamation called for the United States to "adopt and pursue a conduct friendly and impartial towards the belligerent powers."²⁶ It maintained that "the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition."²⁷

Outrage and opprobrium in the newspapers swiftly followed.²⁸ One famous letter, written by a certain Veritas for Philadelphia's *National Gazette*,²⁹ accused Washington of violating the Treaty of Alliance concluded with France as well as overstepping his constitutional authority.³⁰ In response to

21. *Id.*

22. See CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793 21 (1931) ("Hamilton was certain to present ably and completely the British side of every question that might arise, Jefferson would see that no arguments favorable to France were overlooked.").

23. Garrity, *supra* note 19.

24. RON CHERNOW, ALEXANDER HAMILTON 435–36 (2005).

25. *Id.* at 436.

26. THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES VOL. XII: JANUARY–MAY 1793 472 (Theodore J. Crackel ed., digital ed., U Va. Press 2008) [*hereinafter* THE PAPERS OF GEORGE WASHINGTON].

27. *Id.* at 472–73.

28. Christopher J. Young, *Connecting the President and the People: Washington's Neutrality, Genet's Challenge, and Hamilton's Fight for Public Support*, 31 J. EARLY REPUBLIC 435, 445–47 (2011).

29. Veritas' identity, unlike that of Helvidius and Pacificus, has never been identified. Ever the schemer, Jefferson believed Veritas was in fact a treasury clerk, writing disingenuously as to discredit actual opposition to the proclamation. 3 AMERICAN HISTORY TOLD BY CONTEMPORARIES 305 (Albert Bushnell Hart ed., 1900).

30. *Id.* at 305–07.

these attacks, Hamilton published a series of essays in federalist newspapers justifying and defending the validity of the Proclamation.³¹ Fearing that Hamilton's essays were swaying public opinion, Jefferson beseeched Madison to "take up your pen, select the most striking heresies and cut him to pieces in the face of the public."³² Madison, perhaps not thrilled at the prospect of debating the fiery Hamilton, ultimately accepted the task, though not without bemoaning to Jefferson, "I have forced myself into the task of a reply. I can truly say I find it the most grating one I ever experienced."³³ However, fortunately for scholars, Madison completed Jefferson's request with vigor, ultimately penning a rich response to Hamilton's own skillful legal arguments and creating what the world now knows as the *Pacificus-Helvidius* debate.

B. *Constitutional Arguments in the Pacificus-Helvidius Debate*

Although the debate was predominantly concerned with the validity of the Proclamation of Neutrality, in reality neither Hamilton nor Madison (or Jefferson for that matter) seriously controverted Washington's authority to issue it. Rather, Hamilton and Madison took it upon themselves to extrapolate a fundamental conception of the President's foreign affairs authority via the specific powers granted to him by the Constitution. They used the Proclamation as a proxy for a much broader discussion on the President's overall role within the constitutional system, framing their discussion as a more basic discourse of fundamental political precepts. Indeed, although this exchange of essays has been labeled a debate, Hamilton and Madison often do not even address the same issues or even the arguments of the other.³⁴ Rather, their essays serve as a platform to project their respective visions of the presidency, which often were not necessarily incompatible with one another.³⁵

31. Young, *supra* note 27, at 446–47.

32. *Id.* at 447.

33. THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES VOL. XV: MARCH 1793–APRIL 1795 48 (J.C.A. Stagg ed., digital ed., U. Va. Press 2010).

34. See Casto, *supra* note 15, at 613 ("The *Pacificus/Helvidius* essays seem to present conflicting arguments, but the two essayists never joined issue on much of what each other said.").

35. Compare James Madison, *Helvidius Number III*, (Sept. 7, 1793) reprinted in THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES VOL. XV: MARCH

Hamilton lays the groundwork for his expansive understanding of the executive in his first essay, *Pacificus I*.³⁶ He begins with the proposition that the Proclamation itself merely announces the stance of the United States and in no way alters its peaceful relations with other nations, namely France and Great Britain.³⁷ He writes, “the Proclamation is virtually a manifestation of the sense of the Government that the UStates are, *under the circumstances of the case, not bound* to execute the clause of Guarantee.”³⁸ According to Hamilton, the treaty between the United States and France does not, by its terms, mandate the United States to enter the war on France’s behalf, and thus the Proclamation merely proclaims the law as is and establishes no new law.

This supposition that the Proclamation is a purely descriptive document, in and of itself not particularly dangerous or ambitious, reveals Hamilton’s more fundamental argument: The executive reigns supreme in matters of foreign affairs relative to her sister branches. According to Hamilton, the Proclamation’s mere promulgation of the executive’s understanding of the treaty is consistent with the branch’s unilateral authority to interpret treaties as they relate to imposing obligations of war and peace, precisely because the executive is “the *organ* of intercourse between the UStates and foreign nations.”³⁹ He grounds this conception in the enumerated powers vested by the Constitution, noting that the President is charged with serving as “Commander in Cheif [sic] . . . that he shall have power by and with the advice of the senate to make treaties;

1793–APRIL 1795 95–103 (J.C.A. Stagg ed., digital ed., U. Va. Press 2010) [*hereinafter Helvidius Number III*] (discussing the President’s Recognition power), with *Pacificus Number I*, *supra* note 17 (asserting that the President maintains the authority to judge whether new rulers are in fact the “competent organs” of the Nation in question).

36. *Pacificus Number I*, *supra* note 17, at 38. Hamilton’s defense of the Neutrality Proclamation was premised on his desire to avoid conflict in Europe and maintain a state of peace for the young nation. Hamilton thus chose the Latin nom de plume *Pacificus* as an obvious allusion (*pacificus* is the adjectival form of *pax*—the Latin noun for peace) that would have easily been recognized by his readers. Eran Shalev, *Ancient Masks, American Fathers: Classical Pseudonyms During the American Revolution and Early Republic*, 23 J. EARLY REPUBLIC 151, 169 (2003).

37. *Pacificus Number I*, *supra* note 17, at 34.

38. *Id.* at 36.

39. *Id.* at 37.

that it shall be his duty to receive ambassadors and other public Ministers”⁴⁰—all powers interconnected to conducting foreign affairs.

Hamilton diligently notes the linguistic variation between the Executive and Legislative Vesting Clauses and the consequences of such a difference. He points out that the phrasing of the Legislative Vesting Clause reads “[a]ll legislative Powers herein granted,” intimating that Congress may only pass laws in accordance with its enumerated powers.⁴¹ This means that the Constitution does not grant the full scope of legislative powers, whatever they may be, to the House of Representatives and Senate. Hamilton contrasts this with the analogous Executive Vesting clause, Article II, Section I, which states “[t]he executive Power shall be vested in a President of the United States.”⁴² Hamilton emphasizes that this structural linguistic difference necessarily compels the conclusion that the Framers meant to confer upon the President the entire executive power, subject only to enumerated limitations and qualifications, such as the Senate’s involvement in the treaty-making process.⁴³

With these arguments in mind, Hamilton also claims that the prickly issue of declaring war is executive in nature and would be among the President’s powers were it not for the Constitution’s delegation of that power to the legislative branch.⁴⁴ In other words, although the Constitution places the power to declare war in the hands of Congress, this is a mere exception to the overall executive power.

40. *Id.* at 38–39.

41. *Id.* at 39. Of course, this is a fundamental, uncontroverted tenet the judiciary broadcasts any time the authority of Congress is challenged. *See, e.g., McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 521 (2012) (“[T]he Federal Government is a government of limited and enumerated powers.”).

42. U.S. CONST. art. II, § 1, cl. 1.

43. *See Pacificus Number I*, *supra* note 17, at 39 (“The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.”).

44. The precise source from whence Hamilton reaches this conclusion is unclear. *See id.* (“A third [exception that] remains to be mentioned [is] the right of the Legislature ‘to declare war and grant letters of marque and reprisal.’”).

From this foundation, Hamilton makes several interrelated arguments. First, he claims that the power to declare war must be construed narrowly given its artificial residency in the legislative branch.⁴⁵ Hamilton next, in an ingenious sleight of hand, unearths that within the power to declare war there is an ancillary power “to judg[e] whether the Nation is under obligations to make war or not.”⁴⁶ This ancillary power to judge provides a base from which the President may act in making and preparing for war (or peace) without actually declaring war. Hamilton asserts that the President maintains a concurrent authority to exercise this ancillary power given it derives from the inherently executive power to declare war.⁴⁷ Because the Vesting Clause grants the entire Executive Power to the President, Washington, by issuing the Neutrality Proclamation, is only exercising his constitutional authority to judge that a state of neutrality exists; he is not changing the status of the United States in relation to the polities at war.

Madison responds with a vigorous dissent, accusing Hamilton of crafting a spacious canvass of executive power which must be summarily discarded. Madison frames the debate in grandiose terms, claiming that Hamilton, writing as Pacificus, is a wolf in sheep’s clothing, advocating for nothing less than tyranny. Indeed, Madison hoped his response would excite the passions and sympathies of those who remembered France’s steadfast support during the United States’ fight for independence.⁴⁸ Sparing no insult, Madison begins his first essay with the caustic paragraph:

SEVERAL pieces with the signature of PACIFICUS were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution; whilst the

45. *See id.* at 42 (“[A]s the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general ‘Executive Power’ vested in the President, they are to be construed strictly”).

46. *Id.* at 40.

47. *Id.* at 42.

48. *See* Garrity, *supra* note 19 (noting that Americans who were “grateful for past French support” were not satisfied with the Proclamation’s “cold, legalistic approach.”).

publication seems to have been too little regarded, or too much despised by the steady friends to both.⁴⁹

Rhetorical flourish aside, Madison in *Helvidius I* first attacks Hamilton's claims that the power to declare war and the power to make treaties are inherently executive.⁵⁰ For the purposes of this note, it is sufficient to focus on Madison's analysis of the power to declare war. Madison points out that eminent legal scholars such as Wolfius, Burlamaqui, and Vattel all affirmed that the legislative branch is to play "an integral and preeminent part" in exercising the power to declare war given its close connection to conceptions of sovereignty and independence.⁵¹ He next analyzes the "quality and operation" of the power to declare war,⁵² noting that declaring war is not an execution of any given law, but rather the enactment of a new law or set of laws, and therefore it is legislative in nature.⁵³ According to Madison, the act of declaring war not only changes the peaceful or warlike status of one nation in relation to another, but also changes the internal laws of the declaring nation.⁵⁴ Madison eloquently writes that declaring war "has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war: and of *enacting as a rule for the executive, a new code* adapted to the relation between the society and its foreign enemy."⁵⁵

Madison also appeals to the Constitution's structure and text to prove that declaring war is legislative in nature, and not, as Hamilton asserts, fundamentally an executive power. He argues that the Constitution reflects basic Platonic values of governance derived from "fundamental principle[s] in the organization of free governments."⁵⁶ That is to say, those pow-

49. *Helvidius Number I*, *supra* note 17, at 66.

50. Madison took his name from Helvidius Priscus, a Roman statesman known for his defiant republicanism during the reign of Nero. Helvidius Priscus was later executed. 11 ENCYC. BRITANNICA, *Helvidius Priscus* (Hugh Chisholm ed., 1910).

51. In a similar vein, Madison also discusses Montesquieu and Locke's conceptions of Executive and Legislative powers, dismissing both having too close ties or sympathies for the English Crown. *Helvidius Number I*, *supra* note 17, at 68.

52. *Id.*

53. *Id.* at 69.

54. *Id.*

55. *Id.*

56. *Id.* at 70.

ers which the Constitution treats as belonging to the executive are in fact executive in nature, and likewise, the powers conferred to Congress are legislative in nature. From this view, Madison concludes that because the power to declare war is vested in Congress and not in the President, it is properly legislative.⁵⁷

However, Madison knew he would be remiss to stop with such a simplistic argument. Indeed, establishing that the power to declare war is inherently legislative does not address Hamilton's more dangerous argument that the President shares a concurrent authority to make and prepare for war. Madison thus continues to explain that the Constitution generally does not allow the wholesale transfer of executive or legislative powers to another branch of government, as to do so would violate the fundamental principles of a free government. He reasons that "the constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers."⁵⁸ Accordingly, the power to declare war could not possibly be considered executive, as it is conferred to Congress without qualification or involvement of a second branch.⁵⁹ Moreover, Madison rejects Hamilton's insinuations that the powers afforded to the President by virtue of his role as Commander-in-Chief are related to the power to declare war because this would weaken Madison's claim that the power to declare war is exclusively vested in the legislative branch and hence is legislative in nature.⁶⁰ Rather, Madison contends that Commander-in-Chief powers are entirely independent of the power to declare war and in no way confer upon the President the authority to commence, continue, or conclude a war.⁶¹

57. *Helvidius Number I*, *supra* note 17, at 70.

58. *Id.*

59. U.S. CONST. art. I, § 8, cl. 11.

60. Madison rejects Hamilton's contention that, akin to the Treaty-Making Power which requires the involvement of the Senate and the President, the Constitution parses the power to declare war via the Commander-in-Chief clause. Instead, he argues that they are independent of one another. *Helvidius Number I*, *supra* note 17, at 71 ("And instead of being analogous to the power of declaring war, [the Commander-in-Chief power] affords a striking illustration of the incompatibility of the two powers in the same hands.").

61. *Id.*

Following from these basic principles, Madison in *Helvidius II* addresses Hamilton's specific argument regarding the purported ancillary power to judge the nation's obligations to make war. Madison first writes that, assuming such an ancillary power exists, it should nevertheless be excluded from the President's prerogatives given that the entire power to declare war is excluded from the executive.⁶² Second, even if the power to declare war was not entirely excluded from the President, the concurrent exercise of Hamilton's judgment power by both the legislative and executive branches could not be sustained.⁶³ Indeed, such a practice risks an absurdity wherein the executive and legislative adjudge the nation's obligations differently, inevitably leading to one branch trampling on the prerogatives of the other.

Madison's arguments apply in equal force to concluding wars. Just as declaring a war is legislative in nature, in large part because it involves the enactment of a new set of laws, so too is concluding a war. Madison writes in *Helvidius I*, "[i]n like manner a conclusion of peace [i.e. concluding a war] *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace."⁶⁴ According to Madison's theory, such an annulment and revival, insofar as they rewrite the law, must be legislative and therefore must belong to Congress.

Overall, Madison frames the debate while peacocking his republican sympathies and belaboring Hamilton's British and monarchical predilections. Madison writes in *Helvidius II*, "[t]he doctrine which has been examined [by Hamilton writing as *Pacificus*], is pregnant with inferences and consequences against which no ramparts in the constitution could defend the public liberty, or scarcely the forms of Republican

62. James Madison, *Helvidius Number II* (Aug. 31, 1793), reprinted in THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES VOL. XV: MARCH 1793–APRIL 1795 80–81 (J.C.A. Stagg ed., digital ed., U. Va. Press 2010) [*hereinafter Helvidius Number II*].

63. Madison bases this argument on the fact that declaring war is legislative and therefore cannot be exercised independently by the executive branch. See *id.* at 83 ("But an independent exercise of . . . a *legislative act* by the executive *alone*, one or other of which must happen in every case where the same act is exerciseable by each . . . is contrary to one of the first and best maxims of a well organized government.").

64. *Helvidius Number I*, *supra* note 17, at 69.

government.”⁶⁵ Madison emphasizes this sentiment in *Helvidius IV*, in which he clarifies his quarrel with Hamilton’s tyrannical view of the presidency.⁶⁶ Madison claims that the powers Hamilton proposes to grant would result in the President’s unilateral authority to “plunge the nation into war” by simply revoking treaties of peace and adjudging them no longer in effect.⁶⁷ According to Madison, though Hamilton writes under the guise of peace, his views in fact lead to an aggrandizement of executive power, the branch most predisposed to war.⁶⁸

C. Primary Extrapolated Principles

Whether one agrees with Hamilton’s, Madison’s, or neither conception of the presidency, the force of their arguments cannot be denied. Hamilton in *Pacificus I* makes appealing linguistic and structural arguments validating a more expansive understanding of the President’s authority under the Constitution, and he convincingly presents a strong justification for Washington’s issuing of the Proclamation. On the other hand, Madison persuasively refutes some of Hamilton’s key points. What is one to make of the power to declare war? Is it executive or legislative in nature? Whose conception of the presidency is correct? While the consensus on the debate may be that it is not possible to declare a victor,⁶⁹ such a conclusion misses a key point: There is in fact substantial ground to integrate the views of Hamilton and Madison into a coherent compromise that grants the President the requisite flexibility to de-

65. *Helvidius Number II*, *supra* note 61, at 80.

66. See James Madison, *Helvidius Number IV* (Sept. 14, 1793), reprinted in THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES VOL. XV: MARCH 1793–APRIL 1795 109 (J.C.A. Stagg ed., digital ed., U. Va. Press 2010) [*hereinafter Helvidius Number IV*] (“Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.”).

67. *Id.* at 108.

68. See *id.* at 108–09 (“War is in fact the true nature of executive aggrandizement.”).

69. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring) (determining that Hamilton and Madison “largely cancel each other.”); Casto, *supra* note 15, at 612 (noting that “today most have followed his [Justice Jackson’s] lead” in leaving the debate in a stalemate).

clare national emergencies without promoting further presidential aggrandizement.

It would be wholly simplistic and incomplete to conclude that Hamilton supported a strong executive whereas Madison supported a strong legislative branch. It is crucial to remember that their analyses of the President's authority, or lack thereof, was set within the parameters of the debate at hand—the Neutrality Proclamation. Madison adamantly denies that the President has any role in declaring war, arguing that “[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*.”⁷⁰ And yet Madison's stance is not fully impregnable, for surely the President, as Commander-in-Chief, must have some role to play in Congress's assessment of whether to begin, suspend, or end a war. Despite Madison's attempts to separate the role of Commander in Chief from the power to declare war, the two are inextricably linked. Who is better suited to determine whether war in fact exists than the Commander-in-Chief? Who should decide whether cause for war has been given if not the individual in charge of the armed forces?

Despite Madison's categorical denial that the President need play any role in declaring war, a nuance reading of his argument belies a more flexible stance. For example, Madison's cautioning that the Constitution cannot grant legislative or executive powers solely to the other branch clearly allows for the sharing of powers.⁷¹ Given that Madison accepts that some abilities must be shared between the executive and legislative branches, the power to declare war presents a good example of a power that should be so shared. As it is tied to the Commander-in-Chief power, the power to declare war is similar to the Treaty-Making or Appointment Power in contemplating the participation of multiple branches of government, even if the Constitution does not make this connection explicit.

Accordingly, Madison's view that the powers of the legislative and executive branches may overlap is consistent with

70. *Helvidius Number I*, *supra* note 17, at 71.

71. *See id.* at 70 (“[T]he constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers.”).

Hamilton's argument that the power of judging ancillary to the power to declare war is vested with the President. Even though Madison argues that the President does not have this ancillary power because the Constitution excludes the power to declare war from the executive, Madison's argument carries less force given the amorphous and implied nature of the power to judge. Whereas the Constitution explicitly vests Congress with the power to declare war, thereby unambiguously excluding the executive in this endeavor, the Constitution's silence on the power to judge creates a grey zone of sorts. Moreover, Madison concedes that both branches have the concurrent power to interpret the Constitution.⁷² By extension, should they not both then have the concurrent power to interpret the basic state of the nation? Based on the foregoing, it would seem that, consistent with the general principles elucidated by Madison and Hamilton, the President has the authority to play some role in the commencement of wars given the Constitution's lack of a *total* exclusion of the executive within the realm of war.

However, acknowledging a role for the executive does not give the President a complete and unilateral prerogative. Madison is right to conclude that the Constitution, through its exclusion of the formal power to declare war from the President, implies some limitations on the executive. Hamilton concedes this,⁷³ recognizing that Congress still maintains the formal power to actually declare war, notwithstanding the President's prerogative to shape the landscape leading up to such a decision.⁷⁴ Vesting the power to declare war with Congress, therefore, should not be read as an empty limit on the executive. Indeed, allowing the President to act unilaterally within the realm of war would render the war declaration power superfluous. Without any implied limits, Hamilton's robust interpretation of the President's concurrent authority to judge would swallow the purported restriction on the President's power to declare war. Hamilton himself is cognizant of the potential for such aggrandizement and colors his entire argument in *Pacificus I* with the concession that the Neutrality Proclamation itself does nothing more than "make known" the

72. *Helvidius Number IV*, *supra* note 65, at 83.

73. *Pacificus Number I*, *supra* note 17, at 41–42.

74. *Id.* at 42.

state of things.⁷⁵ In effect, Hamilton is implying that the President, notwithstanding his broad power to judge, is nevertheless constrained in how he may respond. The result is that both Madison and Hamilton recognize that the executive's command and use of the armed forces, for making war or responding to emergencies, is subject to substantive limits.

Based on the foregoing, two primary principles with respect to the power to declare war come to light. First, consistent with the proper separation of powers, some powers are inherently of a mixed nature, shared by both the executive and legislative branches. The Constitution itself recognizes the mixed nature of war powers by separating their constituent parts amongst the legislative and executive branches. From this it may be inferred that the President is imbued with some authority to judge whether the nation is in fact in a state of war or whether war is being made.⁷⁶ Second, the executive's judgment power is not unlimited. The power to declare war, based on its residence within the legislative branch and clear separation from the Commander-in-Chief role, imposes substantive limits on the President in commencing wars. Likewise, the power to terminate a war is subject to the same substantive limits. Madison makes the convincing argument that terminating a war is legislative in nature because it requires the repudiation of old laws and the enactment of new ones. Finally, although Hamilton and Madison do not discuss the power to continue a war in any great detail, it is highly relevant to the discussion. The act of continuation is properly conceptualized as a legislative decision not to terminate a war; as such, the power to continue a war is ultimately the prerogative of the legislative branch.

75. *Id.* at 34.

76. Indeed, this view is ratified in the Civil War-era Prize cases. *See* The Brig Army Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.").

D. *The Connection Between the Power to Declare War and the Power to Declare a National Emergency*

Although the *Pacificus-Helvidius* debate is confined primarily to the realm of foreign affairs, the arguments regarding the power to declare war are transferrable to the related power of declaring emergencies given their similar form and significance. Both wars and national emergencies traditionally contemplated a declaration in order to acquire formal, legal recognition,⁷⁷ and both evoke immediate concern for the nation's security and wellbeing. Wars and emergencies may pose existential threats to a nation and thus demand resolute and prompt action. Just as wars and their dangerous conditions necessitate the invocation of the laws of war and the attendant extraordinary powers, emergencies call for similar extraordinary powers.

Based on these similarities, the preceding extrapolated principles of concurrent authority on the power to declare war may be applied to the power to declare an emergency. Indeed, the ideas espoused in the *Pacificus-Helvidius* debate are consistent with Hamilton and Madison's view regarding the power to declare emergencies as formulated in the *Federalist Papers*. Similar to his support of a robust executive who can judge whether a state of war exists, Hamilton proposes that the executive maintains the prerogative to address a state of emergency in its infancy in *Federalist 23*:

BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the

77. The executive's ability to make war and make use of the laws of war has been recognized and debated since the Nation's inception. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1789 318–19 (Max Farrand ed., 1911) (summarizing arguments presented in the federal convention regarding the power to make war). However, courts recognized as early as the Civil War that modern conceptions of war no longer necessarily turn on a formal declaration of war. See *The Prize Cases*, 67 U.S. (2 Black) at 668 (noting that a war “may exist without a declaration on either side.”).

care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.⁷⁸

Madison agrees that the federal government must have the authority to address issues pertaining to the security and wellbeing of the nation,⁷⁹ but he remains highly concerned with the aggrandizement of executive power. In the specific context of emergencies, Madison writes that no branch of government “ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”⁸⁰ In other words, Madison believes there should be an even-handed division of emergency powers.

Because Hamilton and Madison’s writings in the *Federalist* papers on emergency powers closely align with their constitutional views in the *Pacificus-Helvidius* debate, the result is a coherent picture regarding their views of the President’s authority to declare and conclude a national emergency. Hamilton believes a robust executive in the related fields of war and emergencies is crucial to safeguarding the existence of the Nation, and therefore the President must have significant leeway to determine whether an emergency exists. Madison, on the other hand, desires substantive limits in order to maintain the proper of separation of powers, consistent with the principles of a free government.⁸¹

However, the power to declare and conclude wars and states of emergency are not perfectly congruent; they differ in key respects. Whereas declaring war is explicitly provided for in Article I, Section 8, Clause 11 of the Constitution,⁸² there is no explicit mention of declaring an emergency anywhere in

78. THE FEDERALIST No. 23 (Alexander Hamilton).

79. See THE FEDERALIST No. 41 (James Madison) (reasoning that the Constitution may “set bounds to the exertions for its own safety.”).

80. THE FEDERALIST No. 48 (James Madison).

81. See *Helvidius Number I*, *supra* note 17, at 70 (intimating that attributing legislative declaration power to the executive would “violate a fundamental principle in the organization of free governments.”).

82. U.S. CONST. art. I, § 8, cl. 11.

the Constitution's text.⁸³ It is primarily for this reason that Madison's call for more categorical restraints on the President's ability to commence, continue, or conclude wars does not exactly map on to the President's related power to declare or conclude emergencies. Importantly, although Madison rejects Hamilton's proposed power to judge within the context of wars,⁸⁴ it is not clear that he would also deny this power to the President in the context of emergencies given the Constitution's silence on the matter. Therefore, Madison's categorical denials must be narrowly construed to the power to declare war. Similarly, the NEA technically invalidates many of Madison's categorical arguments against the President's authority to play any role in commencing, continuing, or concluding wars, as it delegates a great proportion of congressional authority to the President.⁸⁵ Nevertheless, Madison's broader constitutional vision is still highly relevant and should inform our understanding of the President's proper statutory authority in declaring emergencies.

III. THE NATIONAL EMERGENCIES ACT

A. *Background*

Much has happened in relation to the President's power to declare national emergencies since Madison and Hamilton discussed the validity of the Neutrality Proclamation in 1793. However, there is little need to discuss the historical development of the President's constitutional authority to declare national emergencies,⁸⁶ as the NEA usurped this area of constitutional law. By passing the NEA, Congress essentially immunized presidential declarations by transforming them from constitutionally dubious actions under Justice Jackson's tripar-

83. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1812 (2010).

84. *Helvidius Number II*, *supra* note 61, at 81.

85. See Deborah Pearlstein & Ilya Somin, *State of Emergency: Presidential Power Run Amok*, 2019 CATO POLICY REP. 11 (declaring that the problem with the NEA is one of congressional delegation: "it's not a problem of the president seizing power, but of Congress giving it away.").

86. See generally, e.g., CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (2d ed. 2002) (1948) (exploring the techniques, especially the vesting of extraordinary power in the executive, democratic governments utilize to protect themselves in times of crisis).

tite system laid out in *Youngstown Steel* to impregnable statutorily authorized declarations.⁸⁷

Prior to the NEA's passage, the Senate created the Special Committee on National Emergencies and Delegated Emergencies (the Committee) to examine presidential emergency power. The Committee found that four emergency declarations were still in effect, giving force to 470 independent federal provisions that delegated extraordinary authority to the executive during a state of national emergency.⁸⁸ Of the four emergency declarations still in effect at the time, the most notorious was the Emergency Banking Act of 1933: This act declared a state of emergency in the banking industry and gave the President significant powers to regulate banks.⁸⁹ A relic of the Great Depression, the Emergency Banking Act represented Congress's inability to meaningfully manage and conclude existing national emergencies.⁹⁰ In response to what they viewed as a troubling state of affairs, the Committee sought to

examine the consequences of terminating the declared states of national emergency that now prevail; to recommend what steps the Congress should take to ensure that the termination can be accomplished without adverse effect upon the necessary tasks of governing; and, also, to recommend ways in which the United States can meet future emergency situa-

87. Under Justice Jackson's famous articulation of the President's authority in *Youngstown Sheet*, the President is said to be acting either pursuant to the authorization of Congress with his authority at a maximum; within the "twilight zone" absence of any Congressional grant or denial of authority; or, finally, in contravention of the will of the Congress, relying solely on his own constitutional prerogatives and with his authority at "its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

88. S. REP. NO. 93-549, at III (1973); L. Elaine Halchin, *National Emergency Powers*, 98-505 CONG. RES. SERV. 3 (2020).

89. Emergency Banking Relief Act, Pub. L. No. 73-1, 48 Stat. 1 (1933). The Emergency Banking Act gave rise to the controversial Executive Order 6102, mandating the public "deliver" their gold to the government at a fixed rate. Exec. Order No. 6102 (1933), *repealed by* Exec. Order No. 6260 (1933).

90. See S. REP. NO. 93-549, at 10 (1973) ("What these [emergency declarations] suggest and what the magnitude of emergency powers affirm is that most of these laws do not provide for congressional oversight or termination.").

tions with speed and effectiveness but without relinquishment of congressional oversight and control.⁹¹

The result of the Committee's work was the NEA. Passed in 1976, the NEA was Congress's attempt to formalize and impose limits upon the process of presidential declarations of emergency.⁹² The NEA thus governs the commencement, continuation, and conclusion of states of emergency.⁹³ Pursuant to their goal of providing congressional oversight and control over future declarations, the NEA's drafters also sought to wipe clean the already existing states of emergencies and create a blank slate. Accordingly, § 1601 of the NEA terminates numerous ongoing emergencies and eliminates, albeit with exceptions, the powers associated with these past states of emergency.⁹⁴

The NEA grants unfettered authority to declare a national emergency, with no congressional oversight or other limitation. Perhaps in light of the unforeseen nature of emergencies and the necessity for quick action, Congress did not seek to impose restraints on the President's power to declare national emergencies. However, the NEA does provide the mechanism through which the President must declare national emergencies in § 1621. Per § 1621(a), the President must transmit his declaration of emergency to Congress and publish it in the Federal Register.⁹⁵

91. *Id.* at III. The Senate Special Committee on National Emergencies and Delegated Emergencies also later wrote in its final report prior to the passage of the NEA, "by reemphasizing that emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the National Emergencies Act to end a potentially dangerous situation." S. REP. No. 94-922, at 19 (1976).

92. See James Wallner, *The National Emergencies Act of 1976*, LEGBRANCH (Feb. 28 2019), <https://www.legbranch.org/the-national-emergencies-act-of-1976/> (explaining that one effect of the NEA was to provide "a unique process to make it easier for Congress to terminate a presidential emergency declaration after it was proclaimed by the president.").

93. See Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> (noting that the NEA dictates how emergencies must be declared, updated, terminated, and renewed).

94. 50 U.S.C. § 1601 (2018).

95. 50 U.S.C. § 1621 (2018).

The termination process, however, has a more involved history. Pursuant to the NEA, a national emergency may be terminated either through a presidential proclamation or through a joint congressional resolution.⁹⁶ Termination via presidential proclamation is straightforward: the President may simply issue a declaration formally terminating the emergency.⁹⁷ Congressional termination, on the other hand, has fallen victim to the sweeping decision in *INS v. Chadha*.⁹⁸ Prior to *Chadha*, the NEA provided that Congress could terminate a presidential declaration pursuant to a “concurrent resolution.”⁹⁹ A concurrent resolution required only a simple majority of both Houses and was not subject to presidential veto.¹⁰⁰ However, *Chadha* rendered such concurrent resolutions unlawful. According to *Chadha*, concurrent resolutions must conform to the formal requirements for passing a bill into law, including being subject to a presidential veto.¹⁰¹ As a result of *Chadha*’s seismic shift, Congress amended the NEA by replacing “concurrent resolutions” with “joint resolutions,”¹⁰² which require approval of both Houses and the President’s signature, thereby conforming to *Chadha*’s stringent formal requirements.¹⁰³ As a result, when Congress issues a joint resolution to terminate a declared emergency, the President may now veto it and keep the declared emergency in effect. As with any other bill, Congress may override this veto with a two-thirds

96. 50 U.S.C. § 1622(a) (2018).

97. *Id.*

98. 462 U.S. 919 (1983).

99. See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93, 99 Stat. 405, 448 (1985) (amending the NEA by replacing concurrent resolution with joint resolution).

100. See *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm (last visited May 28, 2020) (noting the difference between joint and concurrent resolutions).

101. See *Chadha*, 462 U.S. at 955–57 (noting that the exceptions to the requirements of bicameralism and presentment are narrowly and explicitly defined, and that actions outside these exceptions must be subject to the “bicameral requirement, the Presentment Clauses, the President’s veto, and the Congress’ power to override a veto.”).

102. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, 99 Stat. at 448.

103. *Types of Legislation*, *supra* note 99.

majority in both Houses.¹⁰⁴ However, this is no small feat in a hyper-partisan environment,¹⁰⁵ and it is effectively entirely within the discretion of the President to permit a national emergency to expire or continue. The result of *Chadha*, then, has been the shift of the power to continue and terminate an emergency from Congress to the President.

One caveat to this analysis is § 1622(d), which provides for the automatic termination of a national emergency unless the President renews his initial declaration.¹⁰⁶ As will be discussed, § 1622(d) has largely turned into a pro forma exercise allowing the President to simply issue renewal declarations with no congressional control or oversight. This concentration of power in the executive necessitates serious reform. However, in order to understand the stakes of reforming § 1622(d), it is essential to first understand the significance of presidential emergency declarations.

B. *Attendant Powers to Declared States of Emergencies*

The Brennan Center for Justice identifies 123 provisions potentially available when the President declares a national emergency pursuant to the NEA and an additional thirteen that become available once Congress declares a national emergency.¹⁰⁷ Most relevant for the purposes of this note are the International Emergency Economic Powers Act (IEEPA) and 10 U.S.C. § 12302 (Ready Reserve), both of which have recently received considerable media attention in light of President Trump's national emergency declarations.¹⁰⁸

104. U.S. CONST. art. I, § 7, cl. 2; see *Chadha*, 462 U.S. at 957 (emphasizing the importance of the veto and the congressional override to the legislative process).

105. See Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *POLITICAL NEGOTIATION: A HANDBOOK* 37, 45 (Jane Mansbridge & Cathie Jo Martin eds., 2015) (noting that republicans and democrats now have “increasingly distinct clusters of policy positions, [and] citizens who identify with one party expect the other party’s identifiers to hold dramatically different political views.”).

106. 50 U.S.C. § 1622(d) (2018).

107. BRENNAN CTR. FOR JUSTICE, *supra* note 1.

108. See, e.g., Jacob Pramuk & Christina Wilkie, *Trump Declares National Emergency to Build Border Wall Setting Up Massive Legal Fight*, CNBC (Feb. 15, 2019, 2:52 PM), <https://www.cnbc.com/2019/02/15/trump-national-emergency-declaration-border-wall-spending-bill.html> (discussing President Trump’s claim that he “has the authority to reallocate money without the

The IEEPA provides for an expansive set of powers within the realm of foreign affairs, specifically authorizing the President to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States . . . if the president declares a national emergency with respect to such threat.”¹⁰⁹ The Act provides a laundry list of authorities, including the power to investigate, regulate, direct and compel, withhold, use, and transfer any property.¹¹⁰

The IEEPA is a powerful statute, and it has enabled significant executive action within the realm of foreign affairs. President Bush’s Executive Order 13224, which blocked assets connected to terrorist organizations,¹¹¹ President Obama’s issuing of sanctions against Russia for its actions against Ukraine and the Crimea,¹¹² and the recent implementation of new sanctions against Iran¹¹³ were all accomplished under the IEEPA. Courts handle executive actions taken pursuant to the IEEPA with high a degree of deference, no doubt due to its close relation with foreign affairs and national security.¹¹⁴ The IEEPA itself has survived constitutional challenges based on theories of non-delegation, takings, and due process.¹¹⁵ Furthermore, *Chadha*’s stranglehold on constitutional interpretation resulted in the invalidation of § 207(b) of the IEEPA, which permitted Congress to terminate a declared national emergency

approval of the legislative branch” to build a wall along the United States-Mexico border following his declaration of a national emergency); Veronica Stracqualursi, *Trump Claims He Has ‘Absolute Right’ to Order US Companies Out of China Under 1977 Law*, CNN (Aug. 24, 2019, 12:17 PM), <https://www.cnn.com/2019/08/24/politics/trump-china-trade-war-emergency-economic-powers-act/index.html> (discussing the IEEPA in the context of President Trump’s demand that U.S. corporations cease doing business in China).

109. 50 U.S.C. § 1701(a).

110. 50 U.S.C. § 1702(a)(1)(B).

111. Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

112. Exec. Order No. 13660, 79 Fed. Reg. 13,491 (Mar. 6, 2014).

113. Exec. Order No. 13846, 83 Fed. Reg. 38,939 (Aug. 6, 2018).

114. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (“Such failure of Congress specifically to delegate authority does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.”) (quotations and citation omitted).

115. Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, R45618 CONG. RES. SERV. 32–40 (2019).

via a concurrent resolution.¹¹⁶ The undeniable conclusion is that IEEPA powers are expansive in their breadth and depth and are subject to minimal judicial scrutiny.

The Ready Reserve provision permits the President to “in time of national emergency declared by the president . . . order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve . . . for not more than 24 consecutive months.”¹¹⁷ This authority, in conjunction with other emergency powers beyond the scope of this note, gives the President significant power to call the armed and reserve forces to action during national emergencies.¹¹⁸

Both the IEEPA and Ready Reserve statutes have come under scrutiny in light of President Trump’s claims that the IEEPA permits him to order U.S. companies “out of China,”¹¹⁹ and that the Ready Reserve Provision authorizes him to send reserve troops to the U.S.-Mexico border and to use otherwise appropriated funding to build the promised wall.¹²⁰ Central to the President’s claims are the broad powers granted under these provisions and the constitutional strength they have been accorded.¹²¹ In fact, there is little doubt that President Trump could legally block future investments in China, political consequences and backlash notwithstanding.¹²² Similarly, it is unclear whether any challenges alleging that the President

116. *United States v. Romero-Fernandez*, 983 F.2d 195, 196–97 (11th Cir. 1993).

117. 10 U.S.C. § 12302(a) (2018).

118. *Id.*

119. Peter Baker & Keith Bradsher, *Trump Asserts He Can Force U.S. Companies to Leave China*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/world/europe/trump-g7-summit.html>.

120. Chantal Da Silva, *Can the Pentagon Shut Down Trump’s National Emergency Plan to Use Military Money for Border Wall?*, NEWSWEEK (Feb. 18, 2019, 7:48 AM), <https://www.newsweek.com/can-pentagon-shut-down-donald-trump-national-emergency-plan-military-money-1334566>.

121. *See Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (“Because the President’s action . . . was taken pursuant to specific congressional authorization, it is ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)).

122. Jennifer Hillman, *Can Presidents Block Investment in China?*, COUNCIL ON FOREIGN REL. (Sept. 5, 2019), <https://www.cfr.org/in-brief/can-presidents-block-investment-china>; *see United States v. Anvari-Hamedani*, 378 F. Supp. 2d 821 (N.D. Ohio 2005) (finding Executive Order 13059’s prohibi-

has exceeded his statutory authority under the Ready Reserve Provision would gain any traction.

The IEEPA and the Ready Reserve grant the President a powerful arsenal of tools, and yet they constitute mere fractions of the total emergency powers granted.¹²³ The recent political controversy surrounding these two specific statutes merely reaffirms the significance of emergency powers in general and their capacity for abuse. More important than the scope of statutory emergency powers, though, is the antecedent and fundamental question of what constitutes a validly declared national emergency. Because a President may utilize emergency powers only pursuant to a declaration of a national emergency, without such a declaration, the President may not dip into his reservoir of statutory emergency powers. The courts, however, provide few restrictions on the President's power to declare a national emergency under the NEA, generally holding that the issue constitutes a non-justiciable political question.¹²⁴ The judiciary's apprehension is undoubtedly the result of a wish to avoid interfering in matters connected to national security.¹²⁵ Proclamation 9844, *Declaring a National Emergency Concerning the Southern Border of the United States*,¹²⁶ and the ensuing litigation exemplifies this hesitation by demonstrating that courts are unwilling to restrict the executive's power to declare a national emergency, even one declared under dubious circumstances.

Proclamation 9844 declares a national emergency and permits the President to take extraordinary action to resolve

tion on "future investments[,]” passed pursuant to the IEEPA, did not violate the non-delegation or void for vagueness doctrines).

123. Significant examples of the 136 provisions, in light of the Coronavirus epidemic, include conducting investigations into causes of a disease or disorder, 42 U.S.C. § 247d, and permitting duty-free importation of medical supplies. 19 U.S.C. § 1318(a).

124. *See, e.g., California v. Trump*, 407 F. Supp. 3d 869, 891 (N.D. Cal. 2019) (“[T]he Ninth Circuit has characterized ‘the declaration or continuation of a national emergency’ as an ‘essentially political question.’”) (quoting *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1080–81 (9th Cir. 1982)).

125. *See Dames & Moore*, 453 U.S. at 678 (“Such failure of Congress specifically to delegate authority does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.”) (quotations and citation omitted).

126. Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

the situation on the shared border with Mexico.¹²⁷ Congress immediately issued a joint resolution terminating the emergency, but did not have the requisite two-thirds majority to overcome the President's predictable veto.¹²⁸ Numerous lawsuits were filed in response, seeking to restrict the diversion of funds earmarked for other programs to build a wall on the United States' southern border with Mexico.¹²⁹ Notably, none of the courts in the ensuing litigation attempted to answer the question of whether Proclamation 9844 declared a valid national emergency. In *El Paso City v. Trump*, the Western District of Texas explicitly stated that it would "not address the other merits arguments raised, including the constitutionality of the Proclamation and the [NEA]."¹³⁰ Similarly, in *Sierra Club v. Trump*, although the Ninth Circuit upheld a preliminary injunction on the government's use of money under a completely separate provision, it conspicuously did not address the validity of Proclamation 9844.¹³¹ The Supreme Court overturned the Ninth Circuit and ultimately issued a stay for the injunction, but it failed to provide any reasoning.¹³² Because the judiciary shies away from reviewing the validity of presidential national emergency declarations, those desiring limitations on the President's power to declare a national emergency under the NEA cannot rely upon the courts for change.

The judiciary, in its avoidance of this fundamental question, seems to have acquiesced to the Hamiltonian preference in the *Pacificus-Helvidius* debates for a robust executive with the concurrent authority to judge and determine the state of the nation. Exacerbating the matter, Congress has delegated its declaration power to the President via the NEA.¹³³ If Congress sought to maintain the majority of its prerogative to de-

127. *Id.*

128. Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html>.

129. See Jeremy Gordon & Hadley Baker, *Border Wall Litigation Tracker*, LAWFARE (June 5, 2019, 4:43 PM), <https://www.lawfareblog.com/border-wall-litigation-tracker> (listing lawsuits filed challenging the declaration).

130. 408 F. Supp. 3d 840, 856 (W.D. Tex. 2019).

131. See 929 F.3d 670, 686 (9th Cir. 2019) ("[O]ur decision does not address any sources of funds Defendants might use to build a border barrier except those reprogrammed under section 8005.").

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

133. 50 U.S.C. § 1621 (2018).

clare an emergency and give only a partial delegation, the third or second prong of Justice Jackson's *Youngstown* framework would be more relevant and Madisonian considerations of meaningful limitations might kick in. This is not the world we live in. Due to *Chadha's* inflexible and absolutist regime, Congress must either delegate the whole of its power or nothing at all, without reserving any right to negate the President's actions except through a difficult-to-procure two-thirds override vote.¹³⁴ The result is that Congress has in fact delegated nearly all of its authority to the President on the front end, and thus the judiciary has acquiesced in the President's unrestricted practice of declaring national emergencies.

Finally, another stark example in which the NEA might interfere in Congress's lawmaking prerogative on foreign matters is the interplay between the Iran Sanctions Act of 1996 (ISA) and the NEA. Section 5(a) of the ISA, codified as a statutory note to 50 U.S.C. § 1701, provides that "the President shall impose" various significant financial penalties, subject to a de minimis requirement, on persons make investments that "directly and significantly contributes to the enhancement of Iran's ability to develop petroleum resources."¹³⁵ To limit this grant of additional emergency powers with respect to Iran, Congress has consistently placed a sunset provision in each iteration of the ISA without presidential authority to unilaterally renew its provisions.¹³⁶ Furthermore, Congress also provided a mechanism to end a sanctions regime under the ISA by including in Section 8:

The requirement under section 5(a) to impose sanctions shall no longer have force or effect with respect to Iran if the President determines and certifies to the appropriate congressional committees that Iran (1) has ceased its efforts to design, develop, manufacture, or to acquire [nuclear, chemical, biological weapons or ballistic missiles]; (2) has been removed from the list of countries [that] . . . repeatedly pro-

134. Amending the NEA to replace "concurrent resolutions" with "joint resolutions" achieves this result and is constitutionally permissible under *Chadha*. 462 U.S. 919 (1983).

135. 50 U.S.C. § 1701 note (2018) (Iran Sanctions).

136. The sunset provision is currently located in section 13 of the ISA and currently extends to 2026. 50 U.S.C. § 1701 note (2018).

vided support for acts of international terrorism; and (3) poses no significant threat to United States national security, interests, or allies.¹³⁷

The strength of the President's emergency powers becomes apparent when the ISA is no longer in force but a President still wants to use the powers granted under the Act. For example, assuming the ISA expired, or that one President certified to Congress that Iran no longer posed a significant threat, there is no mechanism preventing another President, or even the same President, from redeclaring an emergency with respect to Iran, even in the face of clear congressional opposition. This interplay serves to further highlight presidential aggrandizement in foreign affairs matters, even those Congress has addressed.

C. *Reform on the Back End*

A logical solution to this situation could be to rewrite the NEA and change the manner in which national emergencies are declared, but this is a politically infeasible non-starter.¹³⁸ Given the dangerous combination of emergency, security, and foreign affairs, it is unlikely that Congress would seek to restrict the President's authority to take swift action. If judicial precedent on emergency declarations is any indication, it is difficult to imagine that future courts would block the President from acting pursuant to a declared emergency, let alone interfere in his ability to declare one.

With these considerations in mind, this note proposes that the NEA be reformed to limit the President's ability to continue national emergencies. This more practical and politically feasible proposal would restore the NEA to a state of equilibrium by injecting it with certain Madisonian considerations, thereby qualifying the Hamiltonian principles guiding the NEA and reviving the drafters' original intent to rein in presidential aggrandizement. To accomplish this reform, this note proposes changing § 1622(d). Currently, § 1622(d) provides:

137. 50 U.S.C. § 1701 note (2018) (Iran Sanctions).

138. See Goitein, *supra* note 92 ("Congress, of course, will undertake none of these [emergency power] reforms without extraordinary public pressure—and until now, the public has paid little heed to emergency powers.").

Any national emergency declared by the president in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the president does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary.¹³⁹

This provision grants the President nearly unrestricted authority to perpetually renew emergency declarations and thus continually use the vast statutory powers that come with them. In giving the President such unobstructed access to emergency powers, the NEA completely ignores the principles extrapolated from the *Pacificus-Helvidius* debate: The renewal power ignores Madison's fear of presidential aggrandizement as well as his admonition against an executive role in commencing or concluding wars and, relatedly, emergencies. The power completely disregards Hamilton and Madison's consensus on the Constitution's substantive limitations on the President's ability to actually declare or terminate war. Moreover, the NEA tramples upon Hamilton's recognition of concurrent authorities, instead providing the President with the sole prerogative to declare an emergency. Of course, the NEA does not preclude Congress from declaring its own emergencies, but it does move away from the spirit of Hamilton and Madison's recognition of shared powers.

The central principle underpinning reform of the NEA should be Madison's recognition that any formal act of declaration serves to annul one set of laws and replace them with a new set, albeit perhaps temporarily. This annulment and replacement, insofar as it changes the governing laws, is inherently legislative and therefore must reside with the Congress. From this simple proposition, it follows that the executive cannot have the plenary power to declare national emergencies.

Instead of a pro forma procedure with no congressional oversight, some meaningful restraint must be imposed upon the President's ability to renew an emergency declaration. This note proposes a more stringent automatic termination of

139. 50 U.S.C. § 1622(d).

national emergencies: Just as § 1622(d) currently provides, declarations of national emergencies would automatically terminate after a set amount of time. However, the President would not be able to renew the declaration with a simple publication in the Federal Register. Rather, upon presidential request, Congress must pass a law renewing the state of emergency for a specified period of time, consistent with its duties under *Chadha*. This would subject national emergencies to congressional oversight and allow Congress to reclaim some of its prerogative in the realm of emergencies. Moreover, because passing a law is undeniably more time-consuming and burdensome, this reform would also lengthen the duration of the initial state of emergency to last longer than a year. Given the intractable nature of some conflicts, for example, the Iranian government's longstanding hostility, an increase in the initial duration of a national emergency provides flexibility while also preventing perpetual emergencies.

The process of passing a bill would not be too cumbersome, as Congress should nevertheless be able to reach a consensus when faced with bona fide emergencies, even in a hyper-partisan environment. For instance, Congress was able to pass the Countering America's Adversaries Through Sanctions Act, essentially codifying Obama-era executive orders sanctioning Russia,¹⁴⁰ despite President Trump's open opposition.¹⁴¹

This proposal, therefore, is an attempt to restore the balance of powers in the realm of national emergencies. The proposal maintains the initial process of declaring states of emergencies, sustaining the President's prerogative to take swift action and protect the nation. This is consistent with Hamilton's robust conception of presidential authority as including the power to judge the inception of emergencies as well as Madison's recognition of a sharing of mixed powers. However, the proposal changes the termination of states of emergencies, an area in which substantive limits comport with both the Constitution's texts, principles, and structure, and with Hamilton and Madison's respective visions. If it mustered the political

140. Pub. L. No. 115-44, 131 Stat. 886 (2017).

141. Zeeshan Aleem, *It's Official: Congress Has Handcuffed Donald Trump on Russia*, Vox (Aug. 2, 2017), <https://www.vox.com/policy-and-politics/2017/7/28/16055630/congress-trump-russia-sanctions-veto>.

will to do so, Congress would stand on strong constitutional footing to reclaim its power to terminate and conclude states of emergencies.¹⁴²

IV. CONCLUSION

As current political debate demonstrates, emergency powers are comprehensive and highly contested, and their regulation should not be taken lightly.¹⁴³ Critical to this discussion is the antecedent question of who has the authority to declare a national emergency. Legal and historical practice dictate that limits on the power to declare an emergency should not unduly restrict the President, as Commander-in-Chief, from acting to protect the nation in bona fide times of emergency. However, constitutional principles of separation of powers and deference demonstrate that this power should not be absolute; it is the President's job to faithfully execute the laws, not write or annul them.

Under the current legal regime governing emergencies, where Congress has admittedly delegated its full power to declare and terminate an emergency under the NEA, the President's power has become untethered from fundamental constitutional precepts. The plenary declaration and renewal powers contribute to the aggrandizement of presidential power in the realm of foreign affairs. Immune from congressional disapproval and judicial scrutiny, the President today may declare and renew national emergencies as he pleases, eluding congressional mandates and overriding clear congressional oppo-

142. See Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 65 (2013) ("Despite all that can be said in favor of an energetic emergency executive—the arguments from policy, text, structure, and practice—the Founders rendered the Chief Executive almost entirely impotent in crises.").

143. Compare William J. Watkins Jr., *We Should Have Repealed the National Emergencies Act a Long Time Ago*, INDEPENDENT INST. (Mar. 28, 2019), <https://www.independent.org/news/article.asp?id=11768> (arguing the NEA grants too much authority to the president and should be repealed), with Quinta Jercic, *Everyone Calm Down About That Declaration of National Emergency*, LAWFARE (Jan. 9, 2019), <https://www.lawfareblog.com/everyone-calm-down-about-declaration-national-emergency> (arguing that President Trump's invocation of an emergency to fund building a wall is not as drastic as some commentators claim, and that the overall NEA need not be completely reworked).

sition.¹⁴⁴ Reforming § 1622(d) to remove the President's plenary renewal power is thus both constitutionally required and politically desired. Such a reform would allow for more congressional oversight and better comport with basic constitutional principles. Ultimately, by requiring congressional approval for renewing a national emergency, the NEA would reflect the proper separation of powers and curb aggrandizement, comport with the NEA drafters' original intent, and eliminate the President's use of extraordinary powers in ordinary times.

144. See, e.g., Eric Beech, *Trump Vetoes Measures to End His Emergency Declaration on Border Wall*, REUTERS, Oct. 15, 2019, <https://www.reuters.com/article/us-usa-trump-congress-emergency/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKBN1WV06P> (reporting on Congress's majority vote to end President Trump's declared emergency on the southern border).

