

# IMAGINING A FEDERAL EMERGENCY BOARD: A FRAMEWORK FOR LEGALIZING EXECUTIVE EMERGENCY POWER

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*In the United States, the tripartite system ensures the rule of law by dividing the power to make laws between Congress and the President. The system, however, makes virtually no provision for moments of grave emergency, in which the President is expected to act before authorization from Congress can be secured. As a result, presidential discretion—exercised first in emergency—creeps into non-emergency governance, corroding the rule of law.*

*This Note employs John Locke's concept of the federative power to define the emergency moment as limited to that period of time during which it is logistically impossible for Congress to approve executive action. From there, it proposes an administrative agency, the Federal Emergency Board, with the power to declare an emergency during this interval, thereby authorizing and legalizing the exercise of executive power.*

*Without ignoring the somewhat fantastical nature of this proposal, this Note engages seriously in a discussion of its constitutionality. It explores the remedies that would remain available to individuals whose rights were violated during a declared emergency. Finally, it examines whether a sitting President would be likely to seek authorization for his emergency action. It concludes that, at the very least, the existence of the Federal Emergency Board would remind Americans that the system of checks and balances does not disappear during moments of emergency.*

## INTRODUCTION

The American constitutional structure protects the rule of law by dividing power among three branches of government: The legislature makes the rules, the executive applies them, and the judiciary interprets them.<sup>1</sup> In this way, law becomes a predictable, discoverable framework within which actors can function. However, an entirely

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<sup>1</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 358 (2d ed. 1998).

unanticipated event, such as a terrorist attack or natural disaster, can place great strain upon this prospectively defined framework. An immediate government response may be necessary in order to prevent chaos or further loss of life, with exigency precluding the rule process described above from unfolding normally. In the time before Congress drafts, debates, and passes legislation, the Executive must act. This Note focuses on this “emergency moment.”

Unlike the constitutions of many other nations,<sup>2</sup> the U.S. Constitution provides no explicit direction as to how the government should proceed in such emergency moments. As a result, the Constitution is continually stretched or ignored to create legal room for functionally necessary action.<sup>3</sup> The Constitution recognizes the tension between the separation of powers and the exigencies of domestic emergency in only one way: By allowing Congress to suspend the writ of habeas corpus, it provides a mechanism for preventing judicial interference with executive detention.<sup>4</sup> The Constitution does not, however, contain any provision specifically allowing the executive to react to an emergency before securing congressional authorization. While the Commander-in-Chief Clause authorizes the President to make strategic decisions concerning a military effort at home or abroad,<sup>5</sup> its relationship to other emergency actions at home—such as the implementation of restrictions on domestic travel or the expropriation of private property—is substantially more tenuous. Nonetheless, intuition and history indicate that the President must find constitutional authorization for immediate reaction.<sup>6</sup>

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<sup>2</sup> See, e.g., 1987 CONST. 16 (Fr.) (instructing French President to take certain measures during emergency situation); GG art. 115a (F.R.G.) (explaining how “state of defence” shall be declared under German law).

<sup>3</sup> Consider, for example, Roosevelt’s declaration of the bank holiday, Proclamation No. 2038, 48 Stat. 1689 (1933), or Nixon’s imposition of “emergency” trade restrictions, Proclamation No. 4074, 86 Fed. Reg. 15724 (Aug. 17, 1971), *reprinted in* 85 Stat. 926 (1971).

<sup>4</sup> See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). For the proposition that a suspension may allow the executive to do more, see John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 229–30 (2004) (suggesting that Suspension Clause might be interpreted as “spell[ing] out” a “sort of emergency government”).

<sup>5</sup> U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, . . .”).

<sup>6</sup> President Lincoln couched the President’s power to act in an emergency as an obligation. In discussing his decision to suspend the writ of habeas corpus without congressional approval, he said:

[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official

This idea has deep roots in our constitutional tradition. In 1824, Justice Story wrote:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.<sup>7</sup>

Yet Story's description is incomplete: Are we really to accept that the executive may take action authorized neither by the Constitution nor by statute?<sup>8</sup> If this is the case, are there any limits on what actions the President may take? How can such boundaries be policed?

This Note agrees with Justice Story that the executive must have power to act during emergencies and imagines how this implicit emergency power might be defined, and thereby limited, within the bounds of the modern administrative state. It describes an administrative body authorized to decide whether a qualifying emergency exists, thereby legalizing executive action rationally related to that emergency. It examines in tandem the two great twentieth-century distortions of the traditional separation of powers—the expansion of the executive power and the expansion of the administrative state—and posits how the latter might serve as a check on the former. It aims to expose the manifold flaws in our current legal and political dialogue regarding executive emergency power by proposing a solution; but this solution is unlikely to come into being at any time in the near future. For that reason, this Note is best viewed as a thought experi-

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oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?

Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *LINCOLN ON DEMOCRACY* 218 (Mario M. Cuomo & Harold Holzer eds., 2004).

<sup>7</sup> *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824). More recently, Justice Souter hypothesized that the President might have the power to violate the law “in a moment of genuine emergency, when the Government must act with no time for deliberation, . . . [and] there is reason to fear [that a citizen] is an imminent threat to the safety of the Nation and its people.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Significantly for the purposes of this Note, however, he noted that if there is such “an emergency power of necessity [it] must at least be limited by the emergency.” *Id.* But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (rejecting argument that President possesses emergency powers to act without statutory authority “[i]n view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers . . .”).

<sup>8</sup> See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *COLUM. L. REV.* 1, 33 n.157 (accepting proposition that government will act in emergencies, “when the dominant interests so require,” but continuing inquiry as to whether emergency power is extra-constitutional). The question was famously addressed by Justice Jackson's concurrence in *Youngstown Sheet & Tube Co.*, 343 U.S. at 582 (1952) (Jackson, J., concurring), a case with which this Note will engage in Part III.

ment, although it is my hope that the reader will consider its real-world implications.

While this Note was in development, Sanford Levinson and Jack Balkin circulated a paper considering the problem of “constitutional dictatorship” and proposing a wide variety of potential solutions, among which appears a brief mention of an administrative structure analogous to the one proposed here.<sup>9</sup> Levinson and Balkin canvass theorists who have addressed executive emergency power in the past and explore how the contemporary American Presidency and administrative state seem, in various ways, to be “constitutional dictatorships.” Although they focus specifically on the presidencies of George W. Bush and Barack Obama, they suggest various structural remedies that might “head[ ] off the dangers of constitutional dictatorship . . . .”<sup>10</sup> They mention the possibility of an independent executive agency authorized to issue a formal declaration of emergency.<sup>11</sup> This piece significantly expands upon that idea. It explores how such an agency would actually look, how it would interact with extant legal and constitutional doctrines, and why it may be preferable as a solution.

Part I looks to John Locke for the theoretical underpinnings of the President’s discretionary power to act in situations for which Congress could not have planned. Part I then defines the interval between an emergency and congressional action as an “emergency moment” and explores existing, flawed models of the legality of emergency action. In Part II, this Note imagines a statutory solution to the currently unbounded nature of the emergency power. It proposes a Federal Emergency Board—an independent executive agency authorized, in the wake of a great national catastrophe, to perform only one binary function: deciding whether or not an emergency exists. The declaration of an emergency would formally shift the legal regime governing the actions taken in response to the emergency: Only with a declaration from this body would the executive be entitled to rely on the exigencies of the situation to justify action not previously authorized by Congress. Part III explores in depth the constitutional and legal questions surrounding this proposed administrative body, as well as the remedies that would be available to individuals whose rights were violated as a result of authorized executive action.

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<sup>9</sup> Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design* 94 MINN. L. REV. 1789, 1862–63 (2010).

<sup>10</sup> *Id.* at 1858. They discuss implementing a parliamentary system, *id.* at 1858–59, repealing the Twenty-Second Amendment, *id.* at 1859–60, and adding a no-confidence vote to our system. *Id.* at 1860–61.

<sup>11</sup> *Id.* at 1864–65.

## I

## THE EMERGENCY MOMENT

During discrete moments of true emergency, the government must take immediate action to protect its citizens. As Justice Holmes put it, “it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”<sup>12</sup> Yet deciding what constitutes a true emergency and determining what government action is justified by that emergency are not simple questions, nor is determining when the emergency moment has passed. To answer these questions, this Part looks to John Locke’s writings, which it then contrasts with contemporary understandings of emergency power and its temporal and legal limitations.

*A. Locke’s Federative Power*

The Framers of the United States Constitution drew heavily on the ideas of Baron de Montesquieu,<sup>13</sup> who observed that governments exercise three distinct types of power—executive, legislative, and judicial—and suggested that these should be divided among three branches of government.<sup>14</sup> However, Montesquieu’s theory, which was built upon the earlier work of John Locke, obfuscated a fourth power identified by Locke.<sup>15</sup> According to Locke, the power of executing the laws is conceptually separate from the “federative power,” his term for the power over foreign relations, although both are exercised by the executive branch.<sup>16</sup>

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<sup>12</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

<sup>13</sup> See generally THE FEDERALIST NO. 47 (James Madison) (explaining how proposed Constitution satisfies Montesquieu’s demand for separation of powers into three branches of government).

<sup>14</sup> BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156–57 (Anne M. Cohler, Bassia C. Miller & Harold S. Stone trans. & eds., Cambridge 1989).

<sup>15</sup> VILE, *supra* note 1, at 95–96. Vile notes that defining the discretionary (federative) power as part of the executive power “obscures the fact that in large areas of government activity those responsible for day-to-day government decisions will not be ‘executing the law’ but exercising a very wide discretion.” *Id.* at 96. For an argument that the Framers viewed the executive’s power as no broader than the power to execute Congress’s laws, see Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 334 (1952).

<sup>16</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 147, at 77 (C.B. Macpherson ed., Hackett 1980) (1690). Note that the federative power is distinct from the executive’s prerogative power, which Locke describes in a separate section of the Treatise. *Id.* § 160, at 84. The prerogative power has been described as the “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.” JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 81–82 (2007) (arguing that Bush Administration implicitly relied upon prerogative power in justifying executive action). This concept is frequently invoked in

Locke's executive power concerns only the implementation of the laws within the society.<sup>17</sup> These are the *ex ante* laws that govern the behavior of citizens, ensuring that they are aware of the legality or illegality of their actions.<sup>18</sup> The federative power, in contrast, is the power over "all the transactions, with all persons and communities without the common-wealth . . . ."<sup>19</sup> While the wielder of executive power acts according to a set of prospectively-defined rules, the wielder of federative power reacts *ex post*, because the exercise of federative power responds to actors exogenous to the legal system. This function is "much less capable to be directed by antecedent, standing, positive laws, than the *executive* . . . ."<sup>20</sup> As a result, the power must "be left in great part to the prudence" of those who wield it.<sup>21</sup> The federative power entails discretion, while the executive power does not.<sup>22</sup> Thus, by necessity, the exercise of the federative power stands outside the three-pronged rule process. The legislature cannot anticipate all the scenarios that may arise in international affairs, and the government must have some other, reactive power; it must not be paralyzed when unanticipated events occur in the international arena.

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support of executive unilateralism. See Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 305 (2009). Locke, however, justified the prerogative power also in terms of the inability of other branches of government to act expeditiously. LOCKE, *supra*, § 160, at 84 (reasoning that "since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution," executive branch must have prerogative power).

Although the interrelationship between Locke's understanding of these two concepts is no doubt worthy of study, this Note employs the federative power alone as its theoretical framework, despite its focus on the domestic context. See Levinson & Balkin, *supra* note 9, at 1801–02 (discussing Locke's view of prerogative power and contrasting it with Machiavelli's).

<sup>17</sup> LOCKE, *supra* note 16, § 151, at 78–79 (explaining that executive has no power other than through law).

<sup>18</sup> See *id.* § 137, at 72 (describing laws as society's mechanism for pre-committing itself in order to "preserve [ ] lives, liberties and fortunes, and by *stated rules* of right and property to secure [ ] peace and quiet").

<sup>19</sup> *Id.* § 146, at 76.

<sup>20</sup> *Id.* § 147, at 77. Further, even where legislators enact *ex ante* statutes meant to guide reactive executive action, those statutes contain "vague standards that defy judicial enforcement *ex post*." Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, at 21 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 440, 2008), available at <http://ssrn.com/abstract=1301164>.

<sup>21</sup> LOCKE, *supra* note 16, § 147, at 77.

<sup>22</sup> See VILE, *supra* note 1, at 67 (asserting that fact that executive and discretionary powers are "very distinct and very different functions cannot be too strongly emphasized").

Locke does not suggest that the executive is uniquely competent to wield this power. Rather, he argues that the executive power and the federative power must be placed in the same hands because the existence of two separate entities commanding such substantial authority “would be apt some time or other to cause disorder and ruin” when the two disagreed.<sup>23</sup> Furthermore, while both the federative and the executive power are subordinate to the legislature,<sup>24</sup> the legislature is not always in session. Since the executor of the laws must always be operative,<sup>25</sup> she is better situated to wield the federative power whenever it might be called for. In sum, pragmatic necessity justifies lodging discretionary power over foreign affairs in the executive branch. Because the legislature cannot be relied upon to provide responses to international events either before or immediately after they occur, the executive branch must be granted the discretion to react.

### *B. Defining the Emergency Moment*

Locke’s rigid separation between the executive and federative powers was not incorporated in the American Constitution.<sup>26</sup> Nonetheless, Locke’s distinction provides a useful lens through which to examine the nature of emergency moments. His basic insight was that the justification for executive discretion is rooted in the inability of the normal rule process to govern—even in the domestic sphere—when exogenous, unanticipated events require reaction.<sup>27</sup> The President’s discretionary power exists in order to handle situations that *cannot* be governed by pre-existing, positive law, suggesting a strong temporal limitation on that power: The executive may act unilaterally not until a crisis is completely over, but only until enough time has passed for Congress to weigh in.<sup>28</sup> Locke described the executive as having broad power to act for the good of the society “where the municipal law has given no direction, till the legislative can conveniently be assembled to

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<sup>23</sup> LOCKE, *supra* note 16, § 148, at 77.

<sup>24</sup> *Id.* § 153, at 79–80.

<sup>25</sup> *Id.* § 153, at 79.

<sup>26</sup> VILE, *supra* note 1, at 95. Indeed, the Framers allocated portions of the federative power to Congress. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 746 n.177 (2008).

<sup>27</sup> LOCKE, *supra* note 16, § 147, at 77.

<sup>28</sup> *Cf.* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1044 (2004) (urging “liberal constitutionalists [to] view the state of emergency as a crucial tool enabling public reassurance in the short run without creating long-run damage to foundational commitments to freedom and the rule of law”).

provide for it.”<sup>29</sup> This interval between the arrival of a new state of affairs and a legislative reaction is the emergency moment with which this Note is concerned.

Under this definition, a state of emergency will necessarily be finite.<sup>30</sup> A long-term period of heightened security concerns is not an emergency. It is instead a new norm, completely “capable to be directed by antecedent, standing, positive laws”<sup>31</sup> passed by Congress. Thus, for instance, the so-called War on Terror, now in its ninth year, cannot be categorized as an emergency justifying extraordinary deference to the President’s discretion.

The Supreme Court recognized this temporal limitation in *Boumediene v. Bush*.<sup>32</sup> There, the Court addressed the constitutional bounds of the President’s discretionary authority to detain in the absence of a suspension of habeas corpus.<sup>33</sup> While allowing that the Executive may detain an individual for a reasonable amount of time before that individual is entitled to the writ,<sup>34</sup> the Court held that the six years of detention that had elapsed for some petitioners without review by a court had surpassed this limit.<sup>35</sup> By the time the *Boumediene* decision was issued, the September 11 attacks were nearly seven years in the past. The Court was unwilling to find that the Constitution’s separation-of-powers scheme was suspended as a result of that moment of crisis. Here, though, Congress *had* authorized the executive action, attempting to strip habeas from the detainees through means other than suspension of the writ.<sup>36</sup> This bilateral agreement makes the Court’s enforcement of the temporal limitation

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<sup>29</sup> LOCKE, *supra* note 16, § 159, at 84.

<sup>30</sup> Contrast this notion with the nearly twenty-five-year official state of emergency that began with Truman’s 1950 Declaration. Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1017 (2004).

<sup>31</sup> LOCKE, *supra* note 16, § 147, at 77.

<sup>32</sup> 128 S. Ct. 2229, 2262 (2008); *see also* *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (overturning Hawaiian civilians’ convictions by military tribunal where crimes were non-war-related and occurred eight months or more after attack on Pearl Harbor).

<sup>33</sup> The Court held that the Constitution guaranteed habeas rights to detainees held at Guantánamo. It then turned to addressing whether the Combatant Status Review Tribunals created by the executive branch provided an adequate substitute for a habeas proceeding before an Article III court. *Boumediene*, 128 S. Ct. at 2262–76.

<sup>34</sup> *Id.* at 2275–76.

<sup>35</sup> *Id.* at 2275.

<sup>36</sup> *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, 2741–42 (codified at 28 U.S.C. § 801 note (2006)) (example of such means); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241 (2006)) (same).

even more significant; it held that not even Congress can extend the period of executive discretion indefinitely.<sup>37</sup>

The emergency moment is limited not only temporally, but also spatially. When the executive acts abroad in reaction to an emergency, that action inevitably bears resemblance to military strategy. This resemblance may be absent at home. Although the exact contours of the Commander-in-Chief power in the domestic context are a subject of great debate, it is sufficient to observe here that it is far less likely to be a constitutional trump card within sovereign territory.<sup>38</sup> Since this Note focuses on the nature of emergency power that is *not* explicitly authorized by the Constitution, it brackets the question about the boundaries of the Commander-in-Chief power by focusing purely on the domestic context, where readers are least likely to view the Commander-in-Chief power as explicit authorization for discretionary executive action.<sup>39</sup> Further, because the three-step rule process described above<sup>40</sup> exists primarily to lay out the legal framework *within* the United States, it is inside of those borders that discretionary executive action will represent the grossest deviation from the legal norm. Still, in our globalized and networked world, this Note concedes the point that it is not always possible to neatly separate the domestic and international elements of an emergency response. This Note nonetheless focuses on the domestic context, leaving questions of cross-border entanglement for another day.

These temporal and spatial limits do not provide an answer to the fundamental, substantive question: What types of crises can constitute emergencies justifying the use of discretionary executive action? Emergency conditions have been described as those “which have not attained enough . . . stability or recurrency to admit of their being

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<sup>37</sup> In this way, *Boumediene* fulfills Samuel Issacharoff and Richard Pildes’s prediction that, in wartime, courts will act to protect the separation of powers rather than to secure individual liberties directly. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQ. L. 1, 5 (2004). But this institutional process account applies only when the three-pronged rule process is in effect; that is, it does not apply to moments of true exigency in which the President, by necessity, utilizes the prerogative power.

<sup>38</sup> Of course, as the recent Guantánamo cases have demonstrated, the boundary between sovereign and non-sovereign territory may itself be unclear. See *Boumediene*, 128 S. Ct. at 2258–59, 2261–62 (declining to treat Guantánamo Bay as foreign territory, given history and terms of United States’s lease).

<sup>39</sup> But see David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander in Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 17, 17–18 (2006) (pointing out that President George W. Bush continued to assert Commander-in-Chief authority to conduct domestic wiretapping without court approval even though Congress had outlawed such practices).

<sup>40</sup> See *supra* note 1 and accompanying text.

dealt with according to rule.”<sup>41</sup> Such emergency situations have been divided into three categories: grave political crises (encompassing wars, terrorist attacks, riots, and rebellions), economic crises, and natural disasters.<sup>42</sup> Although there are important differences among these three types of crises, for the purposes of this Note, any of them may constitute an emergency as each may require an immediate domestic response before Congress can be adequately consulted.<sup>43</sup> This Note will focus primarily on political crises, which have been the subject of much of the relevant literature and jurisprudence. The concern about the unbounded nature of executive emergency power that motivates this Note arises, in substantial part, in reaction to the post-September 11 bleeding of the President’s Commander-in-Chief power into the domestic context.<sup>44</sup> However, its framework, and its proposed solution, should be applicable in all three kinds of emergency situations.

### C. *Emergency Discretion: Legal or Extra-Legal?*

The federative power described by Locke is extra-legal, allowing for executive action unauthorized by law but justified by necessity.<sup>45</sup> The Framers shared this notion, believing that, when forced by an emergency, the President could take unlawful action and expect subsequent approval from Congress to legalize it.<sup>46</sup> Their understanding

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<sup>41</sup> EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 3 (4th rev. ed. 1957).

<sup>42</sup> Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1025 n.44 (2003).

<sup>43</sup> *But see id.* at 1026 (asserting that “an economic crisis usually allows (but does not have to allow) for longer response periods, thus enabling interbranch action”). For an argument that Roosevelt responded to the Great Depression as if it were a foreign enemy, see Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 *TEX. L. REV.* 67, 70–76 (1983).

<sup>44</sup> See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 *U. PA. L. REV.* 675, 720–25 (2004) (arguing that War on Terror’s blurring of boundaries between zones of conflict and zones of peace has “potentially breathtaking domestic consequences”); Cole, *supra* note 39, at 17–18 (describing Bush argument that Commander-in-Chief power justifies domestic wiretapping without court approval); Stephen I. Vladeck, *Congress, the Commander in Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 933, 953–55 (2007) (describing Bush administration attempt to exercise “Commander in Chief override” to invalidate statutory limitations on domestic wiretapping).

<sup>45</sup> LOCKE, *supra* note 16, at 77, § 147; see also Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1392 (1989) (arguing that several of Thomas Jefferson’s exercises of presidential power were consistent with Locke’s views on executive prerogative).

<sup>46</sup> See, e.g., 16 *ANNALS OF CONGRESS* 516 (1807) (reporting speech of Representative Bidwell, who observed that when President engages in “acts not provided for by any law . . . he must act under a high responsibility, and throw himself upon the justice of his

prevailed throughout the eighteenth and nineteenth centuries,<sup>47</sup> and it had two major advantages. First, it ensured that the President would take care to act only when he felt assured of popular and congressional support for his actions.<sup>48</sup> Second, it preserved a “boundary line separating and protecting the normal constitutional order from the dark world of crisis government,” preventing an emergency response from setting a precedent that could justify action in non-emergency periods.<sup>49</sup> However, this view of the discretionary power has one major drawback: It guarantees that the rule of law will be suspended altogether in moments of emergency.<sup>50</sup>

Fear of the corrosive effects of such moments of suspension led Niccolo Machiavelli to argue in favor of the opposite approach: The exercise of emergency powers should be defined as lawful.<sup>51</sup> He wrote:

[I]f a usage is established of breaking institutions for good objectives, then under that pretext they will be broken for evil ones. So that no Republic will be perfect, unless it has provided for everything with laws, and provided a remedy for every incident, and fixed the method of governing it.<sup>52</sup>

Since it may be anticipated that the government will at some point exercise discretionary emergency powers, these powers must be

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country”); *GAZETTE OF THE UNITED STATES* (Philadelphia), Mar. 9, 1793, at 321 (reporting speech of William Smith of North Carolina, suggesting deviations from law in time of emergency ought to be tested on their own “merits or demerits”); *see also* Barron & Lederman, *supra* note 26, at 746 (asserting historical understanding that, after acting extraconstitutionally in moment of crisis, President should “publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public”); Monaghan, *supra* note 8, at 25 (stating Framers’ understanding that, while “emergency could not justify presidential conduct, the President and his subordinates could expect indemnification”); Wilmerding, *supra* note 15, at 324 (arguing that Framers, without exception, held this view).

<sup>47</sup> Lobel, *supra* note 45, at 1397.

<sup>48</sup> *See* Gross, *supra* note 42, at 1024 (arguing that executive actor’s uncertainty about whether action will be ratified *ex post* raises costs of choosing extralegal action); Wilmerding, *supra* note 15, at 329 (pointing out that officer who must seek *ex post* approval will be very careful to make sure her excuse is invincible).

<sup>49</sup> Lobel, *supra* note 45, at 1388; *see* Wilmerding, *supra* note 15, at 330 (warning that “an act legally done can always be drawn into precedent”).

<sup>50</sup> I use “rule of law” in the formalist sense, to mean only that “the government shall be ruled by the law and subject to it.” Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* (1979), *reprinted in* *READINGS IN THE PHILOSOPHY OF LAW* 13, 14 (Keith Culver ed., 1999).

<sup>51</sup> J. MALCOLM SMITH & CORNELIUS P. COTTER, *POWERS OF THE PRESIDENT DURING CRISIS* 8 (1972).

<sup>52</sup> 1 NICCOLO MACHIAVELLI, *DISCOURSES UPON THE FIRST TEN (BOOKS) OF TITUS LIVY* bk. I, ch. 34 (Jon Roland ed., Henry Neville trans., 1675) (1517), *available at* [http://www.constitution.org/mac/disclivy\\_.htm](http://www.constitution.org/mac/disclivy_.htm).

defined to be legal, lest their exercise wear away at society's commitment to the rule of law.<sup>53</sup>

During the course of the twentieth and twenty-first centuries, American attitudes towards emergency power seem to have moved away from the Framers' view and toward Machiavelli's.<sup>54</sup> No longer do we assume that executive action taken without explicit Congressional authorization is illegal until retroactively cured. Indeed, Justice Jackson explicitly rejected this assumption in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>55</sup> as this Note later discusses in greater detail.<sup>56</sup> Rather, as American involvement abroad has engendered a sense of perpetual crisis, and as the growth of the administrative state has habituated Americans to discretionary executive action in many policy areas, presidential emergency power is increasingly discovered within Article II of the Constitution, so that the President is never formally said to be acting outside the laws.<sup>57</sup> Yet, without a fixed notion of the temporal and spatial limits of this emergency power, the evolving constitutionalization of emergency government cannot serve the boundary-defining function that Machiavelli envisioned.<sup>58</sup> That is, while finding justification for emergency action in the Constitution solves the rule-of-law aspects of the dilemma, it cannot, without more, help us cabin the exercise of executive power.

Neither the extra-constitutional nor the constitutional model of emergency power is entirely satisfying in the American context. Although the former ideally incentivizes presidential restraint, it creates the morally and legally discouraging necessity for the President,

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<sup>53</sup> See Levinson & Balkin, *supra* note 9, 1801 (reading Machiavelli as demanding that constitutions "include ways of responding to emergencies that do not require political leaders to choose between Scylla and Charybdis: the disaster caused by hyperfidelity to legal constraints or the destruction of republican government by recourse to out-and-out illegality").

<sup>54</sup> Posner and Vermeule characterize this shift in attitude as a move from "Madisonian" to "Schmittian" ideas. Posner & Vermeule, *supra* note 20, at 3. In their view, the Framers shared Locke's view that the President could take interim emergency measures only until Congress convenes. Within the administrative state, by contrast, rational legislators and judges have no real choice but to "delegate sweeping power to the executive to cope with the crisis." *Id.* at 16. In so arguing, Posner and Vermeule build on the ideas of Weimar jurist Carl Schmitt.

<sup>55</sup> 343 U.S. 579 (1952) (Jackson, J., concurring).

<sup>56</sup> See *infra* Part III.C.

<sup>57</sup> See Lobel, *supra* note 45, at 1404 ("The effect of both the ideology and reality of permanent crisis has dramatically transformed the constitutional boundaries between emergency and non-emergency powers.").

<sup>58</sup> Indeed, Machiavelli urged resort to the model of the Roman dictator, whose appointment expired after a predetermined period of time. MACHIAVELLI, *supra* note 52, at bk. II, ch. 34.

the chief executor of our laws, to act illegally in an emergency.<sup>59</sup> Further, the notion that retrospective legislation can expunge that illegality seems like a clear cheat—either a prohibited *ex post facto* law<sup>60</sup> or an exercise of the Article II pardon power.<sup>61</sup> The constitutional model, however, creates problems with or without an amendment granting the President the power to act in an emergency. Without an amendment, the emergency power expands inexorably; the executive seems to define the emergency and the actions it justifies without fear of interference from the courts.<sup>62</sup> However, it is difficult to believe that the passage of a constitutional amendment would *increase* the degree of oversight exercised by the courts; consider, by way of comparison, constitutionally protected habeas corpus rights, which the Supreme Court assiduously avoided declaring to be required by the Constitution for close to two and a quarter centuries.<sup>63</sup> Thus, regardless of whether the Constitution provides explicit authorization, the constitutional model provides the executive with a level of discretionary authority that perverts the separation of powers and raises the specter of tyranny with which Machiavelli was concerned.

This Note will now turn to the construction of a third way through this dilemma. It will describe a statutory scheme that builds on the possibilities of the administrative state while remaining mindful of the constraints of constitutional law. It aims to satisfy Machiavelli's desire for legalized, bounded emergency power while simultaneously ensuring presidential reluctance to exercise that power, except in true moments of emergency.

## II

### THE FEDERAL EMERGENCY BOARD

Any attempt to legalize executive emergency power must be particularly careful to build in safeguards against abuse, since it will pro-

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<sup>59</sup> This is true despite the fact that executive branch officials will seek to justify their actions through “vague claims of inherent power” or “creative readings of old statutes.” Posner & Vermuele, *supra* note 20, at 22.

<sup>60</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>61</sup> *Id.* art. II, § 2, cl. 1.

<sup>62</sup> See Lobel, *supra* note 45, at 1418–21 (discussing War on Drugs and Iran-Contra Affair as examples of executives asserting expanded emergency powers); Levinson & Balkin, *supra* note 9, at 1844 (finding that, in United States, “emergency powers usually do not evaporate after a limited time, but rather become part of the basic statutory framework”).

<sup>63</sup> Indeed, the 2008 decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), was the Court's first formal recognition of a constitutional right to the remedy of judicial inquiry into the legality of detention. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 48 (5th ed. Supp. 2008).

vide the President with legal cover for the exercise of enormous discretion, albeit for a highly limited period of time. This Part explains the deficiencies of the extant statutory regime around emergency moments, and imagines a Federal Emergency Board (FEB), insulated from political pressure, that would legally authorize discretionary executive power during finite moments of true emergency so long as any discretionary action is rationally related to the emergency.<sup>64</sup>

### A. *Shortcomings of the Extant Statutory Regime*

Since the era of Woodrow Wilson, American presidents have issued proclamations unilaterally declaring the country to have entered an emergency.<sup>65</sup> In 1973, a Senate special committee studying emergency powers identified 470 statutes that delegated to the President special authority to handle a wide variety of emergencies.<sup>66</sup> Congressional dissatisfaction with the expansion of executive power, particularly over the conduct of the Vietnam War,<sup>67</sup> soon led to the passage of the National Emergencies Act (“NEA”).<sup>68</sup> The NEA standardized and formalized the procedure for declaring emergencies that would trigger enhanced executive power under any of these hundreds of statutes. It provides:

- (a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.
- (b) Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter.<sup>69</sup>

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<sup>64</sup> See *infra* Part III.A for an explanation of the rational relationship test.

<sup>65</sup> HAROLD C. RELYEA, CONG. RESEARCH SERV., NATIONAL EMERGENCY POWERS 7 (2007), available at <http://www.fas.org/sgp/crs/natsec/98-505.pdf>.

<sup>66</sup> *Id.* at 3 (citing S. REP. NO. 93-549 (1973)); see Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. §§ 1-44 (2006)). Wilson’s first proclamation concerned wartime water transportation policy. Proclamation, 39 Stat. 1814 (1917) (repealed by 41 Stat. 1359 (1921)). The second proclamation, issued by Roosevelt, declared the bank holiday, an attempt to implement New Deal regulation of financial institutions. Proclamation, 48 Stat. 1689 (1933). This emergency continued in one form or another (and sometimes several), see, e.g., Pub. L. No. 73-1, 48 Stat. 1, 7-9 (1933), through the passage of the National Emergencies Act.

<sup>67</sup> RELYEA, *supra* note 65, at 1, 9.

<sup>68</sup> Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C §§ 1601, 1621, 1622, 1631, 1641, 1651 (2000)).

<sup>69</sup> 50 U.S.C. § 1621 (2006).

Yet, as discussed below in Part II.B, the NEA was flawed from the outset, as it left the power to declare the emergency in the hands of the executive, whose authority would increase as a result of the declaration.

Under the NEA, termination of an emergency can occur in several ways. First, the President may issue a proclamation terminating the emergency.<sup>70</sup> Second, Congress can end it by passing a joint resolution—significantly harder to achieve.<sup>71</sup> This was originally done through the legislative veto, but that mechanism was found to be unconstitutional in 1985.<sup>72</sup> Finally, the emergency lapses at the end of one year, unless the President again publishes the proclamation of the emergency in the Federal Register in the months leading up to the anniversary.<sup>73</sup> The NEA, then, does attempt to delimit the interval of emergency during which the executive can exercise extraordinary powers. Nonetheless, these intervals tend to be much longer than necessary for Congress to respond; as of January, 2006, forty-six states still had states of emergency in effect related to Hurricane Katrina, which had struck the Gulf Coast five months earlier.<sup>74</sup>

Numerous statutes provide for declarations of emergency, using procedures laid out in the NEA. One example is the Disaster Relief and Emergency Assistance Act of 1974 (“Stafford Act”),<sup>75</sup> under which President Bush declared an emergency after Hurricane Katrina.<sup>76</sup> The Stafford Act defines an emergency as any occasion “for which, *in the determination of the President*, Federal assistance is needed . . . 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.”<sup>77</sup> Given the breadth of the definition, the President’s discretion here is substantial, and once he has declared such an emergency, he can determine how and where federal money will be spent—a power that would otherwise belong to Congress.<sup>78</sup>

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<sup>70</sup> *Id.* § 1622(a)(1).

<sup>71</sup> 50 U.S.C. § 1622(a)(1) (2006); Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 845 n.42 (2005).

<sup>72</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>73</sup> 50 U.S.C. § 1622(d) (2006).

<sup>74</sup> Scheppele, *supra* note 71, at 841.

<sup>75</sup> Pub. L. No. 100-707, 102 Stat. 4689 (codified at 42 U.S.C. §§ 5121–5207 (2006)).

<sup>76</sup> See White House Statement on Federal Emergency Assistance for Louisiana (Aug. 27, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/08/20050827-1.html> (reporting declaration of emergency authorized by Title V of Stafford Act); see also FEMA Disaster Assistance Policy 1004 (May 15, 2007), available at [http://www.fema.gov/pdf/hazard/major\\_disaster\\_requests.pdf](http://www.fema.gov/pdf/hazard/major_disaster_requests.pdf) (citing Stafford Act as authority for declarations of emergency).

<sup>77</sup> § 103, 102 Stat. at 4689 (codified at 42 U.S.C. § 5121) (emphasis added).

<sup>78</sup> See Scheppele, *supra* note 71, at 843.

This is precisely the kind of concentration of authority that the separation of powers exists to prevent and one that would disappear if my proposed FEB replaced the NEA regime.

*B. Heteroinvestiture: A Structural Lesson from Ancient Rome*

The chief virtue of allowing emergency action to remain in the murky realm of the extra-constitutional is that a President is unlikely to take an illegal action unless it seems absolutely necessary.<sup>79</sup> If emergency action is to be brought under the rule of law, separation of powers principles must perform that checking function. In order for the FEB to accomplish this goal, it would employ the principle of heteroinvestiture<sup>80</sup>—the rule that the party declaring the emergency must be completely separate from the party who gains power as a result of the emergency.<sup>81</sup>

Heteroinvestiture was a guiding principle in the ancient Roman republic. There, at a moment of crisis, the Senate could direct consuls to appoint a dictator, who ruled with nearly absolute power for a pre-determined period of six months.<sup>82</sup> None of his actions retained legal effect after the termination of his period of service. An American structure must echo this heteroinvestiture in order to ensure that legalization of emergency discretion would not allow the President to act without Congressional approval whenever she believed it to be expedient.<sup>83</sup>

Heteroinvestiture is satisfied by normal separation of powers principles when Congress passes a law authorizing the President to exercise new powers in response to a crisis because Congress defines the powers and can place limits on the interval during which they may be exercised. Then, the President is unable to “suit the law, both in its making, and execution, to [his] own private advantage.”<sup>84</sup> However,

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<sup>79</sup> See *supra* note 48.

<sup>80</sup> This useful term was coined by Ferejohn and Pasquino, *supra* note 4. Levinson and Balkin discuss the Roman structure briefly. Levinson & Balkin, *supra* note 9, at 1844 (“Noteworthy in the Roman dictatorship is the division of labor between the body that declared the existence of an emergency and the person who held emergency powers.”).

<sup>81</sup> Ferejohn & Pasquino, *supra* note 4, at 218. As Carl Schmitt put it succinctly, “[s]overeign is he who decides on the exception.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 1 (George Schwab trans., MIT Press 1985) (1922).

<sup>82</sup> Ferejohn & Pasquino, *supra* note 4, at 211–12. For an in-depth discussion of the dictatorship, see CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 15–28 (1948).

<sup>83</sup> See Monaghan, *supra* note 8, at 35–36 (expressing concern that judicial recognition of presidential emergency power would amount to routine discretionary authority in President).

<sup>84</sup> LOCKE, *supra* note 16, § 143, at 76.

once such a delegation has occurred, the “emergency moment” has passed, as Congress has had an opportunity to act.<sup>85</sup>

What is needed, then, is some faster-acting body empowered to temporarily authorize the use of presidential emergency powers until Congress can pass new legislation, thereby ending the emergency moment. Heteroinvestiture demands that the FEB be structured so its members do not stand to gain personally from the expansion of executive power and are not tools of the President’s political agenda. These organizing principles point towards a structure already conceived by Congress and approved as constitutional by the Supreme Court nearly eighty years ago: the independent executive agency.<sup>86</sup> This Note will now explore what such a Federal Emergency Board might look like.

### *C. Structure and Function of the Federal Emergency Board*

With multiple mechanisms in place to ensure that the board members remain independent of the President, and that the Board has no opportunity to expand its own power during moments of emergency, the FEB would function like the Roman consuls, initiating and legalizing the exercise of emergency powers from a position of relative disinterest. The FEB would employ a structure similar to the Federal Reserve Board (“Fed”),<sup>87</sup> a model that Levinson and Balkin also employ in their proposal.<sup>88</sup> Like the Fed, the FEB would consist of seven members, appointed by the President with the advice and consent of the Senate to terms of fourteen years and removable only for cause. As with the Fed, FEB members’ terms would be staggered so that no more than one would be appointed in any two-year period, and no member could be reappointed after completion of a full term. These requirements, combined with the restriction that the President could remove a member only for cause, are designed to ensure that the FEB remains independent of the political agenda of the sitting President.<sup>89</sup>

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<sup>85</sup> See *supra* notes 28–30 and accompanying text.

<sup>86</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). Such agencies include the Federal Communications Commission, the Federal Reserve Board, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission. For a full list of the traditional independent agencies, see STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 118 (5th ed. 2002).

<sup>87</sup> 12 U.S.C. §§ 241–42 (2006).

<sup>88</sup> Levinson & Balkin, *supra* note 9, at 1864–65.

<sup>89</sup> The argument has been made that “[t]here is no such thing in Washington as a politically ‘independent’ agency.” Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 *YALE L.J.* 541, 583 (1994). That contention, however, usually rests on the proposition that independent agencies remain under the sway of Congress. *Id.* at 582–83; see also Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 *HARV. L. REV.* 1328, 1341 (1994) (“Because

In order to further ensure the independence of the board members, the FEB statute would include some additional safeguards not incumbent upon the Fed, which Levinson and Balkin do not consider. First, it would mandate that an authorization for the use of emergency powers pass with no less than five votes, thereby preventing emergency status from being manipulated for the advantage of one political party or faction.<sup>90</sup> The supermajority requirement means that, where the FEB is evenly divided as to whether a situation justifies the use of discretionary executive power, such discretion will not be authorized. To guarantee additional independence, no more than four members of the board could belong to any one political party.<sup>91</sup> Finally, to maximize the likelihood that the members could be assembled immediately in a crisis, at least five of them would be required to reside within twenty miles of Washington, D.C.<sup>92</sup>

There are various ways to imagine who would sit on the Board. The guiding principle is that the less political an individual is, the more she can be trusted to vote in the interest of the nation, rather than in the interest of her own political career. Disinterest is crucial for the core, heteroinvestitive purpose of the body. Therefore, no member of the FEB could be appointed while simultaneously holding federal elected office. Although there is an argument to be made that political accountability might be important for a body making such a weighty decision, the very purpose of the FEB is to remain above politics. Thus, the supermajority requirement and the brief duration of the grant, discussed further below, serve as *ex ante* safeguards in lieu of *ex post* electoral accountability.

Furthermore, the Constitution prohibits various political actors from participating in such a board. Members of Congress could not

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[independent] agencies cannot engage in logrolling, committees in Congress gain relative influence.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2271 n.93 (2001) (“[S]uccessful insulation of administration from the President—even if accomplished in the name of ‘independence’—will tend to enhance Congress’s own authority over the insulated activities.”). If the FEB were functionally responsive to congressional concerns, heteroinvestiture would still be satisfied, and the FEB would still serve a valuable purpose. *But see* BREYER ET AL., *supra* note 86, at 119–20 (suggesting that, practically speaking, President may exercise control of independent agencies through various mechanisms).

<sup>90</sup> The five-vote requirement is a supermajority requirement if all members vote or if one is absent. It is a requirement of unanimity if only five members are present. In the event of an emergency so grave that not even five members can be reached to vote, this structure fails. In such a situation, however, I assume there is no legal structure that could, practically speaking, restrain the remaining agents of the government.

<sup>91</sup> This is also a requirement of the U.S. Sentencing Commission. 28 U.S.C. § 991(a) (2006).

<sup>92</sup> For a similar requirement in the context of the Foreign Intelligence Surveillance Act (“FISA”), see 50 U.S.C. § 1803(e)(1) (2006).

constitutionally participate in the FEB: Since *Chadha*, legislators may not retain any role in the exercise of a power that Congress has delegated to another branch.<sup>93</sup> Although it is attractive to consider Article III judges as potential members<sup>94</sup> because of their existing insulation from politics, the Board's function is quasi-legislative, as this Note will explore in detail below, and judges are barred from acting in a legislative capacity.<sup>95</sup> Thus, the FEB would be composed of otherwise private citizens. Levinson and Balkin's sole suggestion about the composition of the Board is that it might include ex officio members, like former Presidents or retired Secretaries of State, in whom the public is likely to have confidence.<sup>96</sup>

Because Congress has the legal authority necessary to authorize responses to a domestic emergency,<sup>97</sup> the FEB's organic statute would merely delegate authority from Congress to this new executive agency.<sup>98</sup> The FEB would have only one decision to make: whether or not the situation facing the country presented an emergency extraordinary enough to necessitate domestic action not authorized explicitly by statute. The statute would provide the FEB with an intelligible principle in the form of rough guidelines as to what constituted a qualifying emergency. It would also instruct the FEB to act only in

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<sup>93</sup> *INS v. Chadha*, 462 U.S. 919, 954–55 (1983) (finding that, after Congress delegates to executive officer authority to make decision, “Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked”); see also *Metropolitan Washington Airports Ass'n v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (holding unconstitutional Board of Review whose members were all to be members of Congress as violative of separation of powers).

<sup>94</sup> See U.S. CONST. art. III, § 1.

<sup>95</sup> The FEB might be imagined as performing an essentially judicial function, with the declaration of emergency as a kind of warrant allowing the President to take otherwise impermissible actions if the Board is persuaded by the initial evidence. However, if it is an essentially judicial function, then judges are likely prohibited from sharing responsibility for performing it with non-judges, and thus they could not sit on the FEB with members of Congress. *Mistretta v. United States*, 488 U.S. 361, 407–08 (1989). This is not a case of judicial rulemaking, a legislative function that has nonetheless been held to belong to the judiciary. *Id.* at 386–87.

<sup>96</sup> Levinson & Balkin, *supra* note 9, at 1865.

<sup>97</sup> Monaghan, *supra* note 8, at 34–35 nn.161–64 (stating that Congress's emergency power is no longer limited by federalism and that Congress has already delegated significant emergency powers to President). Counterarguments to this proposition will be addressed in Part III, *infra*.

<sup>98</sup> Assuming that the statute provided some “intelligible principle” that would guide the FEB in making decisions, it would conform to the limited demands of the vestigial non-delegation doctrine. See *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 474–75 (2001); Monaghan, *supra* note 8, at 5 n.24 (positing that non-delegation doctrine has collapsed despite “[f]ig leaf declarations” that intelligible principle is required). The binary nature of the decision delegated to the FEB would further limit non-delegation problems. *Whitman*, 531 U.S. at 474 (“It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”).

the case of grave political crises (encompassing wars, terrorist attacks, riots, and rebellions), economic crises, and natural disasters.<sup>99</sup> Further, the FEB would be limited to acting when, in its determination, no other federal statute provided for the specific contingency at issue.

The FEB's decision would be binary: It would not be tasked with fashioning specific limitations on the use of the President's discretionary power. Like the Roman Senate's grant of power to the dictator, the FEB's authorization would last only for a predetermined period of time. Because the FEB's authorization is intended to serve only as a bridge mechanism, legalizing the President's actions in the interval before Congress can act, it would expire two weeks from the first day Congress was in session after the grant. The authorization would therefore be in effect only during Locke's "emergency moment."<sup>100</sup>

Although two weeks is likely to give Congress enough time to pass legislation in the wake of a true emergency,<sup>101</sup> it may wish to work on legislation longer. To accommodate this possibility, the organic statute would allow Congress to delegate to the FEB the opportunity to extend the grant for two weeks. That extension would be available only once, however: When Congress is given the opportunity to evade responsibility through inaction, it will often do so,<sup>102</sup> and political deadlock alone cannot be allowed to prolong the emergency moment.<sup>103</sup> If Congress does not resume, the FEB grant would last indefinitely, but this is not a serious concern. If the emergency itself has made a congressional session impossible, then the FEB has served a valuable purpose, legalizing the President's actions in a moment of true national crisis, and it is difficult to imagine a scenario in which Congress opts not to meet in order to extend the period of presidential discretion by default. However, if no quorum chose to attend Congress, the majority of attending Senators and Representatives could have their colleagues arrested and brought to the floor.<sup>104</sup>

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<sup>99</sup> See *supra* text accompanying note 42.

<sup>100</sup> See *supra* Part I.B.

<sup>101</sup> The Authorization for the Use of Military Force, for example, was passed on September 18, 2001, just seven days after the attacks of September 11. 115 Stat. 224 (2001) (codified in 50 U.S.C. § 1541 note (2006)).

<sup>102</sup> Monaghan, *supra* note 8, at 5 n.28 (citing John H. Ely, *Kuwait, the Constitution, and the Courts: Two Cheers for Judge Greene*, 8 CONST. COMMENTARY 1, 4 (1991)) ("[W]hen the President acts as a warrior-king, nothing much generally happens, because . . . Congress hides from its own constitutional responsibilities.").

<sup>103</sup> Monaghan, *supra* note 8, at 38.

<sup>104</sup> BETSY PALMER, CONG. RESEARCH SERV., VOTING AND QUORUM PROCEDURES IN THE SENATE 5 (2006), available at <http://www.senate.gov/reference/resources/pdf/96-452.pdf>.

Of course, there will be an interval immediately before, during, and after the instant of crisis during which action may be required although not even the FEB has yet been able to meet. To provide for such a scenario, the FEB statute would provide for an initial forty-eight-hour period during which the President may declare himself to be operating under an FEB-grant regime, meaning that discretionary executive action rationally related to the emergency would become legal for those two days. While this self-certification period would not be necessary in an ideal world, it accommodates the reality that emergencies are often unpredictable in scope and swift in onset, and that even an institution specifically created to authorize emergency action could not do so instantaneously.

This Note will consider the legal and constitutional meaning of that grant, an exploration not undertaken by Levinson and Balkin. In so doing, it will evaluate the likely judicial response to each piece of the FEB process.

### III

#### LEGAL AND CONSTITUTIONAL ISSUES

##### *A. Individual Rights and Remedies*

The above description of the FEB suggests that, while its authorization for use of presidential discretion is in effect, the President may take any action in response to the emergency. But does that mean there are no remedies available for individuals whose usually protected civil rights are violated as a result of the derogation? Scholars have explored this question extensively in the context of the suspension of habeas corpus. One side of the debate argues that a suspension of habeas does not legalize all executive detention and is not equivalent to an immunization for officials who violate individual rights during the suspension.<sup>105</sup> In this view, the suspension merely precludes individuals from resorting to one remedy, habeas, during the period of suspension, but it does not prevent them from seeking damages *ex post*.<sup>106</sup> The opposing view contends that the very purpose of the Suspension Clause is to allow Congress to override core due

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<sup>105</sup> See, e.g., David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 *CARDOZO L. REV.* 2005, 2032 (2006) (asserting suspension is not “a total derogation from law, but a temporary denial of access to certain parts of the law”); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 *COLUM. L. REV.* 1533, 1539 (2007) (“[T]he historic function and basic purpose of suspension is to remove a particular remedy, namely the habeas writ.”).

<sup>106</sup> Morrison, *supra* note 105, at 1575–79 (distinguishing concepts of suspension, immunity, and legality, and finding *ex post* liability may exist for detention during suspension).

process protections in times of crisis.<sup>107</sup> Thus, the right and the remedy are congruent, and otherwise impermissible executive detention is entirely legal during a suspension.<sup>108</sup>

If the FEB authorization is to solve the problem motivating its creation, the latter model must govern in the context of emergency moments: The FEB authorization must effect a full legalization of the President's action. The FEB attempts to ameliorate the concern that allowing the executive to resort to extra-legal measures is morally and legally corrosive, and if it failed to actually legalize the executive action in question, its purpose would be substantially undermined. Thus, no ex post remedies will be available to individuals whose rights were properly abrogated pursuant to the suspension. For example, an individual whose property is damaged when public health workers enter it to test for the presence of biological contaminants during the suspension would never be entitled to compensation.

This legalization framework does not imply, however, that the executive can never be held liable for action taken during the period of FEB grant. The grant does not give the President an unfettered license to violate rights; rather, it allows him to deviate from codified law to the extent necessary to prevent further damage from the emergency. Therefore, an individual could obtain damages if, during the period of the grant, she had suffered a deprivation of rights bearing no rational relationship to emergency damage control. So, for example, if an attack on the country were believed to be perpetrated by members of a certain ethnic group, and the President, motivated by political expediency, ordered government agents to intimidate innocent members of that group, a court could determine that this order bore no rational connection to the President's emergency response. Thus, a member of this ethnic group could win compensation if her property was damaged when government agents, acting on this order, ransacked her home. The rational relationship standard is, however, a

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<sup>107</sup> Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 386 (2006); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2045 n.53 (2007) (rejecting Morrison's view that "a valid suspension merely withdraws the privilege of the writ—one particular remedy for unlawful detention—while leaving detainees free to seek other remedies, such as damages"); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 86–90 (2006) (finding detention pursuant to suspension of habeas remedy to be entirely lawful). Justice Scalia appears to have embraced this view in *Hamdi*. *Hamdi v. Rumsfeld*, 542 U.S. 507, 563–64 (2004) ("When the writ is suspended, the Government is entirely free from judicial oversight.").

<sup>108</sup> Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 609, 664–82 (2008); see also *Moyer v. Peabody*, 212 U.S. 78 (1909) (holding that no damages are available against governor who detained individual pursuant to delegated power to suppress insurrection).

deferential one, allowing the President to take all responsive action he believes in good faith to be necessary. It is the many safeguards built into the FEB authorization itself, and not the rational relationship standard, that will do most to protect individual rights.

The statute would, additionally, require a presumption in favor of the government's evidence showing a rational relationship. Due process is context specific;<sup>109</sup> given that the weight of the government's national security interest during an FEB grant is exceedingly high, and the threat of liability might impede its protective action, it is important that even in *ex post* proceedings, courts proceed from the premise that executive decisions were justified. Nonetheless, during the grant, the executive branch remains fully bound by the Constitution, regardless of whether a court would impose liability for a violation of the Constitution.<sup>110</sup> Thus, the President must still obey the Constitution and all statutes except where derogation is immediately necessary to prevent chaos and loss of life.

The brief duration of the grant provides another safeguard. At the end of the emergency, when Congress passes new legislation or simply allows the grant to lapse, emergency executive discretion would terminate. Thus, if the President had seized property, that property would revert to its original ownership unless Congress authorized further seizure.<sup>111</sup> Presuming that the President had acted rationally and in good faith, damages would not be available for the seizure period, but the harm would be limited by the period for which it occurred. While this logic fails if executive action has caused death, it is almost impossible to conceive of a situation in which executing individuals, rather than merely detaining or quarantining them, is immediately necessary to contain a crisis.<sup>112</sup> Damages for destruction of property and bodily injury will be unaffected by this durational safeguard.

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<sup>109</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

<sup>110</sup> The President, then, is bound by constitutional operative propositions, as distinct from constitutional decision rules. Morrison, *supra* note 105, at 1602–04 (citing Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004)).

<sup>111</sup> Evaluation of whether the Constitution prohibits such a seizure statute is beyond the scope of this Note. For our purposes, it is sufficient to note that exigency will be somewhat reduced by the time Congress acts, and thus the Constitution may constrain statutory measures more than it constrains executive action during the FEB grant.

<sup>112</sup> A military response, always in the purview of the executive because of the Commander-in-Chief Clause, is beyond the scope of the FEB grant, which delegates to the President power previously belonging to Congress to act within sovereign American territory.

### B. Reviewability of the Board's Decision

Does the Constitution require that the FEB's decision to flip the switch remain reviewable, even if the organic statute attempted to preclude review?<sup>113</sup> Again, a comparison to the suspension of habeas corpus is helpful. One view is that the question—a determination as to whether there exists a rebellion or invasion requiring a suspension to protect the public safety—is the paradigmatic political question, reserved by the Constitution for the political branches and free from judicial review.<sup>114</sup> The opposing view holds that the Constitution's structural values demand judicial review of the decision, as nonjusticiability would prevent the court from protecting individual liberties from the vagaries of the political moment.<sup>115</sup>

In the case of the FEB grant, the existence of other safeguards—both the temporal limitation and the availability of ex post remedies in the event of unnecessary derogation—somewhat mitigates the civil liberties concern. Further, unlike a determination as to the propriety of suspension, a determination as to the propriety of an FEB authorization would rely on statutory, rather than constitutional, prescriptions. Administrative law dictates that, where an agency decides a question of fact on the record, courts will defer to the agency's decision so long as it is supported by substantial evidence in the record.<sup>116</sup> Combined with courts' reluctance to interfere with executive national security action explicitly approved by Congress,<sup>117</sup> this standard

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<sup>113</sup> Another important question is whether any individual would have standing to challenge the FEB's decision. Given the Court's skepticism toward legislative standing, as demonstrated in *Raines v. Byrd*, 521 U.S. 811 (1997), it is unlikely that dissatisfied members of Congress would be found to have standing. However, a plaintiff suing over concrete harm resulting from action taken pursuant to the FEB grant might reasonably be found to have suffered an injury in fact fairly traceable to the challenged action and likely to be redressed by a court's decision that the FEB grant was in error. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (listing requirements for standing). Thus, the political question doctrine is likely to be the most salient in determining the justiciability of a challenge to an FEB grant.

<sup>114</sup> David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405, 450 (2008).

<sup>115</sup> Tyler, *supra* note 107, at 380–81.

<sup>116</sup> Administrative Procedure Act (APA) § 706(2)(E), 5 U.S.C. § 706(2)(E) (2006); see BREYER ET AL., *supra* note 86, at 251 (explaining substantial evidence standard as “intermediate position” between deferring totally and shifting decisional responsibility to judiciary).

<sup>117</sup> See Issacharoff & Pildes, *supra* note 37, at 5–6 (observing that, at times of heightened security uneasiness, U.S. courts are concerned primarily with ensuring buy-in from both political branches and are unlikely to protect rights directly when bilateral process has occurred). Indeed, the argument has been made that judicial policing of the liberty-security trade-off is normatively undesirable, as it hinders the mechanisms by which democratic systems survive wars intact. See Samuel Issacharoff, *Democracy in Times of War*, 29 OXFORD J. LEGAL STUD. 189, 191–92 (2009).

makes review of the FEB's decision seem unlikely. Thus, the FEB authorization decision would remain insulated from judicial review unless it is completely unwarranted by the facts.<sup>118</sup>

The very limited possibilities for judicial review of the authorization, however, do not mean that the agency's power is unchecked. The agency can make only a binary decision via a supermajority vote; once it declares an emergency, the President has the power to take action only rationally related to the emergency for a very limited period of time. If an emergency were somehow declared in a set of circumstances not actually rising to that level, like a relatively minor drop in the Dow Jones Industrial Average, the executive power rationally related to that "emergency" would be seriously limited. Liability would attach *ex post* for actions which exceeded that power, and the legal regime would, in any event, expire in a matter of weeks.

### C. *Executive Defiance and the Courts*

There is one final question central to understanding the implications of the FEB: What happens if the President refuses to conform to the dictates of the FEB's organic statute? Given the history of statutory attempts to limit ever-expanding executive power that has been justified on the basis of national security, such a scenario is not difficult to imagine.<sup>119</sup>

Justice Jackson laid out a famous framework for understanding the legality of executive emergency action in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>120</sup> There, the Court struck down a Korean War-era executive order in which President Truman directed the Secretary of Commerce to seize the steel mills in order to prevent a threatened strike.<sup>121</sup> Justice Jackson's concurrence divided executive emergency action into three categories according to whether Congress had authorized the action in advance.<sup>122</sup> In the first category, wherein Congress has delegated the relevant authority to the

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<sup>118</sup> The APA provides for judicial overturning of agency decisions "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." APA § 706(2)(F). Nonetheless, the application of this standard has been substantially curtailed by the Supreme Court. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415–17 (1971).

<sup>119</sup> *See, e.g.,* Lobel, *supra* note 45, at 1414–16. The case of the National Emergencies Act, 90 Stat. 1255 (1976), is particularly relevant.

<sup>120</sup> 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>121</sup> Exec. Order 10,340, 17 Fed. Reg. 3139, 3139–42 (Apr. 8, 1952). The majority found the President's action to be authorized neither by Congress nor by the Constitution, noting that Congress had specifically considered and rejected a proposal to grant the government seizure power to settle labor disputes in case of emergency. *Youngstown*, 348 U.S. at 585–87 (citing 93 Cong. Rec. 3637–45).

<sup>122</sup> *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

President, courts presume executive action to be legitimate.<sup>123</sup> In the second, Congress has not spoken on the subject. In this “zone of twilight,” Congress and the President may have overlapping authority, and a court’s decision will be highly context-specific.<sup>124</sup> In the third, the President acts contrary to the express or implied will of Congress, and his power is at its “lowest ebb.”<sup>125</sup> In this category, courts can uphold executive action only by holding that Congress had no power over the subject in the first place.

Accordingly, there are two distinct ways in which the President might decline to comply with the FEB regime. The President might seek FEB authorization and have the request rejected, or ignore the existence of the FEB completely. In either case, the President would have to argue that the emergency action fell into the third *Youngstown* category, claiming that Congress never controlled the power in question. While there are those on the Supreme Court, Justice Thomas in particular, who are sympathetic to this position,<sup>126</sup> it is far from clear that a majority of the Court would be willing to strike down the FEB statute as unconstitutional, given the reluctance of the Court to police the line of permissible delegation and its recent history of restraining overbroad claims of executive power in the domestic sphere.<sup>127</sup>

Nonetheless, even assuming that, unlike Congress’s other attempts to restrain executive emergency power, the FEB organic statute were not struck down,<sup>128</sup> the Court might employ a range of reactions to executive defiance. The Court’s first instinct might be that displayed in *Dames & Moore v. Reagan*,<sup>129</sup> in which it allowed a broad reading of executive power despite the International Economic Emergency Powers Act, which Congress passed to limit executive authority in this arena.<sup>130</sup> However, the Court noted that Congress is unable to anticipate and legislate on all the actions the President might find necessary to take in the arena of national security. It relied on that fact in determining that congressional failure to authorize

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<sup>123</sup> *Id.* at 635–37 (asserting that when President acts with congressional authorization, he may be said “to personify the federal sovereignty”).

<sup>124</sup> *Id.* at 637.

<sup>125</sup> *Id.*

<sup>126</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 581–82 (2004) (Thomas, J., dissenting) (rejecting majority opinion limiting presidential power to detain U.S. citizens as enemy combatants and arguing for “unitary executive” theory of Constitution).

<sup>127</sup> *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that United States is de facto sovereign at Guantánamo and that executive may therefore not abrogate habeas rights there).

<sup>128</sup> Lobel, *supra* note 45, at 1416–18.

<sup>129</sup> *Dames & Moore v. Reagan*, 453 U.S. 654 (1981).

<sup>130</sup> Pub. L. No. 95-223, 91 Stat. 1625 (1977).

executive action should not be read as congressional disapproval.<sup>131</sup> Thus, the Court declined to place the action in *Youngstown*'s third category. Because the FEB exists precisely to plug the legal hole created by Congress's inability to create prospective legislation in the arena of national security, the *Dames & Moore* logic would be inapposite if the President took emergency action without securing a grant from the FEB. In that situation, a court would have to stretch substantially further to find that Congress did not intend for the President to be prohibited from taking otherwise unauthorized non-military domestic actions in response to an emergency without FEB authorization.

The President who ignores the FEB thus clearly takes action in the third category of Justice Jackson's *Youngstown* scheme, in which executive power is at its "lowest ebb" because the President defies an explicit command from Congress.<sup>132</sup> And this is the essential purpose of the FEB: Because it creates a clear mechanism for legalizing executive emergency action, it entices courts to see action taken outside of its framework as illegal, rather than merely extra-legal and justified by the practical limitations of an *ex ante* legal scheme. The FEB therefore helps us to heed Locke's warning that "[w]here-ever law ends, tyranny begins."<sup>133</sup>

Although courts may still be reluctant to locate a particular emergency action in the scope of Congress's legislative authority rather than within the executive's Commander-in-Chief authority, the FEB scheme would force a court to use the Commander-in-Chief Clause as a justification for *domestic* action. Such a decision would fly in the face of Justice Jackson's warning, that "[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."<sup>134</sup> Thus, while the existence of the FEB would push the courts towards recognizing limits on executive power, the FEB is not an impenetrable bulwark against the expansion of that power. The FEB statute also provides the executive branch with the incentive to legalize its action with an authorization from the FEB. Armed with

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<sup>131</sup> *Dames & Moore*, 453 U.S. at 678 ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. 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." (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981))).

<sup>132</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>133</sup> LOCKE, *supra* note 16, § 202, at 103.

<sup>134</sup> *Youngstown*, 343 U.S. at 646.

such authorization, the President could respond to a crisis unhindered by fear of legal repercussions. For the duration of the grant, executive actions would be immune from court injunction, and, where an individual sought *ex post* damages, the executive would be entitled to a presumption in favor of its evidence. A President acting in good faith in response to a crisis would therefore have little reason, other than bald possessiveness of so-called executive power, to refuse to seek authorization from the FEB.

#### CONCLUSION

Reading John Locke guides us to an understanding that presidential discretion, far from being normatively desirable, becomes a pragmatic necessity in the immediate aftermath of emergencies caused by exogenous actors. Nonetheless, the currently murky legal status of executive emergency actions has proven to be toxic to retaining any sense of boundary around executive power. The FEB would, within the confines of existing administrative law, draw clear lines around appropriate usage of presidential discretion. Although executive compliance with Congress's instructions cannot be guaranteed in the national security context, the very existence of the FEB would change the dialogue around executive power, perhaps instilling in Americans a restored sense that an emergency does not render irrelevant the Constitution's system of checks and balances.