

STUDENT NOTE

Roosevelt's "Limited" National Emergency: Crisis Powers in the Emergency Proclamation and Economic Studies of 1939

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ABSTRACT

On September eighth 1939, President Franklin D. Roosevelt issued a proclamation of a "limited" national emergency. This was mere days after the Nazi invasion of Poland, but years before the U.S. entry into the Second World War. Roosevelt did not invoke any statutory authority as a basis for the proclamation or identify which emergency authorities he was activating, making this a rare, general emergency proclamation. Shortly thereafter, the Justice Department studied the interaction between a declaration of emergency and the powers of the federal government. Upon close inspection, the historical evidence does not suggest Roosevelt was invoking an inherent executive power to declare emergencies or to take emergency action. Instead, the actions and assertions of the Roosevelt administration during these events stand in stark contrast to recent claims to an inherent executive emergency power. Moreover, they call into question assertions that Congress and the courts should defer to a presidential determination regarding the existence of an emergency.

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I. INTRODUCTION

On a sunny September afternoon in 1939, Robert Jackson, then U.S. Solicitor General, arrived at the White House. War had erupted in Europe four days earlier, and President Franklin D. Roosevelt wanted to discuss the powers available to him to respond to the crisis.¹ Specifically, he sought to use an emergency declaration to activate various statutory authorities to increase defense readiness. The President was also worried about a sharp spike in consumer prices that had accompanied the outbreak of war.² Roosevelt did not know precisely which powers he sought, but he wanted to respond to these developments without raising public alarm. Reportedly, the request perplexed Jackson, and he offered to let the President write the draft himself.³ Roosevelt obliged, and he scrawled out a handwritten proclamation, which he gave to Jackson to be reviewed by the Department of Justice.⁴ Unlike most Presidents who have declared national emergencies before and since, Roosevelt did not invoke any specific statute, making this a rare, general emergency proclamation.

Under the Trump administration, the United States saw a spate of troubling emergencies, both real and fictitious.⁵ After Congress refused to appropriate funds for a border wall, President Donald Trump issued a proclamation of national emergency allowing for construction to go forward regardless.⁶ This purported emergency was widely criticized as non-existent.⁷ More troublingly still, in the face of the COVID-19 pandemic, the President claimed unlimited power under the Constitution.⁸ Though condemned by constitutional scholars, the former President's assertion perhaps derived from the views of his Attorney

1. EUGENE GERHART, *AMERICA'S ADVOCATE* 181 (1958).

2. See discussion *infra* Sections III.A, III.B.

3. GERHART, *supra* note 1.

4. *Id.* At this point, there was not yet an Office of Legal Counsel, so Jackson's office fulfilled that advisory function. See U.S. DEP'T OF JUST., SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL 421 (2013), <https://perma.cc/8MKY-4XFD>.

5. See Elizabeth Goitein, *The coronavirus is a real crisis. The border wall obviously wasn't.*, WASH. POST (Mar. 12, 2020, 6:00 AM), <https://perma.cc/P8MP-87JA>.

6. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); Fred Barbash, *Trump administration tells judge Congress did not deny border wall funds when it declined to appropriate money for it*, WASH. POST (May 17, 2019, 7:34 PM), <https://perma.cc/8S24-SEJS>.

7. See, e.g., Cecillia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J. F. 620, 623–24 (2020); *Exclusive: Full Text of Bipartisan Declaration of Former Senior U.S. Officials Refuting President's Claim of a National Emergency at Southern Border*, JUST SECURITY (Feb. 25, 2019), <https://perma.cc/BW4M-J556>; Joshua Geltzer, *Blame Trump, Not the U.S. Code for His Abuse of Emergency Authority*, JUST SECURITY (Aug. 26, 2019), <https://perma.cc/2GJQ-2VJZ>.

8. Meagan Flynn & Allyson Chiu, *Trump says his 'authority is total.' Constitutional experts have 'no idea' where he got that.*, WASH. POST (Apr. 14, 2020, 6:36 AM), <https://perma.cc/T7G2-HUML>.

General, William P. Barr, who has argued that the executive branch possesses an inherent power under the Constitution to respond to a crisis.⁹

In this fraught environment, the history of executive practice relating to emergencies attains new relevance. Looking to how past executive branch actors have dealt with crises and used emergency proclamations helps illuminate the range of permissible presidential actions under the Constitution. This Note examines a series of September days in 1939 and offers a new look at how the Roosevelt administration understood emergency powers. That fall, after Germany invaded Poland, the fear of a new European war caused a brief, but acute, market panic in the United States. Thus, the Roosevelt administration faced a foreign crisis with domestic ramifications. In response, it adopted a flexible conception of emergency that allowed it to stretch existing constitutional and statutory authority, but that nonetheless respected the participation of the other branches of government.

This Note relies on original documents from the Library of Congress—some of which have received little to no scholarly attention—to shed new light on Roosevelt's emergency actions. First, Roosevelt's limited proclamation of national emergency, issued on the eighth, shows the administration avoiding broad claims to executive authority, even as it acted independently. Although the proclamation represented the rare use of a declaration of national emergency not grounded in a particular statute, the Roosevelt administration defended it on the basis of prior congressional delegations and limited it to the factual predicate at hand. Second, studies from the Justice Department on the constitutionality of price-fixing legislation provide a revealing glimpse into the executive branch's conception of emergency powers and responsibilities. These documents show executive branch lawyers grappling with enigmatic Supreme Court precedent on emergencies. The lawyers sought to give concrete substance to the Court's cryptic formulation that emergency may not create power, but may afford reason for exerting a power already enjoyed.¹⁰

The historical evidence undermines claims that the Roosevelt administration asserted an inherent executive power to declare emergencies, and it weighs against arguments for a constitutional power of the executive branch to take emergency actions. Although the Roosevelt administration adopted a flexible conception of emergency, it relied on congressionally delegated powers and accommodated inter-branch participation. In particular, administration lawyers strongly assumed that the courts could review the factual predicate behind an emergency proclamation. These findings call for skepticism when evaluating both claims by the executive branch to

9. See William P. Barr, Att'y Gen., Dep't of Just., 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention (Nov. 15, 2019), <https://perma.cc/3RQU-TGV2> ("A related, and third aspect of Executive power is the power to address exigent circumstances that demand quick action to protect the well-being of the Nation but on which the law is either silent or inadequate – such as dealing with a plague or natural disaster. This residual power to meet contingency is essentially the federative power discussed by Locke in his Second Treatise.")

10. See *Wilson v. New*, 243 U.S. 332, 333 (1917) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

extra-statutory authority in the event of an emergency and judicial reticence to probe the factual predicate behind emergency action.

First, this Note briefly reviews contemporary emergency powers debates. Next, it investigates Roosevelt's proclamation of a limited national emergency in the fall of 1939 as an example of emergency action. It then examines internal Department of Justice memoranda as an instance of executive branch theorizing on emergency powers. It then discusses the lessons from the Roosevelt administration for present-day emergencies. Finally, it concludes by suggesting a modest reinterpretation of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.

II. EMERGENCIES: THREE QUESTIONS

Conceptually, emergencies are times when unexpected and sudden circumstances make the application of ordinary rules inadequate.¹¹ The U.S. Constitution famously contains no express emergency powers provision, aside from a few obliquely worded clauses.¹² This state of affairs has produced substantial debate over how the Constitution allocates power among the branches to respond to a crisis.¹³ Justice Jackson's concurrence in *Youngstown* is a good starting point for any analysis of emergency powers because it provides a framework for thinking of the constitutionality of executive action in relation to the actions of Congress.¹⁴ For the purpose of this Note, the interaction between emergencies and the separation of powers raises three key questions.

11. As described by Edward Corwin, emergency conditions are those "which have not attained enough of stability and recurrence to admit of their being dealt with according to rule." EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 1 (1940); see also *Hearing on The National Emergencies Act of 1976 Before the H. Subcomm. on the Const., C. R., and Civ. Just. of the H. Comm. on the Judiciary*, 116th Cong. 1–2 (2019) (statement of Elizabeth Goitein, Co-Dir., Brennan Center For Justice) [hereinafter *Goitein Testimony*], <https://perma.cc/N4B2-ZNEC> ("[A] sudden change in circumstances necessitate[ing] an immediate response[.]").

12. See, e.g., 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."); U.S. CONST. art. I, § 8, cl 15 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]"); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("They [the forefathers] made no express provision for exercise of extraordinary authority because of a crisis."); see also Oren Gross, *Providing for the Unexpected*, 33 ISR. Y.B. HUM. RTS. 13, 19 (2003) ("The Constitution of the United States is almost entirely devoid of references to states of emergency and to emergency powers.").

13. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1041 (2004) (noting that the constitutional scope of emergency powers has been traditionally left to the courts).

14. See *Youngstown*, 343 U.S. at 635–38. Given most legal practitioners' familiarity with *Youngstown*, it suffices to note here that executive action bears the highest presumption of constitutionality when taken pursuant to a congressional statute. See *id.* at 635–36. By contrast, executive claims and action are least likely to be constitutional when they conflict with a congressional statute. See *id.* at 638 ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution . . ."). Where Congress has taken no action, the President can only rely on inherent powers, but Jackson acknowledges there is a degree of authority shared concurrently between the two branches. *Id.* at 637.

First, are non-war emergency powers more properly located in the executive branch, the legislative branch, or shared concurrently? On one side of the ledger, some scholars have argued that the Constitution affirmatively vests a power in the executive branch to respond to emergencies.¹⁵ This would allow the President to act without statutory authority,¹⁶ and it would impose some limits on Congress's ability to regulate presidential emergency powers. In response, a significant body of work has argued that emergency authorities reside with Congress.¹⁷ This means that presidential emergency actions taken in the absence of congressional authorization are either *ultra vires*,¹⁸ or at least subsequently de-feasible by Congress.¹⁹

15. JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 122 (2009) (arguing that vesting of executive power in the President includes the power "to address national emergencies and crises."); EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 147–57 (4th ed. 1957) (discussing broad presidential emergency powers); Candidus Dougherty, *Necessity Hath No Law: Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 22–27 (2008) (arguing that Article II vests emergency powers in the executive branch); Charles J. Cooper, Orrin Hatch, Eugene V. Rostow & Michael Tigar, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 191–92 (1988) ("[T]he emergency prerogative powers Lincoln exercised should be considered constitutional because they were necessary[.]"). Adherents to the "royal residuum" theory would seemingly tolerate a constitutionally derived executive crisis power. The theory maintains that the "Executive power" vested in the President contains the elements of the royal prerogative. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1181–84 (2019) (describing the theory and its adherents). Both John Locke and William Blackstone reportedly endorsed conceptions of the prerogative that included a broad necessity power permitting action in times of crisis. See Saikrishna Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1370–72 (2013) (cataloging arguments that the Constitution confers emergency powers in the President); see also CLEMENT FATOVIC, *OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER* (2010); L. ELAINE HALCHIN, *CONG. RESEARCH SERV.*, RL98505, *NATIONAL EMERGENCY POWERS* 2 (2019) (describing the differences between the visions of the presidency promulgated by Presidents Theodore Roosevelt and William Howard Taft and how these differ in a crisis).

16. For instance, Yoo suggests that the Vesting Clause provided sufficient authority for President Thomas Jefferson to complete the Louisiana Purchase without congressional participation. See YOO, *supra* note 15, at 122.

17. See Saikrishna Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1347–51 (2015) (situating emergency powers in the legislative branch based, in part, on the President's power to call Congress into session on "extraordinary Occasions" (citing U.S. CONST. art. II, § 3.)); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 151, 153 (2004) (responding to arguments that most emergency powers are inherently executive or extraconstitutional and instead arguing that many of the broad emergency powers associated with the executive were delegated by Congress); Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC, Jan.–Feb. 2019 [hereinafter Goitein, *The Alarming Scope*] (noting that the Constitution assigns emergency powers to Congress).

18. See Prakash, *supra* note 15, at 1366–67 (summarizing expectation that executive could take illegal action in a crisis then seek indemnification from Congress).

19. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 691, 1108 (2008) (concluding there is some precedent for the executive to act in contravention of a congressional statute in an emergency under war powers).

Second, are emergency powers fixed by the text of the Constitution or may they expand in times of crisis?²⁰ Under the former view, the scope of rights and powers remains constant through times of emergency as well as times of stability.²¹ Adopting the latter view, some have argued that powers may “stretch” to take the steps necessary to avert some exigency.²²

Third, to what extent are invocations of emergency reviewable by the judiciary?²³ This question implicates the courts’ ability to investigate and second-guess the factual predicate underlying a determination by a political branch of whether an emergency exists.²⁴ The Supreme Court has at times hinted that the President’s determination is conclusive and thus judicially unreviewable.²⁵ More recently, it has held that an emergency does not displace ordinary scrutiny, but it has largely deferred to the executive branch’s factual determinations in national security cases.²⁶

Scholars grappling with these questions have looked to the Roosevelt administration as a source of executive branch precedent. David Barron and Marty Lederman show that the administration—although it took independent action and

20. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1021 (2003) (differentiating “business as usual” theory from “accommodative constitution” theory).

21. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.”).

22. See, e.g., Will Smiley & John Fabian Witt, *Introduction* to FRANCIS LIEBER & G. NORMAN LIEBER, *TO SAVE THE COUNTRY* 1, 15 (Will Smiley & John Fabian Witt eds., Yale Univ. Press 2019) (discussing the Liebers’ view of an “elastic” power in times of emergency); see also John Fabian Witt, *A lost Theory of American Constitutionalism*, 36 LAW & HIST. REV. 553–52 (2018); Prakash, *supra* note 17, at 1344–47 (arguing that congressional power to do what is “necessary” and “proper” expands to meet a wartime emergency).

23. See AMANDA TYLER, *HABEAS CORPUS IN WARTIME* 216 (2019); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2565–68 (2003) (examining whether courts should exercise normal judicial review during emergencies); William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11, 19–23 (1988) (discussing need for a robust crisis-time jurisprudence); James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 924–26 (1979) (discussing judicial role as a contrast to emergency suspensions); see also Prakash, *supra* note 17, at 1342 (declining to address this last item). Scholars have, on occasion, conflated the third and second items by arguing that the fact of a power being fixed in the Constitution signifies that it is an ordinary power and subject to judicial review. See John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 215 (2004).

24. See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–85 (2009) (discussing when courts defer to factual judgements by the executive branch on national security questions).

25. Dicta in *Martin v. Mott* would seem to suggest this stance. See 25 U.S. 19, 29–30 (1827) (“We are all of the opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President. and that his decision is conclusive upon all other persons.”).

26. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs.”); Robert Tsai, *Manufactured Emergencies*, 129 YALE L.J. FORUM 590, 604–608 (2020).

advanced its own policy goals—never seriously asserted a preclusive presidential power that displaced congressional intervention.²⁷ In his account of the period, John Yoo does not claim the Roosevelt administration asserted such a preclusive power, but instead he emphasizes instances where the Roosevelt administration acted unilaterally, pointing to these as indications of an inherent executive power.²⁸

Despite the attention paid to the Roosevelt administration generally, scholars have yet to focus significant attention on the emergency proclamations and ensuing economic studies. Most historical accounts mention Roosevelt's "limited" 1939 proclamation of national emergency only as a brief stopping point on the way to the "unlimited" proclamation of 1941.²⁹ Curiously, the scholars and historians—including the famed Clinton Rossiter—who have discussed the constitutional status of these emergency proclamations have labeled them exercises of inherent executive power under the Constitution.³⁰ For instance, Yoo suggests that Roosevelt's emergency declarations fall under an "unspecified presidential emergency power."³¹

Today's emergency powers regime is characterized by a vast number of congressional delegations to the executive branch;³² therefore, Presidents have generally not relied on assertions of their own constitutional authority to recognize

27. See Barron & Lederman, *supra* note 19, at 1042–57.

28. John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 231–32 (2018); see also Matthew Waxman & Samuel Weitzman, *Remembering the Montgomery Ward Seizure: FDR and War Production Powers*, LAWFARE BLOG (Apr. 25, 2020, 8:33AM), <https://perma.cc/6AHD-22CM> (discussing arguments for sweeping presidential power—alongside statutory arguments—made by the Roosevelt administration in the midst of World War II).

29. See Kim Lane Scheppele, Comment, *Small Emergencies*, 40 GA. L. REV. 835, 849 (2006); Albert Sturm, *Emergencies and the Presidency*, 11 J. POL. 121, 121 (1949).

30. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES 266 (1948) ("The most significant emergency actions which he undertook on the basis of his constitutional powers were: the two proclamations of emergency, . . ."); see also LOUIS WILLIAM KOENIG, THE PRESIDENCY AND THE CRISIS 14–15 (1944) ("With each branch able by its own action to determine the existence of an emergency . . ."); Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 CAL. L. REV. 1453, 1485 (1979) ("World War II provided Roosevelt with further opportunities to use the inherent emergency powers to take discretionary crisis action. In 1939, Roosevelt declared a 'limited national emergency' in anticipation of his subsequent inherent emergency powers actions." (citation omitted)); cf. Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 264 (2000) ("Roosevelt relied on the proposition that by grounding such extra-constitutional measures [the emergency proclamation of 1933] in his powers as Commander-in-Chief, the measures would pass constitutional muster.").

31. He makes this claim with reference to Roosevelt's 1933 proclamation declaring a bank holiday. See Yoo, *supra* note 28, at 211. For the 1933 proclamation, the administration invoked the Trading with the Enemy Act, so surely Yoo's argument about an unspecified emergency power should apply with more force to the 1939 declaration, where Roosevelt did not invoke any statutory authority. Indeed, Yoo discusses the 1941 proclamation as an assertion of broad presidential power. See *id.* at 250. But Yoo notes that in the exercise of independent action, such as the deployment of troops to Iceland, Roosevelt followed congressional prescriptions and requirements. *Id.* at 250–51.

32. See Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1843–48 (2010) (discussing practical features of the modern presidency that give the office effective emergency powers); Brennan Center for Justice, *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE, (Jan. 23, 2019) <https://perma.cc/3PDF-BSVW>;

emergencies.³³ If Roosevelt's emergency proclamations were indeed instances of the President exercising inherent executive power, then these would have some precedential value for arguments against greater congressional regulation of the President's use of emergency authorities.³⁴ Defenders of an executive emergency power could then argue that the procedures of the National Emergencies Act are constitutional precisely because they do not meaningfully constrain the executive branch.³⁵

The 1939 proclamation offers a good test case to assess whether the Roosevelt administration asserted an inherent emergency power. The fall of that year saw a sudden crisis in the form of both the war in Europe and inflation in the United States while the executive and legislative branches disagreed widely on the proper response. A close inspection of executive action during this period helps illuminate the Roosevelt administration's answer to the first question presented above. A Department of Justice study undertaken in the wake of the proclamation provides a glimpse into the administration's thinking on the second two questions. This study, which examined domestic price fixing, has until now remained absent from the literature, with far more attention going to the Emergency Price Control Act of 1942.³⁶ Together, the proclamation and the price fixing study present a cohesive picture of the Roosevelt administration's view of emergency powers.

Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE BLOG (Dec. 8, 2017, 9:00 AM), <https://perma.cc/BU26-ZTWX>; Ackerman, *supra* note 13, at 1078.

33. See Goitein, *The Alarming Scope*, *supra* note 17 (mapping the statutory powers available to the President); see also Quinta Jurecic, *Everyone Calm Down About That Declaration of National Emergency*, LAWFARE BLOG (Jan. 09, 2019, 8:37 AM), <https://perma.cc/XS8X-EV5N>.

34. Cf. Goitein, *The Alarming Scope*, *supra* note 17 (“Of course, Trump might also choose to act entirely outside the law. Presidents with a far stronger commitment to the rule of law, including Lincoln and Roosevelt, have done exactly that, albeit in response to real emergencies.”).

35. See Goitein *Testimony*, *supra* note 11. This would imperil various potential reforms, such as efforts to substantively restrict—through statutory language—what the President may designate as an “emergency.” See Goitein, *The Alarming Scope*, *supra* note 17 (“[T]he National Emergencies Act doesn’t require that the powers invoked relate to the nature of the emergency[.]”); Jurecic, *supra* note 33 (“Crucially, the National Emergencies Act places no restraints on what a President may declare as an emergency.”). Or efforts to require the *ex ante* consent of other actors before the President may declare an emergency. See Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, YALE L.J. F. 610, 617 (Feb. 15, 2020) [hereinafter Vladeck, *Separation of National Security Powers*].

36. See, e.g., Bernard F. Grainey, *Price Control and the Emergency Price Control Act*, 19 NOTRE DAME L. REV. 31, 38 (1943) (“[I]n view of power of Congress . . . to do nearly anything necessary to properly wage war under the War Powers there can be no question but that even a wide spread price fixing program can likewise be maintained.”); Joseph Anthony Madey, Recent Decisions, *War Powers – Federal Emergency Price Control Act Valid under War Powers of Congress*, 31 GEO. L.J. 93, 94–95 (1942) (describing recent court challenge and noting authorities that supported the outcome); Donald D. Holdoegel, *The War Powers and the Emergency Price Control Act of 1942*, 29 IOWA L. REV. 454, 462 (1944).

III. PRACTICE: THE PROCLAMATION OF 1939

Today, the National Emergencies Act prohibits the President from declaring an emergency without grounding it in specific statutory authority.³⁷ In the fall of 1939, Roosevelt did exactly that. He issued a proclamation of “limited national emergency” that—on its face—made no reference to any specific statutory basis. The commentators who have discussed this incident have labeled it an assertion of inherent executive authority, the implication being that Roosevelt was claiming a power to put the country on emergency footing. If correct, this would be a thumb on the scale in favor of an independent emergency authority located in the executive branch. Moreover, the historical evidence suggests Roosevelt sought the proclamation in part because of his belief that the federal government needed to intervene in the domestic economy to fix consumer prices. This raises the specter of unilateral executive *action*—as opposed to just declaration—in the event of an emergency.

A close look at the history surrounding the 1939 proclamation undercuts the reading that Roosevelt asserted an emergency power inherent to the executive branch. Rather, Roosevelt and his administration appear to have taken advantage of the statutory ambiguity that existed then in congressionally delegated emergency powers. The administration did not pursue direct, domestic price fixing as a unilateral executive action once it ascertained that no statutes allowed it to do so. This Part addresses the first question from above regarding the basis and extent of the President’s power to act in an emergency.

A. *Studying and Drafting*

The 1939 emergency proclamation came as Roosevelt sought to extricate the country from the Neutrality Acts, a series of laws designed to keep the United States out of another European war. Congress had enacted them following an investigation into the munitions industry that had fueled the narrative of avaricious “war profiteers” deceiving the public into fighting World War I to generate profits.³⁸ The Acts, passed between 1935 and 1937, forbade the sale of arms or ammunition to belligerents, proscribed the ability of U.S. ships to carry goods for either party, and restricted the granting of loans from the United States.³⁹

Roosevelt possessed limited ability to contest the laws. The court-packing fight of 1937 and his attempted purge of non-loyal Democrats in 1938 had badly hurt

37. 50 U.S.C. § 1631 (“When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.”).

38. KENNETH S. DAVIS, *FDR INTO THE STORM 1937–1940*, at 469 (1993); GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER 503* (2008); Matthew Waxman, *Remembering the Ludlow Amendment*, *LAWFARE BLOG* (Jan. 10, 2019, 8:00 AM), <https://perma.cc/2WD7-6SYT> (“Members of this movement thought that a jingoistic press and munitions-industry profiteers had pressured the government into an unnecessary European war”); Senate Historical Office, *Merchants of Death*, U.S. SENATE, <https://perma.cc/QN2G-MUX3>; see also ROBERT DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 1932–1945*, at 101–03, 109 (1979).

39. S. Res. 51, 75th Cong. (1937) (enacted); *Federal Legislation*, 24 GEO. L. J. 408, 410 (1936).

his popular appeal and political sway.⁴⁰ The President was also contending with the charge that he harbored dictatorial ambitions, in part because of his proposal to reorganize the executive branch.⁴¹ These accusations so affected Roosevelt that he had his staff issue an open letter at a late-night press conference, in which he disavowed any “inclination to be a dictator.”⁴² Roosevelt was convinced that Nazi Germany posed a threat to the country, yet he was in a tight spot politically. He tried to induce Congress to review and revise the Neutrality Acts, but the Senate voted down the administration’s bill.⁴³

Tensions broke on the first of September when Hitler invaded Poland.⁴⁴ One official who saw Roosevelt that morning said the President looked “serious.”⁴⁵ At the cabinet meeting, Roosevelt did not dwell on the invasion; after all, everyone possessed only the same limited information. Instead, he contemplated measures to control industrial and consumer prices. According to an attendee, Roosevelt “talked at some length about the price structure and its regulation in the event of war.”⁴⁶

The President feared inflation. During the First World War, an increase in food exports along with greater wartime demand had caused a sharp rise in basic commodity prices.⁴⁷ In one particularly acute case, prices rose between twenty and thirty percent over just a few days.⁴⁸ With this history in mind, the President had previously sought an opinion from the Department of Justice on his power to enact price controls.⁴⁹ Although the New Deal had generated expansive economic regulatory powers for the federal government, the Department firmly assumed that direct price controls would require new congressional action.⁵⁰ With foreign

40. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN 158–162* (1995).

41. DALLEK, *supra* note 38, at 109.

42. *See Text of Roosevelt Statement and Letter*, N.Y. TIMES, March 31, 1938, at 8; SUSAN DUNN, *ROOSEVELT’S PURGE*, 1–2, 63 (2010).

43. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940*, at 292–93 (1963); DAVIS *supra* note 38, at 449–458.

44. HERRING, *supra* note 38, at 517.

45. Memorandum to The Files from Mr. Haines (Sept. 1, 1939) (on file in the Morgenthau Presidential Diaries with the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, NY), <https://perma.cc/5UNC-HWRG>.

46. *Id.*

47. Dana Frank, *Housewives, Socialists, and the Politics of Food: The 1917 New York Cost-of-Living Protests*, 11 FEMINIST STUD. 255, 256–57 (1985).

48. *Id.* at 257.

49. *See* Memorandum from James W. Morris, Assistant Attorney General, Golden W. Bell, Assistant Solicitor General, & Alexander Holtzoff, Special Assistant to the Attorney General (Sept. 23, 1938), in ROBERT HOUGHWOUT JACKSON PAPERS, box 83 (on file with the Manuscript Division, Library of Congress, Wash. D.C.) [hereinafter JACKSON PAPERS] (“Control of Commodity Prices by the Federal Government during Wars not Involving the United States as a Belligerent.”); *see also* Memorandum from James W. Morris, Assistant Attorney General, Golden W. Bell, Assistant Solicitor General, & Alexander Holtzoff, Special Assistant to the Attorney General (Sept. 23, 1938), in THE PRESIDENT’S SECRETARY’S FILE, box 56, Justice – Cummings, Homer 1938–1944 (on file with Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, N.Y.) [hereinafter PSF], <https://perma.cc/8E2V-DHSQ>.

50. *See* Memorandum from James W. Morris, Assistant Attorney General, Golden W. Bell, Assistant Solicitor General, & Alexander Holtzoff, Special Assistant to the Attorney General (Sept. 23, 1938), in JACKSON PAPERS, *supra* note 49, at 2, 7.

war now all but certain, Roosevelt once again entrusted the task of studying possible anti-profiteering actions to the Justice Department.⁵¹

Two days later, France and Britain declared war on Germany, signaling the beginning of another Europe-wide conflict.⁵² Roosevelt addressed the nation on the third in a fireside chat; he offered few specifics besides an indication that his administration was preparing the proclamation required by the Neutrality Acts.⁵³ Turning briefly to the domestic economy, Roosevelt warned against profiteering.⁵⁴ Nevertheless, consumer prices in the United States began rising alarmingly and would continue on this trend for the month of September.⁵⁵ To take just one consumer good, statistics from the Department of Labor showed a 37% increase in the price of sugar between August 15 and September 7 in New York City.⁵⁶

The actual outbreak of war prompted a flurry of hectic activity in the Justice Department.⁵⁷ The Department's focus expanded to include price controls, embargoes, tax policy, alien property matters, defense secrets, and emergency powers.⁵⁸ The initial study of anti-profiteering and emergency powers fell to Alexander Holtzoff, one of the authors of the earlier memo.⁵⁹ Although Holtzoff uncovered a range of statutory authorities that would allow the federal government to indirectly influence price levels, it could only directly fix the prices of bituminous coal and natural gas.⁶⁰ He concluded, "there is not existing statutory authority empowering the Federal Government to fix prices in any other

51. Press Conference of President Franklin Delano Roosevelt (Sept. 5, 1939), in *PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT*, Series 1, at 3 (transcript available in the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, N.Y.) [hereinafter *ROOSEVELT, PRESS CONFERENCES*], <https://perma.cc/NM2W-9FDQ> ("Q: Anything you can say on profiteering? THE PRESIDENT: No, except that the Department of Justice, as you know, is studying the subject.").

52. HERRING, *supra* note 38, at 517.

53. President Franklin D. Roosevelt, September 3, 1939: Fireside Chat 14: On the European War (Sept. 3, 1939) (transcript available at Univ. of Va. Miller Center), <https://perma.cc/232E-SXYN> ("Until four-thirty this morning I had hoped against hope that some miracle would prevent a devastating war in Europe.").

54. *Id.* ("[N]o American has the moral right to profiteer at the expense . . . of his fellow citizens[.]").

55. See Andrew Bartels, *The Politics of Price Control: The Office of Price Administration and the Dilemmas of Economic Stabilization, 1940–1946*, at 2 (1980) (Ph.D. dissertation, Johns Hopkins) (ProQuest).

56. Special to the New York Times, *Rise in Food Prices Shown in 10 Cities*, N.Y. TIMES, Sept. 10, 1939, at 33.

57. GERHART, *supra* note 1, at 182 (observing that advisors close to the President "began to study the problems of a wartime economy"); see Memorandum from Edward G. Kemp, Special Assistant to the Attorney General, to Robert H. Jackson, Solicitor General (Sept. 6, 1939), in *JACKSON PAPERS*, *supra* note 49, box 84.

58. GERHART, *supra* note 1, at 182.

59. Memorandum from Alexander Holtzoff for Edward G. Kemp, Assistant to the Attorney General (Sept. 5, 1939), in *JACKSON PAPERS*, *supra* note 49, box 84; Memorandum from Edward G. Kemp, Special Assistant to the Attorney General, to Robert H. Jackson, Solicitor General, *supra* note 57; Memorandum from James W. Morris, Assistant Attorney General, Golden W. Bell, Assistant Solicitor General, & Alexander Holtzoff, Special Assistant to the Attorney General (Sept. 23, 1938), in *JACKSON PAPERS*, *supra* note 49.

60. Memorandum from Alexander Holtzoff for Edward G. Kemp, Assistant to the Attorney General, *supra* note 59.

commodities.”⁶¹ On his carbon copy of the memo, Robert Jackson underlined this last sentence.⁶²

B. The Emergency Proclamation

On the fifth of September, the President issued the required neutrality proclamation.⁶³ That afternoon, he met with Jackson to request the emergency proclamation. In addition to drafting the text himself, Roosevelt asked for a precise accounting of the powers he could use under a declaration of emergency. The next day, Jackson telephoned the White House to inform the President he had ready a list of statutory emergency powers.⁶⁴ The list provided short summaries of statutory sections granting special powers to the President or federal agencies that only became active upon a declaration of national emergency or similar factual finding.⁶⁵

The President’s margin notes on his copy display an interest in military readiness powers. He placed checkmarks next to provisions allowing departments and agencies to exceed appropriations limits and allowing the President to take over radio stations, to allocate funds for the protection of Americans abroad, to order army or national guard members to active duty, to increase the enlisted strength of the navy, and to designate “prohibited places.”⁶⁶ The list also contained several authorities related to the domestic economy, but nothing allowing the government to directly fix prices.

The next day, the President met with several advisors, including Jackson, to discuss the proclamation.⁶⁷ The Department had made only minor changes to the President’s original draft. The proclamation identified the unfolding war in Europe as requiring the United States to enforce its neutrality and strengthen the national defense. According to language added by the Department, preparations would occur “within the limits of peace-time authorizations.”⁶⁸ Therefore, this

61. *Id.*

62. *Id.*; Memorandum from Edward G. Kemp, Special Assistant to the Attorney General, to Robert H. Jackson, Solicitor General, *supra* note 57.

63. Proclamation No. 2348, 4 Fed. Reg. 3809 (Sept. 6, 1939) (“Proclamation of Neutrality of the United States Issued Pursuant to General International Law”); HERRING, *supra* note 38, at 517. Though printed on the sixth, the proclamation was signed on the fifth. Proclamation No. 2348, 4 Fed. Reg. at 3812.

64. Memorandum for the President (Sept. 6, 1939), in PSF, *supra* note 49, box 55, Justice 1938–1939, <https://perma.cc/5ATV-KZXV>; Memorandum from Robert H. Jackson, Solicitor General, to the President (Sept. 6, 1939) [hereinafter Memorandum from Robert H. Jackson to the President], in PSF, *supra* note 49, box 55. The Assistant Solicitor General, Golden Bell, appears to have contributed in the making of the list. See Memorandum from Robert H. Jackson to the President, *supra*.

65. Memorandum from Robert H. Jackson to the President, *supra* note 64.

66. *Id.* at 5.

67. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 108 (1984). George Marshall, Admiral Harold R. Stark, and possibly Frank Murphy were also in attendance. *Id.*

68. Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), in ROOSEVELT, PRESS CONFERENCES, *supra* note 51, Series 1, at 7, <https://perma.cc/NM2W-9FDQ>. This was a change from the original draft; Roosevelt had merely stated that national defense preparations would occur on a “peacetime basis.” See President’s Draft, in JACKSON PAPERS, *supra* note 49.

"call[ed] for the exercise of only a limited number of the powers granted in a national emergency." Where the President had written only a short, cursory sentence actually proclaiming the emergency, the Department added more specific language cabining the emergency to ensuring neutrality and preparedness.⁶⁹

Roosevelt planned to issue the national emergency proclamation at his morning press conference on the eighth. That day, after lightheartedly joking with reporters, Roosevelt suddenly grew serious. He had misplaced the proclamation.⁷⁰ After asking Attorney General Frank Murphy if he possessed a copy, searching a brown envelope in the trash bin, and facetiously accusing the reporters in the front row of purloining the document, Roosevelt dispatched a courier to retrieve another copy.⁷¹ The President refused to discuss the proclamation without the text before him, and he took questions from reporters while they waited.⁷²

The questions concerned the anticipated special session of Congress,⁷³ and the rise in commodity prices. When asked about profiteering studies, Roosevelt declined to answer directly; instead, he downplayed the danger of commodity hoarding or price rises, but he hinted that prices could be brought down by reducing surpluses.⁷⁴ When the proclamation reached his desk, the President took a moment to caution reporters off the record. He warned them against printing "scare headlines" and disavowed any aggressive assertions of executive power.

Now, a thing called "Declaration of National Emergency" is provided for in a great many statutes, not just one, and if one were to assume to issue a Proclamation of National Emergency without any limitation, scare headlines might be justified because, under that, the Executive could do all kinds of things.⁷⁵

69. President's Draft, in JACKSON PAPERS, *supra* note 49 ("Now therefore, I, etc., do proclaim a national emergency."); Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 7–8 ("NOW, THEREFORE, I FRANKLIN ROOSEVELT, President of the United States of America, do proclaim a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of the our national defense within the limits of peace time authorizations.").

70. Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 1 ("Who took my copy of the Proclamation? Frank Murphy has it. Frank did, you steal my carbon copy, the last one I had of the Proclamation?").

71. *Id.* at 1–2.

72. *Id.* at 2.

73. Roosevelt had indicated that in the event of a European war that he would call Congress back into a special session. Press Conference of President Franklin Delano Roosevelt (Aug. 11, 1939), in ROOSEVELT, PRESS CONFERENCES, *supra* note 51, Series 1, at 9–10, <https://perma.cc/NM2W-9FDQ>.

74. Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 4–5. This comment foreshadows actions the President would take on the eleventh of September. *See infra* notes 90–94 and accompanying text.

75. Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 6.

Roosevelt then read the proclamation aloud. He reiterated throughout the conference the “limited” nature of the emergency, and he continuously emphasized that it would be implemented on a peacetime basis.⁷⁶

Roosevelt then introduced four Executive orders following his reading of the proclamation.⁷⁷ Together, three of the orders increased the strength of the Army, National Guard, Navy, Marine Corps, and Federal Bureau of Investigation, and they allowed the relevant departments to waive appropriations limits as needed.⁷⁸ The President also made funds available to the State Department for the protection of American citizens abroad.⁷⁹ Although Roosevelt observed that other orders might be necessary, introducing these specific ones to reporters seemed to serve a cabining effect by showing precisely why he sought the emergency.⁸⁰ Though he did not discuss it in the press conference, Roosevelt also signed an order that day accomplishing his reorganization of the executive branch.⁸¹ The reorganization had received congressional approval but only at a high level of generality.⁸² In addition to establishing the Executive Office of the President, the order allowed the President to create new emergency management offices within the executive branch.⁸³

All of these orders invoked statutory authority, and they principally relied on powers from Jackson’s memo. Most of these statutes explicitly conditioned the exercise of emergency powers upon the *President’s* finding of a national emergency.⁸⁴ However, the statute allowing the increase in the enlisted strength of the

76. *Id.* at 6–8.

77. *Id.* at 8–10.

78. See Exec. Order No. 8244, 4 Fed. Reg. 3863 (Sept. 12, 1939) (“Authorizing an Increase in the Strength of the Army”); Exec. Order No. 8245, 4 Fed. Reg. 3863 (Sept. 12, 1939) (“Authorizing Increases in the Enlisted Strengths of the Navy and the Marine Corps”); Exec. Order No. 8247, 4 Fed. Reg. 3864 (Sept. 12, 1939) (“Authorizing Increases in the Personnel of the Federal Bureau of Investigation, Department of Justice”).

79. Exec. Order No. 8246, 4 Fed. Reg. 3863–64 (Sept. 12, 1939) (“Making Funds Available for the Protection of American Citizens in Foreign Countries During the Existing Emergency”).

80. See Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 10.

81. Exec. Order No. 8248, 4 Fed. Reg. 3864–65 (Sept. 12, 1939) (“Establishing the Divisions of the Executive Office of the President and Defining Their Functions and Duties”). The orders were only printed in the Federal Register on September twelfth but were signed by the President on the eighth. *E.g., id.* at 3865.

82. Roosevelt had received congressional approval for this reorganization plan in June of 1939. See Pub. Res. No. 20, 53 Stat. 813 (June 7, 1939) (approving creation of the Executive Office of the President by joint resolution). However, the functions of the new office had not yet been defined. The executive order undertook this task. See *supra* note 81.

83. Exec. Order No. 8248, 4 Fed. Reg. at 3864.

84. Act of June 29, 1939, Pub. L. No. 76-156, 53 Stat. 885, 890 (“[W]henever, the President shall find a state of emergency exists endangering the lives of American citizens in any foreign country, he may make available for expenditure for the protection of such citizens, by transfer to this appropriations, not to exceed \$500,000[.]”); Naval Reserve Act, ch. 690, § 5, 52 Stat. 1175, 1176 (June 25, 1938) (codified at 34 U.S.C. § 853 (1938)) (“Any member of the Naval Reserve. . . may be ordered to active duty by Secretary of the Navy in time of war or when in the opinion of the President a national emergency exists.”); Act of July 1, 1918, ch. 114, 40 Stat. 704, 714, *amended by* Act of July 11, 1919, ch. 9, 41 Stat. 131, 137 (codified at 34 U.S.C. Supp. IV § 151 (1934)) (“[T]he President is hereby authorized, whenever, in his judgement a sufficient emergency exists, to increase the authorized enlisted strength of the Navy to one hundred and ninety-one thousand

Army did not specify who was to declare an emergency. It instead stated that the size of regular forces should not be increased beyond a set limit "[e]xcept in time of war or similar emergency."⁸⁵ Likewise, in the case of increasing the strength of the FBI, it appears that Roosevelt relied solely on the statutory authority to allow departments to waive appropriations ceilings.⁸⁶

The next day, the newspapers discussed the declaration and the possibility of domestic regulation in the same breath. The general tenor of the reporting emphasized the President's measured response to the rise in food prices and echoed the President's reassurances that the proclamation would not be used for domestic regulation.⁸⁷ But one reporter still wondered whether the "war situation will present the opportunity for the Administration to make a popular bid for price-control legislation in the interest of the poor and the under-privileged."⁸⁸ Regarding the President's power to issue the proclamation, most papers repeated Roosevelt's claim to statutory authority, but at least one carried an almost throw-away statement from an unnamed Department of Justice official that the declaration had constitutional underpinnings.⁸⁹

men."); Act of July 1, 1918, ch. 114, 40 Stat. 704, 717, *amended by* Act of June 10, 1922, ch. 212, § 17, 42 Stat. 625, 632 (codified at 34 U.S.C. § 423) ("[D]uring the existence of war or of a national emergency declared by the President to exist, any commissioned or warrant officer of the Navy or Marine Corps of the United States on the retired list, may at the discretion of the Secretary of the Navy, be ordered to active duty at sea or on shore."); *see also* Act of June 3, 1916, ch. 134, § 62, 39 Stat. 166, 198 (giving the President some control over national guard size).

85. *See* Act of June 3, 1916, § 2, 39 Stat. 166, *amended by* Act of June 4, 1920, Pub. L. No. 66-242, § 2, 41 Stat. 759, 759 ("Except in time of war or similar emergency when the public safety demands it, the number of enlisted men of the Regular Army shall not exceed [280,000]."); *see also* Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48, 49 (codified at 31 U.S.C. § 665 (1934)) ("[A]ll such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment . . . the same shall be waived or modified in writing by the head of such executive department or other Government establishment having control of the expenditure."). The appropriations waiver authority seems most naturally read to require the heads of department to be the ones to recognize the existence of the emergency. The President's order also allowed the return of army reserve officers to active duty. *See* Act of June 3, 1916, ch. 134, § 37a, *amended by* Act of June 4, 1920, § 32, 41 Stat. 759, 776 (codified at 10 U.S.C. § 369) ("To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any purpose; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent.").

86. *See* Exec. Order No. 8247, 4 Fed. Reg. 3864 (Sept. 12, 1939) (citing 10 U.S.C. § 665) ("The Attorney General shall increase the personnel of the Federal Bureau of Investigation, . . . in such number, not exceeding 150 as he shall find necessary.").

87. *See* Washington Bureau, *No Business Curbs*, WALL ST. J., Sept. 9, 1939, at 1; Felix Belair, *100,000 more men*, N.Y. TIMES, Sept. 9, 1939, at 1, 6; William V. Nessly, *Roosevelt Bolster U.S. Defense With 100,000 Men*, WASH. POST, Sept. 9, 1939, at 1; Mark Sullivan, *Roosevelt Stays Calm*, WASH. POST, Sept. 9, 1939, at 9.

88. John H. Crider, *Capital Ponders Profiteering Law*, N.Y. TIMES, Sept. 10, 1939, at E6.

89. Belair, *supra* note 87, at 6. This could have been Frank Murphy, who, the *Times* reported, was sitting behind the President during the press conference. *Id.*

C. More Proclamations and the Congressional Response

Roosevelt continued to rely on Jackson's memo. On the eleventh, he invoked the Sugar Act of 1937 to ease quota restrictions on sugar and increase supply in the market in the hopes of bringing prices down. Unlike other emergency provisions, the Sugar Act specifically required the President to find the existence of an emergency in sugar production.⁹⁰ Roosevelt dutifully complied with this requirement in his proclamation.⁹¹ On the thirteenth, Roosevelt issued a proclamation calling for Congress to reconvene in extraordinary session.⁹² This proclamation did not cite to statutory authority and for good reason. The Constitution explicitly vests in the President the power to, "on extraordinary Occasions, convene both Houses" of Congress.⁹³ The proclamation declared that such an extraordinary occasion existed.⁹⁴

When Congress reconvened, it decided to investigate these emergency proclamations. On the twenty-eighth, Senator Vandenberg submitted a resolution calling on the executive branch to provide a list of precisely what powers Roosevelt's proclamation activated and what other extraordinary powers became available to the President in an "emergency or state of war."⁹⁵ The resolution did not confine its request to *statutory* powers and was phrased in broad terms. The Senate passed the resolution that day.⁹⁶

In his reply to the congressional request—on which Jackson collaborated—Murphy took the position that Congress could not compel the Attorney General to provide it with legal opinions; therefore, he declined to assess the full extent of the President's powers in an emergency. Nonetheless, he provided an extensive list of statutory emergency and war powers.⁹⁷ This list derived from Jackson's initial work, but it was longer and more complete. For instance, it included powers only available upon a congressional declaration of emergency.⁹⁸ Murphy also

90. Memorandum from Robert H. Jackson to the President, *supra* note 64.

91. Proclamation No. 2361 (Sept. 11, 1939), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 507–08 (Samuel Roseman ed. 1941).

92. Proclamation No. 2365 (Sept. 21, 1939), in *THE AMERICAN PRESIDENCY PROJECT*, <https://perma.cc/H8QY-VLWA>.

93. U.S. CONST. art. II, §3.

94. Proclamation No. 2365, *supra* note 92.

95. 85 CONG. REC. 32 (1939) (Statement of Senator Vandenberg). When asked about the resolution, the President appeared untroubled. See Press Conference of President Franklin Delano Roosevelt (Sept. 26, 1939), in *ROOSEVELT, PRESS CONFERENCES*, *supra* note 51, Series 5, at 5.

96. See Request of the Senate for an Opinion as to the Powers of the President in Emergency or State of War, 39 Op. Att'y Gen. 343, 343 (1941) (dated Oct. 4, 1939).

97. *Id.* at 347, 348.

98. Compare *id.* at 349 ("[A]uthorizing the President to place members of the enlisted Reserve Corps on active duty for a longer period than 15 days in a calendar year, without their consent, in time of a national emergency expressly declared by Congress." (quotation omitted)), and *id.* at 356 ("[A]uthorizing the President to order into the active military service of the United States all units and members of the National Guard of the United States, when Congress shall have declared a national emergency. . . ." (quotation omitted)), with Memorandum from Robert H. Jackson to the President, *supra* note 64 (omitting these provisions).

declined to identify the particular powers that Roosevelt had used in connection with his September eighth proclamation.⁹⁹

In closing his introduction to the list, Murphy invoked inherent executive powers. Yet he only noted that the executive branch possessed some power under the Constitution as well as the power to take necessary steps to carry out constitutional duties, without ever identifying these powers or duties.¹⁰⁰ He continued on to state that the permissibility of the executive's use of powers "both constitutional and statutory," would be "dependent on conditions and circumstances." According to Murphy, the "right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action." This is a revelatory statement, for it says very little about the scope of executive branch power,¹⁰¹ but it concedes the importance of the factual predicate for the use of such power.

Roosevelt did eventually take unilateral executive action to curb price inflation under the September eighth proclamation.¹⁰² This came almost two years later in April of 1941. By this point, the London Blitz was in full swing, and Roosevelt had already initiated some of his more assertive efforts to aid British resistance to the Nazis.¹⁰³ The Executive order created an "Office of Price Administration and Civilian Supply" headed by a single administrator and located within the emergency management offices created by the President's earlier orders.¹⁰⁴ The order did not purport to confer any power to directly fix prices; rather, the administrator would coordinate the use of various economic regulatory powers delegated by Congress to prevent inflation and profiteering.

D. Analysis: General, but Not Inherent

For the purpose of analysis, this Section breaks down executive branch practice surrounding the 1939 proclamation into two components: *declaration*—the

99. See Letter from Frank Murphy, Attorney General, to John Nance Gardner, Vice President and President of the Senate (Oct. 2, 1939) ("[T]he Attorney General is neither authorized, nor can he undertake to act as the legal adviser to the Congress. . . . Accordingly, I shall not here attempt to state which of the powers granted in the several statutes listed may now be exercised by reason of the President's proclamation of September 8, 1939 nor under what conditions the exercise of the power granted in one of them would be justified."), in JACKSON PAPERS, *supra* note 49.

100. Request of the Senate for an Opinion as to the Powers of the President in Emergency or State of War, 39 Op. Att'y Gen. 343, 347 (1941).

101. Murphy's reference to power springing from the Constitution should not be alarming, and Murphy could simply have been referring to enumerated powers. After all, the President had just exercised a constitutional power to call Congress into extraordinary session.

102. See Exec. Order No. 8734, 6 Fed. Reg. 1917 (Apr. 15, 1941); see also Paul B. Rava, *Procedure in Emergency Price Fixing*, 40 MICH. L. REV. 937, 941 (1942) (describing this process).

103. Principally, this includes the destroyers-for-bases deal. See Yoo, *supra* note 28, at 245–46; Barron & Lederman, *supra* note 19, at 1046–47; see also William R. Castro, *Advising Presidents: Robert Jackson and the Destroyer-for-Bases Deal*, 52 AM. J. LEGAL HIST. 1 (2012).

104. Exec. Order No. 8734, 6 Fed. Reg. 1917 (Apr. 15, 1941); see also Exec. Order No. 8629, 6 Fed. Reg. 191 (Jan. 7, 1941) (establishing emergency management office). A subsequent Executive order would separate the functions of the administrator and create a single office of price administration. See Exec. Order No. 8875, 6 Fed. Reg. 4483, § 8 (Aug. 30, 1941).

process of recognizing and proclaiming an emergency—and *action*—the use of substantive powers made available by the emergency. On both counts, the practice of the Roosevelt administration in the fall of 1939 militates against the recognition of an executive crisis power. This Section takes up each of these points in turn.

By one estimation, Roosevelt's 1939 declaration was the United States' first general emergency proclamation and thus represented a new development in emergency powers law.¹⁰⁵ Prior declarations of emergency, primarily issued by President Woodrow Wilson and Roosevelt himself, had followed a pattern of identifying the factual predicate of the emergency, grounding the proclamation in specific statutory text, and proclaiming the emergency, often in a specific segment of the economy.¹⁰⁶ By contrast, the 1939 proclamation contained no statutory references. The proclamation rested on the obligations that inhered to the United States as a neutral party in the European conflict.¹⁰⁷ On its face, the document sought to exercise "only a limited number of the powers" available by emergency declaration, and Roosevelt indicated that specific powers would be used on an ongoing basis.¹⁰⁸ As numerous commentators have observed, the term "limited" was not a legal restraint,¹⁰⁹ "Mr. Roosevelt was, therefore, entirely free to select the statutes which might be comprehended by his notion of a 'limited emergency.'"¹¹⁰

In *Constitutional Dictatorship*, Clinton Rossiter labels the proclamation an exercise of inherent executive authority. "The most significant emergency actions which [Roosevelt] undertook on the basis of his constitutional powers were: the two proclamations of emergency," including the one in 1939.¹¹¹ In defense of this argument, Rossiter observes that one view of emergency powers could have located the power to declare a general emergency solely in Congress as a consequence of Congress alone possessing the power to declare war.¹¹² Following Rossiter's argument, one could assert that Roosevelt declared the general

105. See Harold C. Relyea, *Declaring and Terminating a State of National Emergency*, 6 PRESIDENTIAL STUD. Q. 36, 37 (1976).

106. Such as maritime shipping, banking, or cotton production. See A Proclamation: Water Transportation Emergency, 39 Stat. 1814 (1917) (citing Act of Sept. 7, 1916, Pub. L. No. 64-260, 39 Stat. 728); Proclamation No. 2039, 48 Stat. 1689, 1690 (1933) (citing Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917)); Proclamation No. 2118, 49 Stat. 3438 (1935) (citing Cotton Control Act, Pub. L. No. 73-169, 48 Stat. 598 (1934)).

107. Proclamation No. 2352, 4 Fed. Reg. 3851 (Sept. 9, 1939) ("Whereas this state of war imposes on the United States certain duties with respect to the proper observance, safeguarding, and enforcements of such neutrality, and the strengthening of national defense within the limits of peace-time authorizations.").

108. *Id.* ("Specific directions and authorizations will be given from time to time for carrying out these purposes[.].")

109. See Relyea, *supra* note 105, at 37; ROSSITER, *supra* note 30, at 266-67.

110. KOENIG, *supra* note 30, at 13.

111. ROSSITER, *supra* note 30, at 266.

112. *Id.* at 267 ("[I]n each of these proclamations that President was untying his own hands and giving himself permission to make use of the large arsenal of presidential emergency powers which had been accumulated during the crises of the past. Many people feel strongly that Congress alone should possess this power, just as Congress alone possesses the constitutional power to declare war.").

emergency instead of seeking a declaration from Congress; therefore, he asserted an inherent presidential power to find and declare emergencies.¹¹³ The notion that only Congress could properly claim a general emergency power was not implausible at the time.¹¹⁴ In some laws, Congress had carved out instances where it alone could declare the emergency necessary to activate given statutory authorities.¹¹⁵ Along these lines, one could understand the various statutes requiring a presidential declaration as narrow delegations of power with Congress retaining the general power to put the nation on an emergency footing.

The terms of the 1939 proclamation tend to undercut Rossiter's argument. The document failed to reference any statutory provisions, but it also made no reference to the President's role as Commander in Chief or to any other constitutional source of executive power. Rather, the proclamation declared that the emergency existed in connection with "safeguarding and enforcing" U.S. neutrality.¹¹⁶ As much as Roosevelt disliked the Neutrality Acts, the proclamation thus anchored its basis of authority in carrying out the will of Congress. The document also mentioned that the emergency related to the need for strengthening "national defense," yet this should not suggest an assertion of inherent executive authority seeing as the Constitution creates important national security roles for both Congress and the President. The proclamation even acknowledged congressional restrictions imposed by the Neutrality Acts by stating that any subsequent action would occur within the "limits of peace-time authorizations."

The best reading of the events surrounding the declaration is that the Roosevelt administration understood the mass of statutes referencing an "emergency" to confer an ability on the President to recognize emergencies. Before issuing the proclamation, Roosevelt had consulted Jackson's memo describing and listing statutory delegations of power. And at his morning press conference, the President defended his proclamation with the argument that "emergency" was something created by congressional acts.¹¹⁷ That Roosevelt declared a *general* emergency should not suggest inherent executive power. Congress had not yet required—as it would in the National Emergencies Act—that a declaration cite to

113. *See id.*

114. Notably, a version of this view was expressed in the Second Congress during debates regarding delegation to the President of the power to call forth the militia. *See* 3 ANNALS OF CONG. 579 (1792) ("Mr. Livermore . . . doubted whether the Legislature of the United States had a right to authorize the President to call forth the Militia till some real necessity for the measure should exist.").

115. *See, e.g.,* Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 776, 780 ("[E]xcept in time of a national emergency expressly declared by Congress . . ."); *see also* Act of June 10, 1922, Pub. L. No. 635, 42 Stat. 626 ("During the existence of a state of war, formally recognized by Congress, . . .").

116. Proclamation No. 2352, 4 Fed. Reg. 3851 (Sept. 9, 1939); *see also* Letter from Frank Murphy, Attorney General, to John Nance Gardner, Vice President and President of the Senate (Oct. 2, 1939) (noting that the proclamation "by its terms" was limited to the "observance, safeguarding, and enforcement of neutrality and strengthening the national defense within the limits of peace-time organization"), *in* JACKSON PAPERS, *supra* note 49.

117. Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 6 ("Now, a thing called [a] 'Declaration of National Emergency' is provided for in a great many statutes, not just one").

specific statutory authority. Some statutes required only the recognition of “emergency,” without imposing more detailed factual findings.¹¹⁸ Thus, the administration could reasonably have construed the mass of statutory emergency provisions as permitting and envisioning general emergency declarations. Tellingly, the administration did not assert that its general proclamation could activate statutory powers that called for more specific findings. For example, the President’s Executive order under the Sugar Act contained the findings required by Congress.

In terms of the substantive actions that followed the September eighth proclamation, the President plainly sought to use statutory powers.¹¹⁹ After all, each of the President’s Executive orders cited to statutory authorities, most of which expressly delegated power to the President. That said, a close inspection of the fit between the text of the orders and of the statutes reveals substantial daylight in some cases. The President’s orders increasing the size of the Army and the FBI appear to stretch the scope of relevant statutory authorities. However, in both cases the administration was taking advantage of statutory ambiguity, a far cry from asserting its own independent emergency power.

The President did reference the September eighth proclamation in establishing the executive branch Office of Price Administration.¹²⁰ However, as discussed above, the order did not purport to give the administrator any power to influence prices besides recommending action to the President under existing statutes.¹²¹ Besides this, the administrator was charged with coordination and planning functions within the executive branch. Thus, the creation of the Office of Price Administration hardly seems strong precedent for some inherent executive emergency power. Finally, Murphy’s response to the congressional information request also does not evidence a broad assertion of presidential emergency power. Though Murphy nodded to the President’s power under the Constitution, he specifically declined to comment on its scope.¹²² To the extent that Murphy did give an opinion, he emphasized the importance of the factual predicate for an emergency. This last piece actually suggests a *limitation* on power, and it raises the

118. Some statutes also used the condition of “emergency” as a trigger without specifying which branch needed to make the declaration. *See* Act of June 3, 1916, §2, 39 Stat. 166, *as amended by* Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 759, 759. The administration could have reasonably construed such statutes as indicating that any declared emergency could activate these authorities.

119. *Cf.* KOENIG, *supra* note 30, at 14 (“[T]he President was prepared to avail himself freely of the great reservoir of statutory powers.”).

120. Exec. Order No. 8734, 6 Fed. Reg. 1917 (April 15, 1941) (“[I]n order to define further the functions and duties of the Office for Emergency Management with respect to the national emergency as declared by the President on September 8, 1939, for the purpose of avoiding profiteering and unwarranted price rises”).

121. *See id.*; *see also* David Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, 9 LAW & CONTEMP. PROBS. 1, 24 n.7 (1942) (stating “[the Executive order] empowers the Administrator to recommend to the President the exercise of such of his powers” and then listing statutory powers).

122. Moreover, he did so after the President had just exercised an enumerated constitutional power to call Congress into session.

possibility of the other branches serving as checks on presidential actions. The next Part delves more fully into the Roosevelt administration's views on this point.

IV. THEORY: REGULATION BY EMERGENCY

The 1939 proclamation is a helpful instance of executive branch practice for understanding the Roosevelt administration's view of emergency powers. A Department of Justice study undertaken in the proclamation's wake proves even more instructive. The study included a series of research memos that inquired into the power of the federal government as a whole to directly fix prices in the domestic economy. These memos help shed light on the two additional emergency questions: whether emergencies allow existing powers to stretch and whether courts may review the factual predicate behind an emergency declaration. The study reveals the persistence of a flexible conception of emergency powers within the administration as well as the administration's assumption that judicial review would remain available to examine the factual assertions of an emergency declaration.

A. *A Price Control Bill*

The outbreak of war in Europe fueled press speculation that the President might call an extraordinary session of Congress to seek new anti-profiteering measures.¹²³ This prediction seemed accurate when the President called for the extraordinary session and the very next day Murphy revealed that his department was working on price control legislation. He indicated that the White House had requested the proposal, but he included the caveat that the President would ultimately decide whether to introduce the bill.¹²⁴ With Congress set to reconvene on the twenty-first, the Justice Department hurried to prepare a legislative proposal.

The President quickly threw cold water on these plans. On the fifteenth of September, he stated that he "did not expect" to seek anti-profiteering legislation at the special session.¹²⁵ Roosevelt also communicated that he would not issue additional Executive orders under the state of emergency.¹²⁶ Apparently, the news of Roosevelt's disinclination to push price-control legislation was slow to reach the Justice Department. That same day, Francis J. McNamara, Assistant Attorney General for Alien Property, convened a meeting of several lawyers,

123. Press Conference of President Franklin Delano Roosevelt (Sept. 8, 1939), *supra* note 68, Series 1, at 4.

124. *Murphy Believes Anti-Trust Laws Block Profiteering*, WALL ST. J., Sept. 15, 1939, at 9; Felix Cotton, *Legislation Drafted to Curb Profiteering*, WASH. POST, Sept. 15, 1939, at 2.

125. Press Conference of President Franklin Delano Roosevelt (Sept. 15, 1939), *in* ROOSEVELT, PRESS CONFERENCES, *supra* note 51, Series 2, at 2; *No Anti-Profiteering Law Now*, WALL ST. J., Sept. 16, 1939, at 1.

126. The President would instead request that the Temporary National Economic Committee look into the increases in prices. *See* Bartels, *supra* note 55, at 2 (citing Franklin D. Roosevelt, Letter to Sen. Joseph O'Mahoney, September 29, 1939, "Price-Fixing" folder, Box 2, File 327, Official Files of Franklin D. Roosevelt).

many from the claims division, to study the constitutionality of an anti-profiteering law. Specifically, he asked the attorneys whether Congress could enact legislation to control prices in the absence of U.S. participation in the unfolding European war.¹²⁷ McNamara wanted answers the next day.¹²⁸

Working late into the night and over the weekend, these attorneys faced a daunting task. Price regulation, of the sort envisioned, represented a substantial economic upheaval. The contemplated government program would suspend the influence of market forces on prices, thereby striking at the “central nervous system of the economy.”¹²⁹ Congress had previously enacted the Lever Act, which temporarily forbade the charging of “unreasonable” prices, but this had been during World War I.¹³⁰ Although a state of war existed abroad, nothing yet suggested that the United States would necessarily join the conflict.

To complicate matters further, familiar sources of constitutional authority did not appear immediately available. The Justice Department understood the Supreme Court had shifted to a more permissive interpretation of federal power under the Commerce Clause after 1937.¹³¹ However, this power had yet to reach its zenith in *Wickard v. Filburn*, where the Court would uphold intrusive economic regulation solely on a Commerce Clause basis.¹³² Given the uncertainty concerning the Commerce Clause’s scope, some of the Department’s lawyers turned to the existence of emergency, harkening back to the Court’s “emergency doctrine.”

B. The Emergency Doctrine

The full significance of the Justice Department’s price-fixing study only becomes clear with a proper understanding of its constitutional backdrop. Therefore, this Section takes a brief detour to explain the “emergency doctrine” and why its appearance in the study would be startling. In the early twentieth century, several Supreme Court cases produced a loosely defined and under-theorized conception of emergency power. Although not a theory of independent

127. See Memorandum from F.J. McNamara, Assistant Attorney General for Alien Property, to Francis M. Shea, Assistant Attorney General, Claims Division (Sept. 19, 1939), in JACKSON PAPERS, *supra* note 49.

128. See Memorandum from Fred Esch to F.J. McNamara, Assistant Attorney General for Alien Property (Sept. 16, 1939), in JACKSON PAPERS, *supra* note 49; Memorandum from Brice Toole to F.J. McNamara, Assistant Attorney General for Alien Property (Sept 16, 1939), in JACKSON PAPERS, *supra* note 49.

129. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

130. Food and Fuel Control Act, Pub. L. No. 65-41, § 4, 40 Stat. 276, 277 (1917). The Supreme Court would eventually void this provision as unconstitutionally vague in violation of the Fifth and Sixth Amendments. See *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89–93 (1921).

131. LEUCHTENBERG, *supra* note 40, at 143 (“[Assistant Attorney General for Antitrust] Thurman Arnold confided to his attorneys ‘Roosevelt has already accomplished his objectives and we are rewriting all of our briefs in the Department of Justice in terms of the new definition of the commerce power.’”).

132. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (“[T]he power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt”); see also John J. Trenam, Note, *Commerce Power Since the Schechter Case*, 31 GEO. L. J. 201, 209 (1943).

constitutional power, this "emergency doctrine" seemingly allowed constitutional powers to "stretch" and constitutional restrictions to "shrink" in an emergency.¹³³

In 1916, Congress enacted an eight-hour workday to prevent a nationwide railroad worker strike.¹³⁴ A challenge to the act reached the Court in *Wilson v. New*. Writing for the majority, Chief Justice Edward Douglass White located the ability to set an eight-hour workday within the Commerce Clause power of Congress by virtue of the "the entire interruption of interstate commerce [being] threatened."¹³⁵ According to White, the dissent's argument that "emergency cannot be made a source of power" begged the question; this formulation failed to answer the first-order question of *what* powers Congress could exercise.¹³⁶ As he noted, "emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."¹³⁷

Eighteen years after *Wilson*, the Court again confronted the emergency question in *Home Building and Loan Association v. Blaisdell*, where it faced a Minnesota law suspending home mortgages in response to the housing loan crisis brought on by the Great Depression.¹³⁸ Chief Justice Charles Evans Hughes upheld the law against a claim that it violated the Contract Clause of the Federal Constitution, and he returned to and updated the language in *Wilson*. "While emergency does not create power, emergency may furnish the occasion for the exercise of power."¹³⁹ Continuing on in dicta, Hughes compared the situation before the Court to the federal government's war power, which entailed the power to "meet that emergency."¹⁴⁰ Though the factual existence of an emergency could not override firm and clear constitutional commandments, it allowed the Court to construe ambiguous provisions in light of the existing crisis.¹⁴¹ In

133. For a lengthier description of this concept, see Gross, *supra* note 20, at 1059–64. Gross fits the doctrine under the heading of "interpretive accommodation" in his treatment of emergency powers. *Id.* This conception of emergency is similar to, but ultimately distinct from, that detailed in LIEBER & LIEBER, *supra* note 22.

134. See *Wilson v. New*, 243 U.S. 340, 342 (1916); see also *Topics in Chronicling America – Eight Hour Day (1916)*, THE LIBRARY OF CONGRESS (Aug. 9, 2016), <https://perma.cc/LQL8-28VN>.

135. See *Wilson*, 243 U.S. at 347–48.

136. See *id.* at 348.

137. *Id.*

138. *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 425 (1934).

139. *Id.* at 426. Hughes followed this sentence by quoting *Wilson. Id.*

140. *Id.*

141. *Id.* ("[T]hus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts.' But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."); see JOHN A. FLITER & DEREK HOFF, *FIGHTING FORECLOSURE, THE BLAISDELL CASE, THE CONTRACT CLAUSE, AND THE GREAT DEPRESSION* 132 (2012); Matthew Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 637–38 (2017) (discussing Charles E. Hughes, *War Powers Under the Constitution*, 40 ANN. REP. A.B.A. (1917)).

Though Hughes did not explicitly say in *Blaisdell* that ambiguous constitutional provisions should be interpreted in light of the existing emergency, he said virtually as much in his 1917 speech to the

Blaisdell, this process allowed Hughes to read into contracts a reservation for state power to address “extraordinary conditions.”¹⁴²

Together, *Wilson* and *Blaisdell* articulate an “emergency doctrine.” Both opinions disavow any new sources of power in an emergency, yet they both hold that non-emergency authorities—such as the police power or the Commerce Clause—contain the power to meet an “emergency.” This formulation suggests that an emergency permits some government action that would not be allowed in calmer times when the fact of an emergency is absent.¹⁴³ After all, *Blaisdell* represented an extension of Hughes’s thinking that federal war and emergency powers were flexible powers that could adapt in response to specific exigencies and threats.¹⁴⁴

Hughes’s vision of a flexible emergency power stood in contrast to a more formalistic understanding of that power.¹⁴⁵ Writing in 1935, Robert Maurer, a law professor at Georgetown, assailed this flexible view of emergency.¹⁴⁶ Using emergency as the test for constitutionality, Maurer reflected, created one set of constitutional restraints for “ordinary times” and another set for “emergency times.” This could not be correct, thought Maurer, who concluded that a given regulatory power must either reside entirely within Congress’s authority or Congress simply did not possess the power.¹⁴⁷ Despite such criticism, Hughes did not advance a theory of unbridled power. As Matthew Waxman observes, Hughes remained perturbed by the problem of how to properly constrain war and emergency powers, and he sought clear limits on their use.¹⁴⁸ First, the emergency doctrine required that the factual predicate of the emergency actually be real.¹⁴⁹ Second, the doctrine embraced a role for the courts to review this factual predicate.¹⁵⁰ In *Blaisdell*, Hughes reaffirmed that such an inquiry “is always open” to the judiciary.¹⁵¹

American Bar Association. See Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 18 (1917) (noting that constitutional provisions may be “construed” to, among other things, “preserve the rights of citizens.”).

142. *Blaisdell*, 290 U.S. at 439; FLITER & HOFF, *supra* note 141, at 132.

143. See Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 81 (1983) (“This was merely another way of saying that the crisis expanded the sphere of legitimate government action.”).

144. Waxman, *supra* note 141, at 673. Waxman rightly notes that in *Blaisdell* Hughes added the caveat of any emergency power needing to follow clear constitutional limitations. *Id.* at 633.

145. See Belknap, *supra* note 143, at 89 n.144.

146. Robert Maurer, *Emergency Laws*, 23 GEO. L.J. 671 (1935).

147. See *id.* at 721.

148. Waxman, *supra* note 141, at 620, 674–75.

149. See Hughes, *supra* note 141, at 16 (“If the necessity actually exists it cannot be doubted that the power of the Nation is adequate to meet it, but the rights of the citizens may not be impaired by an arbitrary legislative declaration.”).

150. See *id.* at 12 (“The judicial power of the United States continues to be vested in one Supreme Court and such inferior courts as Congress has ordained.”); Waxman, *supra* note 141, at 633–38 (mentioning the inclusion of the judicial power in portion of the speech on structural inflexibility). Cf. Waxman, *supra* note 141, at 631–632 (discussing how Hughes stressed the importance of judicial review in the delegation context).

151. *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 442 (1934) (“It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends” (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547, 548 (1924))).

In the early days of the New Deal, the emergency doctrine presented an attractive option to the lawyers trying to defend new government programs. Following *Blaisdell*, the New Dealers at the National Recovery Administration felt confident the Court would sustain their agency on emergency grounds.¹⁵² Stunningly, Hughes in *Schechter Poultry v. United States* repudiated a broad reading of his own prior holding.¹⁵³ According to Michal Belknap, the New Deal lawyers thoroughly absorbed this lesson and abandoned emergency as a constitutional justification for domestic legislation, thus ending the emergency doctrine.¹⁵⁴ Belknap explicitly contrasts the domestic sphere with the realms of foreign affairs and war, where he observes that a flexible emergency power remained well-accepted throughout and following the Second World War.¹⁵⁵ Belknap's account, while accurate, obscures the exercise of power in the in-between spaces that are neither comfortably foreign, nor entirely domestic.¹⁵⁶ As the next Sections show, an emergency doctrine with domestic application took on a brief second life in the time before the war.

C. "Fritz" Wiener and the Emergency Power

Returning to the price-fixing study of 1939, the group's clearest and most detailed memo belonged to Frederick Bernays Wiener, an attorney from the claims division. A graduate of Harvard Law School and close protégé of Felix Frankfurter, "Fritz" Wiener would go on to a celebrated career in military justice and national security law. He served in the JAG corps during the war and later successfully argued the famous case *Reid v. Covert*.¹⁵⁷ He also wrote several treatises on appellate advocacy, martial law, and military justice. At the time, Wiener was already working on his *Practical Manual of Martial Law*.¹⁵⁸

Wiener opened his memo by setting aside the questions he was not addressing. The memo would not consider excessive profits taxes or price control through antitrust laws; moreover, it would not consider the powers of the states or the

152. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 93–94 (1982).

153. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) ("Extraordinary conditions may call for extraordinary remedies . . . [but] do not create or *enlarge* constitutional power" (emphasis added)); see Belknap, *supra* note 143, at 97 (quoting the same); see also IRONS, *supra* note 152, at 101 (discussing Hughes's opinion). *Schechter* can be distinguished from *Blaisdell*, not solely on the state-federal axis, but also with regard to the relative lack of procedure and unbounded discretion conferred on the executive and private parties in *Schechter*.

154. See Belknap, *supra* note 143, at 97–98.

155. *Id.* at 98–101.

156. Belknap counts presidential proclamations of national emergency as evidence of the continued viability of the flexible emergency doctrine. See *id.*

157. An Oral History by CPT Michael J. Kelleher & CPT Dan Trimble of Frederick Bernays Wiener (Jan. 28–30, 1987), at 10, 11–12, 17; Letter from Frederick Bernays Wiener to Felix Frankfurter (Sept. 6, 1933) in FELIX FRANKFURTER PAPERS, Box 111, Reel 67 (on file with the Library of Congress, Manuscript Division, Washington, D.C.); see also Jed S. Rakoff, Book Review, *Frederick Bernays Wiener: Master of Advocacy* 81 LA. L. REV. 945 (2021) (reviewing PAUL R. BAIER, *WRITTEN IN WATER: AN EXPERIMENT IN LEGAL BIOGRAPHY* (2020)).

158. See FREDERICK BERNAYS WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940); Rakoff, *supra* note 157, at 946 (discussing some of Wiener's other publications).

executive branch alone.¹⁵⁹ It would only address the direct control of prices under duly enacted legislation. He framed his inquiry with a tripartite division of congressional powers. According to Wiener, Congress could plausibly enact price control legislation under either the War Powers Clause, the Commerce Clause, or “perhaps” some power arising from the fact of an emergency.¹⁶⁰

Wiener turned first to the emergency doctrine, which he thought he could address quickly.¹⁶¹ “It is now well settled,” wrote Wiener, “that the existence of an emergency does not operate as the grant of a new substantive power.” He then quoted the enduring language from *Wilson* and *Blaisdell* that emergency could not create power, but could provide the occasion for the use of already-existing power.¹⁶² According to Wiener, this adage allowed the states or Congress to use powers they already possessed to meet related crises.¹⁶³ Thus, he read *Wilson* to stand for the proposition that Congress could address an emergency in interstate commerce, such as a nation-wide strike.¹⁶⁴

Wiener noted unequivocally that no emergency “however dire” permitted the federal government to exercise state police powers.¹⁶⁵ For this proposition, he cited to *Schechter*, thus acknowledging the Court’s repudiation of an expansive reading of *Blaisdell*.¹⁶⁶ Wiener then cited again to *Blaisdell* as additional support for the proposition that emergencies could not justify the violation of clear constitutional constraints. This understanding, according to Wiener, called for a discussion of Congress’s enumerated powers, to which he proceeded.

On the War Powers Clause, Wiener determined Congress could enact price-fixing legislation under its war powers.¹⁶⁷ However, war measures required actual war or at least “imminently threatened hostilities,” which Wiener thought were not present.¹⁶⁸ Turning to the third basis of authority, Wiener considered the Commerce Clause. He reiterated that Congress “[u]ndoubtedly” possessed the power to protect commerce from an “emergency,” citing again to *Wilson*.¹⁶⁹ Therefore, he concluded it would be “constitutionally possible under the Commerce Clause to devise controls for the major commodities in an emergency short of war.”¹⁷⁰

159. Memorandum from Frederick Bernays Wiener to F.J. McNamara, at 1, 6 (Sept. 16, 1939) [hereinafter Wiener Memo], in JACKSON PAPERS, *supra* note 49.

160. *Id.* at 1.

161. *Id.*

162. *Id.* (“Although an emergency may not call into a life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.” (quoting *Wilson*, 243 U.S. at 348)); *Id.* (“While emergency does not create power, emergency may furnish the occasion for the exercise of power.” (quoting *Blaisdell*, 290 U.S. at 426)).

163. *Id.* at 1–2.

164. *Id.* (citing *Wilson*, 243 U.S. at 348).

165. *Id.* at 2 (“But no emergency, however dire, which is short of war, will give the Congress the ordinary police powers, which are reserved to the states.”).

166. *Id.*; see also IRONS, *supra* note 152, at 93–94, 101.

167. Wiener Memo, *supra* note 159, at 2–3.

168. *Id.* at 3.

169. *Id.*

170. *Id.*

Having established these bases of power, Wiener discussed the due process requirements of price-fixing legislation. Even in wartime, he opined, Congress had to observe due process limitations.¹⁷¹ Wiener then devoted a substantial portion of his short memo to considering whether the courts could review a declaration of emergency. In his view, emergency declarations by Congress and state legislatures would bear some presumption of being correct, but they could not be conclusive. As a practical matter, a court would not look “far beyond the declaration,” yet it retained the power to do so.¹⁷² To reach this conclusion, he reasoned by analogy, relying on a single case involving a state governor. In *Sterling v. Constantin*, the Governor of Texas had used a declaration of martial law to curtail oil production in the state.¹⁷³ The Court—in another opinion by Hughes—dismissed the Governor’s argument that this declaration precluded judicial review; it reasoned that the Court could always determine when official action had exceeded permissible discretion.¹⁷⁴ Wiener drew the following lesson from the case:

If therefore, Congress should declare an emergency when all was peaceful and undisturbed, when there was no economic dislocation, simply to gratify the views of those to whom the profit principle is anathema, it may be asserted with some confidence that the Court would hold the emergency non-existent, and deal with the case on that basis.¹⁷⁵

In short, Wiener firmly endorsed the view that a court could recognize and dismiss a manufactured assertion of emergency.

Wiener ultimately reached three conclusions. First, he indicated that a price-fixing statute would pass constitutional muster under the War Powers Clause pursuant to a declaration of war, but could not be sustained absent imminent hostilities.¹⁷⁶ Second, he opined that price-fixing legislation would be constitutional under the Commerce Clause *and* a declaration of emergency, “if an emergency in fact existed.”¹⁷⁷ Finally, any such legislation would have to comply with delegation and due process requirements, but could likely “reach a very great deal of *intrastate* commerce.”¹⁷⁸

Some aspects of Wiener’s memo reflect the particularities of its author. The work’s forceful conclusions, regard for the courts, and emphasis on precedent all display Wiener’s eagerness to litigate. Despite the idiosyncrasies, Wiener’s

171. Wiener also discussed the due-process limitation on permissible delegation. *Id.* at 5.

172. *Id.*

173. *Sterling v. Constantin*, 287 U.S. 378, 388–92 (1932).

174. *Id.* at 397–401.

175. Wiener Memo, *supra* note 159. Wiener may have had in mind certain New Dealers who saw the emergency context as an opportunity for more dramatic economic reform. See Washington Bureau, *No Business Curbs*, WALL ST. J. (Sept. 9, 1939), at 1; see also *supra* note 88 and accompanying text.

176. Wiener Memo, *supra* note 159, at 6.

177. *Id.*

178. *Id.* (emphasis added).

memo is highly revelatory. His writing shows a supposedly defunct doctrine doing a surprising amount of work to justify an unprecedented degree of economic control by the federal government outside of wartime.

D. *The Other Memos*

Wiener did not write alone, and the memos of other attorneys serve as telling markers regarding the consensus—or lack thereof—within the Justice Department on certain emergency questions.

On the matter of whether an emergency could allow certain powers to stretch, Wiener was not the only study participant to point to the continued vitality of the emergency doctrine. Other lawyers similarly indicated in their memos that the factual predicate of an emergency would bear weight on the constitutionality of price fixing. They agreed that an emergency did not allow Congress to use powers beyond those enumerated by the Constitution,¹⁷⁹ but they nevertheless assessed that—in an emergency—Congress could extend an enumerated power beyond the limits of “normal times.”¹⁸⁰ According to one claims division attorney, Congress had no power to regulate prices without an emergency.¹⁸¹ By contrast, some lawyers relied solely on the Commerce Clause,¹⁸² with one attorney going so far as to call Congress’s power under the Clause “plenary.”¹⁸³

179. Memorandum from Brice Toole to F.J. McNamara (citing to *Wilson v. New*, 243 U.S. 332 (1916)), *supra* note 128, at 4.

180. *Id.* (“While the opinion does not directly say so, its tenor seems to be that during an emergency Congress may use an existing power to a greater extent than in normal times.” (quoting *Wilson*)); *see also* Memorandum from J.W. Connally to F.J. McNamara, at 5–9 (Sept. 18, 1939) (relying on *Nebbia v. New York*, 219 U.S. 502 (1934), to conclude that an emergency could justify the extension of the Commerce Clause power to new industries), *in JACKSON PAPERS*, *supra* note 49.

181. Supplemental Memorandum from Brice Toole to F.J. McNamara, Assistant Att’y Gen. for Alien Property, at 4 (Sept. 18, 1939) (“[T]here is no authority *per se* in Congress to regulate prices by the device of using delegated power (interstate commerce, taxation, etc.), unless extraordinary conditions warrant such exercise of delegated powers in an extraordinary manner [U]ntil such ‘emergency’ exists in fact, there is not authority for positive action for the control of commodity prices.”), *in JACKSON PAPERS*, *supra* note 49.

182. Memorandum from Franck Sterck to F.J. McNamara, Assistant Att’y Gen. for Alien Property, at 5 (Sept. 18, 1939) (observing that Congress could enact legislation to remove burdens to interstate commerce), *in JACKSON PAPERS*, *supra* note 49; Memorandum from G.W. Spangler & J.J. Edwards to F. J. McNamara, Assistant Att’y Gen. for Alien Property (Sept. 16, 1939) (citing to *Nebbia* for the proposition that “if a state can so regulate prices, it follows that the Congress may regulate prices in interstate commerce[.]”), *in JACKSON PAPERS*, *supra* note 49; *see also* Memorandum from Alexander Holtzoff for Edward G. Kemp, *supra* note 59 (“There is no doubt that under the Commerce Clause Congress has the constitutional power to enact legislation to regulate prices of commodities in interstate and foreign commerce, at least in respect to commodities in which there is a public interest.” (citing *Block v. Hirsh*, 256 U.S. 135 (1921) and *Nebbia v. New York*, 291 U.S. 502 (1934))).

183. Memorandum from Fred Esch to F.J. McNamara, *supra* note 128 (embracing a capacious understanding of congressional Commerce Clause power by noting that such power appeared “plenary”). For the most part, the memos do not otherwise offer a clear picture of whether any given attorney read the Commerce Clause capaciously or narrowly. For instance, Brice Toole, who seemed to advocate a flexible emergency doctrine, also noted that Congress could not use the Commerce Clause to reach intrastate prices, even in an emergency. *See* Memorandum from Brice Toole to F.J. McNamara, *supra* note 128. According to Toole, this would not be a grave restriction because the regulation of interstate prices would indirectly affect intrastate prices. *See id.*

Concerning the relationship between Congress and the President, all the attorneys who addressed the matter assumed that Congress would either have to declare the emergency in domestic prices itself or delegate this function to the President.¹⁸⁴ Here, they agreed with Wiener.¹⁸⁵ None of the memos mentioned the President's September eighth declaration, but that all the authors discussed emergency declaration as a delegated power is fairly instructive. At a minimum, it confirms a fairly intuitive understanding that Congress possesses ultimate control over emergency measures relating to its own enumerated powers. The Constitution explicitly allocates the power to regulate commerce to Congress, so to suggest the President could exercise independent power in this area would be extraordinary. Yet—with domestic prices rising because of a foreign war—no lawyer even hinted that the President's existing proclamation provided the necessary recognition of an emergency to allow price fixing by the federal government.

On the question of judicial review of an emergency declaration, even the attorneys who disagreed with Wiener that emergency declarations were judicially reviewable conceded important limits. The authors of one memo strongly implied that the courts could not look behind a congressional declaration where the existence of an emergency was a least ambiguous.¹⁸⁶ However, they admitted that courts could question the existence of an emergency "under certain circumstances." They distinguished *Sterling v. Constantin* as a case where the circumstances not only showed no evidence of a crisis, but also indicated the Governor's failure to exercise honest judgement.¹⁸⁷ So even these authors kept a role for the courts in ensuring that the entity declaring the emergency acted in good faith. Other lawyers, without directly addressing judicial review, stressed the importance of an emergency existing "in fact."¹⁸⁸ This view at least implicitly left open the possibility of the judicial branch second-guessing the factual predicate of a declared crisis.

By the morning of September nineteenth, the study group had finalized its work into one document. McNamara described this memo as the product of substantial collaboration between several lawyers; however, the document mirrored the structure of Wiener's initial draft and incorporated large sections of his

184. Supplemental Memorandum from Brice Toole to F.J. McNamara, *supra* note 181, at 4 (proposing a statutory structure whereby a congressional act would require a positive factual finding by the President when an emergency arose in domestic prices); Memorandum from G.W. Spangler & J.J. Edwards to F.J. McNamara, *supra* note 182 (proposing a structure whereby Congress or the President would find an emergency, and a commission would then fix prices).

185. Wiener Memo, *supra* note 159, at 6 ("A price-fixing statute . . . would be valid under a congressional declaration of emergency . . . or under a delegated executive declaration of emergency [.]").

186. Memorandum from G.W. Spangler & J.J. Edwards to F.J. McNamara, *supra* note 182 ("[T]he Supreme Court has expressed the view that it is within the province of Congress to declare that such an emergency exists[.]") (citing to *Stafford v. Wallace*, 258 U.S. 495 (1922)).

187. *Id.* (citing to *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)).

188. Supplemental Memorandum from Brice Toole to F.J. McNamara, *supra* note 181, at 4; Memorandum from J.W. Connolly to F.J. McNamara, *supra* note 180, at 3 (stressing importance of emergency being "real").

language verbatim.¹⁸⁹ It included his conclusion that price-fixing legislation—in the absence of war—would be valid pursuant to an emergency declaration.¹⁹⁰ It also adopted his view that courts could review the facts underpinning such an emergency declaration, though it omitted his more forceful language on this front.¹⁹¹

Curiously, this final memo nominally repudiated the emergency doctrine while simultaneously requiring an emergency to exist for Congress to directly fix prices.¹⁹² This illuminates the paradox of emergency theorizing. If an emergency represents unexpected circumstances calling for the suspension of normal rules, then the power to meet an emergency cannot be restricted by formal, normal-time distinctions, such as whether a particular activity falls within Commerce. As the memos show, this paradox gave the emergency doctrine a second life in the space between the domestic and foreign spheres. Alongside this flexible conception of emergency, the memos reveal the importance of an emergency actually existing as a factual matter and this fact question being reviewable by the judiciary.

That same day, McNamara submitted the final memo to a conference of the Attorney General's close subordinates.¹⁹³ The attendees reportedly approved of the work and agreed to draft a price control bill consistent with an emergency exercise of the commerce power.¹⁹⁴ Though the President had foreclosed action at the special session, the conference decided to continue work and place the bill “on ice” until needed.¹⁹⁵

189. Memorandum from F.J. McNamara, Special Assistant to the Att’y Gen., to Edward G. Kemp, Assistant to the Att’y Gen., at 1 (Sept. 19, 1939), in JACKSON PAPERS, *supra* note 49 [hereinafter after McNamara Memo].

190. Compare Wiener Memo, *supra* note 159, at 6 with McNamara Memo, *supra* note 189, at 6.

191. Compare Wiener Memo, *supra* note 159, at 5 with McNamara Memo, *supra* note 189 at 5. The final memo did omit some of Wiener’s forceful conclusion expressing certainty that the court would easily look past spurious emergency declarations. See McNamara Memo, *supra* note 189, at 5. The final memo noted in reference to *Sterling v. Constantin* that “the Court had no difficulty in going behind the proclamation and reviewing the actions of the Executive,” but it omitted Wiener’s comments about a fictitious emergency to suspend the “profit principle.” *Id.*; see *supra* note 175 and accompanying text.

192. See McNamara Memo, *supra* note 189, at 6; Wiener Memo, *supra* note 159, at 6. Of course, this contradiction might merely reflect the reality of producing a legal document with multiple authors in a short time frame. However, the presence of this contradiction in both Wiener’s draft and those of other lawyers suggests that it was a real feature of the understanding of emergencies at the time.

193. Memorandum from F.J. McNamara to Francis M. Shea, *supra* note 127.

194. *Id.*

195. *Id.* The committee produced a final draft in December after relying in part on British price-fixing legislation as a model. See Memorandum from F.J. McNamara, Special Assistant to the Att’y Gen., to Francis M Shea, (Sept. 28, 1939), in JACKSON PAPERS, *supra* note 49; Memorandum from F.J. McNamara to Edward G. Kemp (Oct. 3, 1939) (noting that that subcommittee for drafting price control legislation met on Sept. 29, 1939, but could not agree on a text), in JACKSON PAPERS, *supra* note 49. Further research may reveal how much these initial efforts contributed to the enactment of the Emergency Price Control Act of 1942, Pub. L. No. 77–421, 56 Stat. 23 (codified as amended at 50 U.S.C. §§ 901–46).

Roosevelt would not ask Congress for a price control bill until the summer of 1941.¹⁹⁶ While the bill was working its way through the legislative branch, Japan attacked Pearl Harbor, bringing the United States into the war. By January, Congress had produced the Emergency Price Control Act of 1942. It granted the administration the direct control over prices it had been seeking for the prior three years. The Act empowered a Federal Price Administrator to “establish such . . . maximum prices as in his judgement shall be generally fair and equitable.”¹⁹⁷ Evidencing its emergency status, Congress placed a mandatory sunset provision in the Act—setting it to expire after a year and half—and provided that the price control regime could also be ended by the President alone or by a concurrent resolution of Congress.¹⁹⁸

V. DISCUSSION

Taken as a whole, the executive branch's response to the outbreak of war abroad and rising prices at home presents a distinct view of how emergencies interact with the constitutional scheme. The first Section below distills the Roosevelt administration's internal memos and external actions into discrete lessons. They reveal a flexible understanding of emergency that accommodated—as opposed to foreclosing—inter-branch participation. The second Section discusses the applicability of these lessons to present day problems of national emergency. The history of these September days shows a marked difference from recent executive branch actions and claims.

A. *Lessons from History*

The experience of the Roosevelt administration in grappling with the threat of inflation in the fall of 1939 presents several lessons for understanding emergency powers under the Constitution. These lessons concern: (1) the scope of the executive's inherent emergency power, both to declare emergencies and to act to meet them; (2) whether emergencies allow powers to expand to meet a crisis; and (3) how much the judiciary can investigate the factual predicate behind an emergency declaration. This Section takes up each of these questions in turn.

First, as discussed in Part III, the Roosevelt administration's unilateral declaration of a “limited national emergency” in 1939 should not be taken as precedent for an inherent power of the executive branch to recognize and declare emergencies. Although the administration did not cite to any statutory authority in its proclamation, the evidence suggests it was relying on delegated power. The administration appears to have construed the mass of statutes which did confer an emergency-declaration function to give the President a general power to recognize the existence of a crisis. Notably, Roosevelt complied with statutes that required more precise findings to activate certain powers.

196. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE* 35 (2012) (“Fearing inflation at home as war raged in Europe, Roosevelt, in the summer of 1941, had asked Congress to take action.”).

197. Emergency Price Control Act of 1942, § 2, 56 Stat. at 24.

198. *Id.* § 1(b).

Additionally, the administration did not assert a broad power to take substantive, independent action under its own constitutional authority in response to a crisis. Although it worried about domestic price inflation and profiteering, the administration readily conceded that Congress had not given it the power to fix prices directly. The executive branch could have asserted that the foreign origins of the price rises gave it some power to intervene domestically, but it never appears to have seriously considered this argument. Roosevelt's eventual creation of the Office of Price Administration by Executive order was traceable to statutory authority, and the office's administrator could only recommend presidential action under existing statutes. Roosevelt and the Justice Department did display a willingness to stretch existing statutes and construe statutory ambiguity in their favor; however, this does not evidence a preclusive view of executive power. Rather, it shows a flexible conception of emergency.

Second, as Part IV reveals, the administration relied on a flexible emergency doctrine in its internal theorizing. Although the memos in the Justice Department study reiterated *Blaisdell's* conclusion that an emergency did not create new power, the study group's final memo determined the existence of an emergency would be necessary to justify intrusive domestic price regulation by the federal government.¹⁹⁹ This marks a reprise for a doctrine that had supposedly met its end with *Shechter Poultry*.²⁰⁰ The doctrine's persistence appears tied to war being at the doorstep. No doubt, these executive branch lawyers could not help but think of the unfolding European conflict when they searched for government authority to control prices.

Examining Roosevelt's actions surrounding the 1939 proclamation in light of the continued vitality of the emergency powers doctrine suggests remarkable consistency within the administration. Through this lens, the administration's willingness to "stretch" existing statutes appears best understood not as an assertion of some distinctly executive power, but as a recognition that any power—statutory or constitutional—should be interpreted to include sufficient flexibility to meet a crisis. One contemporaneous commentator implicitly made this connection by observing how Roosevelt's actions—including the 1939 proclamation—conformed to Hughes's formulation of the doctrine in *Blaisdell*.²⁰¹ Moreover, the Attorney General himself stressed the importance of the fact of an emergency in interpreting both statutory and constitutional power. Although the persistence of the emergency doctrine might prompt worries about an unmoored font of power,

199. Tellingly, the study group's final memo did not adopt the view that congressional Commerce Clause power was "plenary" and could permit domestic price fixing without more. See McNamara Memo, *supra* note 189.

200. Belknap, *supra* note 143, at 102.

201. See KOENIG, *supra* note 30, at 11 ("But Mr. Roosevelt was, as we have remarked, very prompt in characterizing the circumstances confronting the nation as an 'emergency.' What were the legal effects of this designation? . . . The relation of emergency to Constitutional powers has been defined by the Supreme Court. Emergency does not 'create' new Constitutional power. . . . [But] emergency may afford the reason for the exertion of a power already enjoyed."); see also Belknap, *supra* note 143, at 98–101 (discussing the persistence of the emergency doctrine in connection with war and foreign powers, including the 1939 proclamation).

this appears not to have seriously troubled the Roosevelt administration because of its assumption regarding the availability of judicial review.

Third and finally, the historical evidence suggests the administration assumed the courts could review the factual predicate behind an emergency declaration. Wiener's memo in particular included the forceful conclusion that courts would have no trouble invalidating an emergency proclamation—either by Congress or the President—if in fact there was no emergency in the domestic economy.²⁰² Although this particular passage was cut from the final memo, the conclusion that an emergency declaration did not preclude judicial review remained.²⁰³ Even the attorneys who disagreed with Wiener indicated that courts could ascertain whether the proclamation had been issued in good faith.²⁰⁴ Together, the memos suggest that Roosevelt's Justice Department considered the factual basis behind an emergency to be important and understood the courts to be able to second-guess the executive's factual assertions.

B. Emergencies Today

These lessons from the Roosevelt administration offer some insights for assertions of emergency power today. First, the practice of the Roosevelt administration stands in marked contrast to recent executive branch claims to inherent emergency authority. Second, the Roosevelt administration's understanding of emergency authority calls into question judicial deference toward emergency declarations and crisis actions. Finally, the experience of the Roosevelt administration validates worries concerning the practical realities of executive branch control of delegated emergency powers.

As mentioned in the Introduction, Attorney General William Barr adopted and endorsed the argument that the Vesting Clause confers on the President the power to "address exigent circumstances" where the law is "silent or inadequate."²⁰⁵ This encompasses domestic crises including—according to Barr—a "plague" or a "natural disaster." Barr located this emergency power in the Constitution's Article II, effectively suggesting it cannot be regulated by Congress or the courts.²⁰⁶ Barr's argument speaks to a power to take substantive action, yet even the power to recognize and declare emergencies would still be significant. Such a power would imperil proposed reforms to the National Emergencies Act, including efforts to more precisely define what the President may call an "emergency"²⁰⁷ and to require judicial pre-approval of emergency declarations.²⁰⁸

202. Wiener Memo, *supra* note 159, at 5.

203. McNamara Memo, *supra* note 189, at 5–6.

204. See discussion *supra* Section IV.D.

205. See Barr, *supra* note 9 ("A related, and third aspect of Executive power is the power to address exigent circumstances that demand quick action to protect the well-being of the Nation but on which the law is either silent or inadequate – such as dealing with a plague or natural disaster. This residual power to meet contingency is essentially the federative power discussed by Locke in his Second Treatise.").

206. This was the whole theme of Barr's lecture. See *id.*

207. Goitein Testimony, *supra* note 11, at 16–17.

208. See Vladeck, *Separation of National Security Powers*, *supra* note 35, at 618–19.

At first blush, Roosevelt's 1939 proclamation might appear to be an instance of executive branch practice that supports Barr's argument.²⁰⁹ Both Rossiter and Yoo's accounts suggest the administration asserted and exercised inherent executive emergency powers. If correct, these accounts would be a considerable thumb on the scale in Barr's favor. However, close inspection shows the 1939 proclamation offers poor support for such broad claims, aside from a single statement by an unidentified official. The far better reading of the administration's unilateral action is that it exploited statutory ambiguity in existing congressional delegations of power.

Moreover, Barr's argument for a constitutionally derived emergency power does not appear in executive branch documents surrounding the proclamation. This absence is telling. If the executive branch had historically possessed an emergency power as Barr suggests, then the fall of 1939 would have been the time to use it. War had broken out abroad, the United States was experiencing inflation at home, and Congress was out of session. Yet instead of asserting executive emergency powers, the administration relied on existing statutes, complied with their specific requirements, and called Congress back to work.²¹⁰ When Congress asked for a precise accounting of the powers available to the President in an emergency, Murphy complied, despite emphasizing that he was not Congress's Attorney General. This all suggests that the Roosevelt administration—unlike Barr—understood executive branch emergency powers to be very narrow in the absence of congressional action.

The Trump administration also highlighted the problem of judicial review of the executive's determination that an emergency exists. On February 15, 2019, President Donald J. Trump issued a proclamation declaring an emergency at the southern border of the United States.²¹¹ In the declaration, the President specifically invoked two statutes allowing the government to “undertake military construction projects” and to order troops to active duty in the event of a national emergency.²¹² This emergency allowed the President to access an additional \$3.6 billion necessary for the completion of a wall on the U.S.–Mexico border.²¹³ The President's declaration was roundly criticized on several grounds, including the absence of any sudden or emergent threat.²¹⁴ The President's declaration also came after Congress pointedly refused to appropriate funds for the project. Congress, acting pursuant to the National Emergencies Act, voted to terminate

209. Barr's narrative relies on a gradual erosion of executive branch power following Watergate and the 1960s. *See* Barr, *supra* note 9.

210. Moreover, Roosevelt accomplished this last action using a power that is plainly in the Constitution. *See* U.S. CONST. art. II, § 3.

211. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019).

212. *See* 10 U.S.C. §§ 2808, 12302.

213. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N. Y. TIMES (Feb. 15, 2019), <https://perma.cc/5J3J-HC5F>.

214. *Exclusive: Full Text of Bipartisan Declaration of Former Senior U.S. Officials Refuting President's Claim of a National Emergency at Southern Border*, JUST SECURITY (Feb. 25, 2019), <https://perma.cc/3EXQ-JAEG>.

the national emergency.²¹⁵ Following the President's veto,²¹⁶ various groups, among them the U.S. House of Representatives, filed suit challenging the President's actions.²¹⁷

In one sense, President Trump's declaration appears more restrained and less dangerous than Roosevelt's 1939 proclamation.²¹⁸ Trump's proclamation was—by its own terms—grounded in specific statutory authorities, and it invoked only limited powers.²¹⁹ However, the Justice Department argued in litigation that emergency proclamations are judicially unreviewable as a matter of statutory interpretation.²²⁰ This position reflects the argument that the congressional grant of emergency authority makes the action unreviewable. Furthermore, the Supreme Court has displayed an unwillingness to investigate the factual predicate behind exercises of statutory power implicating national security and foreign policy.²²¹ As Robert Tsai observes, the Court “will rarely, if ever, scrutinize a President's motives or the evidence underlying a crisis claim.”²²²

Both as a constitutional and statutory matter, a reflexive aversion to judicial review appears inconsistent with the theory of emergency action endorsed by Roosevelt's Justice Department. Wiener in particular argued that courts could identify and dismiss phony emergencies, whether declared by Congress or the President. Other administration lawyers agreed that a court could at least ensure that the entity declaring the emergency did so in good faith. That these views emanated from the executive branch—which would seemingly have the most to gain from foreclosing judicial review—should be a strong indicator that the courts should remain open to probing factual inquiries into the true existence of an emergency.

The fall of 1939 does present some worrying precedent. Today, commentators have warned of the mass of statutes that delegate emergency authority to the

215. H.R.J. Res. 46, 116th Cong. (2019); Lisa Mascaro, Alan Fram, & Catherine Lucey, *Senate Slaps Down Trump Border Emergency; Republicans Defect*, AP NEWS (Mar. 14, 2019), <https://perma.cc/9FQH-X9C9>; Andrew Clevenger, *House Votes to End National Emergency on Southern Border*, ROLL CALL (Sep. 27, 2019, 12:00 PM), <https://perma.cc/NLT5-WPLV>.

216. A veto which Congress did not have sufficient votes to override. *U.S. Senate Fails to Override Trump Veto of Bill to End Border Emergency*, REUTERS (Oct. 17, 2019, 7:06 PM), <https://perma.cc/H8RC-HGFT>.

217. Application for a Preliminary Injunction, *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d (2019) (No. 1:19-cv-00969), 2019 WL 7547191; Complaint for Declaratory and Injunctive Relief, *Alvarez v. Trump*, No. 1:19-CV-00404 (D.D.C. Feb. 15, 2019); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. Trump*, 483 F. Supp. 3d 11 (2020) (No. 1:19-CV-00408).

218. See Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019); see also Jurecic, *supra* note 33.

219. See Jurecic, *supra* note 33.

220. Motion to Dismiss at 21–24, *Alvarez v. Trump*, No. 1:19-CV-00404 (D.D.C. Apr. 02, 2019); Motion to Dismiss at 22–25, *Ctr. for Biological Diversity v. Trump*, 483 F. Supp. 3d 11 (2020) (No. 1:19-CV-00408).

221. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–21 (2018) (refusing to look beyond facially neutral reason for exclusion policy except to perform rational basis review); see also Tsai, *supra* note 26, at 599–601 (describing judicial unwillingness to probe executive branch motivations in emergency context).

222. Tsai, *supra* note 26, at 599.

President. Elizabeth Goitein has referred to these numerous and varied authorities as a “parallel legal regime” allowing for the use of far-reaching powers upon the President’s determination that an emergency exists.²²³ Roosevelt skillfully used these congressionally delegated emergency powers to increase defense readiness despite Congress’s imposition of the Neutrality Acts. Jackson’s memo was the key to unlocking these powers. It mapped out for Roosevelt what actions he could take unilaterally and where he would have to push the legislative branch. With the benefit of hindsight, Roosevelt’s proclamation and Executive orders appear as prescient and necessary steps to prepare the country for the Second World War. However, they also represent the exercise of substantial power by a single individual.

Roosevelt’s experience illustrates the practical reality of presidential control in shaping an emergency. The 1939 proclamation declared safeguarding U.S. neutrality as its purpose, a move that can only be understood as disingenuous in light of Roosevelt’s antipathy for the Neutrality Acts. Rhetorically, this framing made subsequent Executive orders appear as measures to keep the country out of war, instead of efforts to ready it for war. Although anti-profiteering was on everyone’s mind in September of 1939, the proclamation also made no reference to the domestic economy. Yet Roosevelt invoked the emergency declaration when he created the first Office of Price Administration within the executive branch, setting the stage for intrusive economic regulation.²²⁴ This only further confirms that the executive branch’s ability to frame an emergency is a powerful tool in its own right.

As a final point, this Note argues that the practice and theories of the Roosevelt administration do not support an unbounded executive emergency power, but this is not to say that Roosevelt’s uses of presidential power were uniformly good or lawful. Following the U.S. entry into the war, the President issued the now properly reviled Executive order 9066. This order led directly to the mass internment of citizens and individuals of Japanese descent, a policy Roosevelt supported.²²⁵ Aside from the action’s evident unconstitutionality, this was a profound moral failing for the United States with its own troubling parallels today.²²⁶

CONCLUSION

The events of fall 1939 offer a snapshot of the changing nature of crisis powers. In the early twentieth century, the Supreme Court explored a doctrine that

223. See Goitein, *The Alarming Scope*, *supra* note 17.

224. Of course, prices were rising in 1939 because of the emergency identified by the proclamation: the outbreak of foreign war.

225. See TYLER, *supra* note 23, at 222, 239–40.

226. See *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (“Today’s holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*. . . . As here, the Government invoked an ill-defined national security threat to justify an exclusionary policy of sweeping proportion.”); Adam Serwer, *A Crime by Any Name*, THE ATLANTIC (Jul. 3, 2019), <https://perma.cc/E8QG-45GJ> (discussing internment of Japanese Americans as precedent for internment of undocumented migrant families).

allowed the fact of an emergency to stretch government power to meet exigent circumstances. This doctrine has since been replaced by a reliance on the enumerated powers of the individual branches. Whereas Hughes in *Blaisdell* tried to solve the problem of emergency action by relying on a flexible power, Jackson in *Youngstown* would rely on delegation between the branches. Compare Hughes, “[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power,”²²⁷ with Jackson, “Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency.”²²⁸

This shift has worrying implications for the separation of powers. If the fact of an “emergency” allows the expansion of power, then this does not necessarily preclude the process of inter-branch give and take. Rather, this view of emergency emphasizes the importance of the factual predicate existing in reality, which then invites scrutiny by other branches. By contrast, if a constitutional enumeration or congressional delegation provides the source of power, then this suggests that this power is exclusively committed to the branch exercising that power.

In the midst of this shift, executive branch lawyers in the Roosevelt administration grappled with the thorny problems of emergency powers to address the domestic ramifications of a crisis that originated abroad. This dynamic resonates with the present day, when many emergencies defy easy characterization as foreign or domestic, including the present COVID-19 pandemic. Given this resonance, the Roosevelt administration’s legal conclusions bear some special applicability to present problems, and the logic of emergency from the Roosevelt administration helps clarify the dangers of emergency practice today. Though Roosevelt acted independently to issue an emergency declaration, his administration did not argue this power could not be regulated by Congress or inspected by the courts. Indeed, the theories advanced in Roosevelt’s Justice Department implicitly accepted a flexible doctrine in part because inter-branch checks were presumed to remain open. Today’s practitioners would do well to remember this history.

227. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

228. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring).
