EXCERPTED FROM

Above the Law? The Evolution of Emergency Presidential Power

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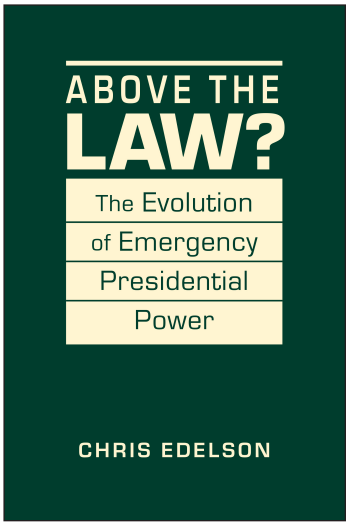
ISBNs: 979-8-89616-687-0 hc
979-8-89616-688-7 pb



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The Evolution of Emergency Presidential Power

The men who drafted the United States Constitution were famously brief when it came to emergency power. In 1952, Supreme Court Justice Robert H. Jackson declared that "aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, [the framers] made no express provision for exercise of extraordinary authority because of a crisis."[1] One could also point to Congress's authority under Article I to declare war or "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" as a source of emergency power, but Justice Jackson's point remains broadly valid: The Constitution contains very little in the way of express emergency power—and notably grants no explicit emergency power to the US president.[2]

Constitutional Design: Balancing Emergency Power and Limits on Power

The framers' decision to provide only limited emergency power under the Constitution is evidence of their desire to balance power against limits on power, a goal reflected throughout the Constitution, the Federalist Papers, and other early writing.[3] In fact, this was the central motivating principle behind the Constitution: The Articles of Confederation had failed by providing for a federal government too weak to take on national problems, so the solution was to strengthen the powers of that government while also taking care not to create a new tyranny.[4] In Federalist No. 51, James Madison reasoned, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government

which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[5] The framers and their successors saw two primary dangers when it came to constitutional design, as President Abraham Lincoln aptly observed three-quarters of a century after the Constitution was drafted: The government they created might be either "too strong for the liberties of its own people, or too weak to maintain its own existence."[6]

In light of these tensions, Madison, Alexander Hamilton, and other framers described two ways in which the constitutional system might fail: (1) the government (or a branch of the new government they created) could wield power without limits—what Madison called "the very definition of tyranny"—or alternatively, (2) government (or one branch) could be too weak to carry out its responsibilities.[7] Their approach to emergency power was aimed at balancing these competing considerations. The new federal government would have some emergency power—including, as discussed during debate over the Constitution at the Philadelphia convention, implied power for the president to "repel sudden attacks"—but emergency power (like other powers) would not be absolute and would be subject to mechanisms of accountability designed to prevent the tyranny that Madison, Hamilton, and others feared.[8]

Emergency Power Subject to Congressional Control

As for the framers' concern that emergency power might be exercised without limit, Justice R. H. Jackson remarked that they "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. . . . Their experience with emergency powers may not be irrelevant to the argument . . . that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers."[9] Accordingly, Jackson—and a majority of the Supreme Court—concluded in 1952 that the Truman administration's notion of emergency presidential power unlimited by law was incompatible with the Constitution.[10] Jackson suggested that the best way to provide presidents with the power needed to deal with emergencies is for Congress to "[grant] 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."[11]

Neither the framers of the Constitution nor Justice Jackson were infallible, of course—but their view of emergency power fits comfort-

ably within the liberal democracy that the United States eventually became. As a nation with slavery and without universal suffrage, the United States was not a liberal democracy in 1787 when the framers drafted the Constitution.[12] Nor was it a liberal democracy in 1952 when Justice Jackson aptly summarized and applied the framers' conception of limited emergency power under law, even as the Jim Crow system continued to deny voting rights to most Black Americans in the south.[13] But the structure for emergency powers that the framers designed is well suited to liberal democracy as it aims to provide government officials, including the president, with power cabined by law and subject to limits.[14] In other words, preserving the balance sought by the framers between emergency power and limits on this power is essential to preserving the modern liberal democracy that the United States became in 1965 with passage of the Voting Rights Act, which enforced the right to vote for Black Americans.

The problem for liberal democrats today is that the balance envisioned by the framers and elucidated by Justice R. H. Jackson has come undone over the years, especially in the twentieth century and even more so in the years after the 9/11 terrorist attacks on the United States.[15] Before the mid-twentieth century, it was unusual to find presidents advancing claims of plenary emergency power or prerogative (*prerogative* generally meaning power used by "a person such as a monarch to act without regard to the laws on the books").[16] Presidential power was often limited by forbearance or self-restraint exercised by the president himself. Since World War II, however, presidential power has expanded and has not been subject to meaningful external constraints.[17] Power unconstrained by law is, by definition, a threat to liberal democracy, which requires, among other things, "a robust rule of law."[18] Unconstrained emergency power is even more dangerous in the hands of "would-be authoritarians [who] are primed to exploit [real or contrived] crises to justify power grabs."[19] Authoritarians, by definition, cannot be reliably expected to exercise forbearance, which has traditionally been one of the central constraints on presidential power. A number of US presidents, especially after 9/11, have exercised emergency power without recognizing meaningful external limits on it.[20] However, with the notable exception of Richard M. Nixon, none of the post-1965 liberal democracy–era presidents who preceded Donald Trump were authoritarians who broadly rejected the rule of law and limits on power.[21] Trump's presidency, like Nixon's, raises particular concern about the abuse of emergency power because Trump, like Nixon before him, is an authoritarian.[22]

Historical Context as a Way to Understand Current Challenges

This book begins with a description of the origins and history of emergency presidential power as a way to provide a framework for analyzing the specific challenges that Donald Trump's presidency poses for emergency presidential power under the US Constitution, considered in light of his authoritarian ambitions, and focuses on emergency power in the context of real or contrived national security threats.[23] Chapters 2–7 provide historical context, starting with the drafting of the Constitution, to explain the origins and development of emergency power and identify examples of constitutional failure. This provides a framework for Chapters 8–9, which assess questions of emergency power and constitutional failure in the context of Trump's presidency. Chapter 10 considers what dangers emergency presidential power poses during Trump's second term in office, and what may come next.

Two Kinds of Constitutional Failure

As I suggest earlier in this chapter, when it comes to emergency presidential power, there are at least two ways in which constitutional failure can occur: (1) overreach, when a president exceeds constitutional and/or statutory limits on power in responding to a real or contrived emergency without being constrained by Congress, the courts, or some other actor, and (2) underreach, when a president fails to take necessary action to respond to an emergency while Congress, the courts, and other actors fail to impose meaningful consequences.[24] Trump's first term in office demonstrated both types of failure—for example, unconstrained overreach involving a pretextual national emergency he declared at the southern border, and unremedied underreach when he failed to attempt to organize a national response to the pandemic.[25] Events leading up to and including the January 6 attack on the US Capitol in 2021 additionally present questions of both overreach and underreach, to the extent that Trump took action aimed at overturning election results while failing to take immediate action to respond to the emergency presented by the assault on the Capitol, an emergency that he himself helped to precipitate. Trump faced no meaningful consequences for overreach or underreach in the context of attempting to change the 2020 election results. Early in his second term, Trump has again overreached when it comes to emergency power, including in the context of deportation, the domestic deployment of the military, tariffs, and the external use of military force.[26]

In a healthy, functioning constitutional system, Congress would have taken action to correct Trump's overreach and underreach during his first term in office, and to rein in overreach during his second term. Instead, partly because of flaws in the relevant statutory framework and partly because of a breakdown in the Madisonian system of separation of powers, Congress has not taken effective action. When given the chance, the US Supreme Court has also failed to strike a balance between power and limits on power. In *Trump v. United States*, the court held that former presidents have absolute immunity from criminal prosecution for actions taken in office when exercising "core constitutional powers" and have at least presumptive immunity for other "official actions."[27] As Justice Sonia Sotomayor's dissenting opinion observed, the majority opinion failed to balance power with limits on power, instead effectively placing the president "above the law."[28] The case involved allegations that Trump had violated criminal law through various efforts to overturn the results of the 2020 election, including by pressuring Vice President Mike Pence, as well as state officials and Department of Justice (DOJ) officials, to either change the election results or falsely say that there was evidence of fraud that had affected the results.[29] The court ruled that some of Trump's actions were absolutely immune and remanded the case back to the US District Court, which was instructed to determine whether Trump was immune from prosecution for other crimes alleged by the government.[30] This essentially became a moot point when Trump was elected to a second term in November 2024 and the DOJ moved to dismiss the case.

The Supreme Court's ruling in *Trump v. United States* unravels the balance between power and limits on power that was envisioned by the framers and that is necessary for a functioning liberal democracy. A president who is immune from criminal prosecution can exercise emergency power in new and, by definition, unbridled ways if he or she can convince the courts that those actions are either taken pursuant to "core constitutional powers" or are official actions otherwise immune from prosecution. For instance, a president could, as commander in chief, order the military to assassinate political rivals, critics, or any other Americans, claiming such action was a response to an emergency. Since the court ruled in *Trump v. United States* that "in dividing official from unofficial conduct, courts may not inquire into the President's motives," it would not matter whether there actually was an emergency—or even whether the president actually believed there was an emergency or was instead creating a pretext for action.[31] This opens new opportunities for exercising emergency power without limits, especially in the hands of someone who is an aspiring dictator.

Where does that leave the constitutional system now? The framers' vision of emergency power bounded by limits in the context of presidents being accountable for their actions has been upended because government officials have failed to strike a balance between power and limits on it. Trump's first term showed that a would-be authoritarian could abuse emergency power without being held meaningfully to account by Congress or the courts. In his second term, Trump, emboldened by the Supreme Court's decision on presidential immunity and by congressional acquiescence, is abusing emergency power in new and increasingly dangerous ways. As detailed in Chapters 8 and 9, Trump claims more power than the British king formally possessed in 1776, a kind of unlimited power reminiscent of the absolute prerogative exercised by seventeenth-century English monarchs. As I discuss in the conclusion of this book, there are ominous questions as to how Trump might seek to exploit emergency power as a way to undermine democracy in the 2026 and 2028 elections. Even if Trump does not fully realize his authoritarian ambitions during his second term, a path has been opened for other would-be authoritarians who could use a real or pretextual emergency as a basis for consolidating power and undermining democracy in the United States. This book explains how we have arrived at this point and what this means for the US constitutional system.

Notes

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

2. Chris Edelson, *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror* (Madison: University of Wisconsin Press, 2013), 7. Article II Section 3 of the US Constitution provides that the president "may, on extraordinary occasions, convene both Houses [of Congress], or either of them." This can be described as an emergency power, but it is quite limited and grants the president no substantive power; he or she may simply call Congress into special session.

3. Edelson, *Emergency Presidential Power*, 12–17.

4. Sotirios Barber, *Constitutional Failure* (Lawrence: University Press of Kansas, 2014), 30, 84–85.

5. James Madison, "Federalist No. 51" (February 8, 1788), in *The Federalist Papers*, ed. Michael A. Genovese (New York: Palgrave Macmillan, 2009), 120 (hereinafter *The Federalist Papers*).

6. Abraham Lincoln, *Collected Works of Abraham Lincoln*, vol. 4, 426, https://quod.lib.umich.edu/l/lincoln/lincoln4/1:741?rgn=div1;view=fulltext.

7. James Madison, "Federalist No. 47" (February 1, 1788), in *The Federalist Papers*, 101–105; Alexander Hamilton, "Federalist No. 70" (March 18, 1788), in *The Federalist Papers*, 199–204.

8. Louis Fisher, "Teaching the Presidency: Idealizing a Constitutional Office," *PS: Political Science and Politics* 45, 1 (January 2012): 18; Hamilton, "Federalist No. 70," 199–204; Madison, "Federalist No. 47," 101.

9. *Youngstown Sheet,* 343 U.S. at 650 (Jackson, J., concurring).

10. *Youngstown Sheet,* 343 U.S. at 646–653 (Jackson, J., concurring). The Truman administration argued in *Youngstown Sheet* that emergency presidential power could not be limited by law, the president had "the power to protect the country in times of national emergency by whatever means seem appropriate to achieve the end," and President Truman declared that presidents have "very great inherent power to meet national emergencies." Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* (Durham, NC: Duke University Press, 1994), 106. Patricia L. Bellia, "Story of the Steel Seizure Case," in *Presidential Power Stories*, ed. Christopher H. Schroeder and Curtis A. Bradley (New York: Foundation Press, 2009), 254–255.

11. *Youngstown Sheet,* 343 U.S. at 652 (Jackson, J., concurring).

12. Indeed, the term "liberal democracy" was not used at the time. Arthur Ginns, "The First Theorists of Liberal Democracy," *Constellations* (2025), 1–2.

13. Russell Brooker, "Voting Rights for Blacks and Poor Whites in the Jim Crow South," America's Black Holocaust Museum.

14. Larry Diamond, *Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition, and American Complacency* (New York: Penguin Books, 2020), 18–19.

15. Chris Edelson, *Power Without Constraint: The Post-9/11 Presidency and National Security* (Madison: University of Wisconsin Press, 2016).

16. Aziz Huq, "America Is Watching the Rise of a Dual State," *The Atlantic*, March 23, 2025. In this book, I use the terms "prerogative" and "plenary power" to refer to claims that presidential power to respond to emergencies cannot be limited by statutory law.

17. Edelson, *Power Without Constraint*, 6–7.

18. Diamond, *Ill Winds*, 19.

19. Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018), 95.

20. Edelson, *Power Without Constraint*.

21. Levitsky and Ziblatt, *How Democracies Die*, 65.

22. Levitsky and Ziblatt, *How Democracies Die*, 60–67.

23. This book focuses on emergency power in the context of national security. It does not address emergency power related to natural disasters or, for the most part, public health crises (with the exception of the Covid-19 pandemic, as that relates to questions about Trump's authoritarian tendencies). For discussion of emergency power related to natural disasters and public health crises, see Jennifer K. Elsea, Jay B. Sykes, Joanna R. Lampe, Kevin M. Lewis, and Bryan L. Adkins, "Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act," Congressional Research Service, July 14, 2020.

24. David E. Pozen and Kim Lane Scheppele, "Executive Underreach, in Pandemics and Otherwise," *American Journal of International Law* 114, no. 4 (2020): 608–617.

25. Chris Edelson, "Sounding the Alarm: Trump's Emergency Declaration at the Southern Border and Constitutional Failure," *Congress & the Presidency* 47, no. 2 (2020): 224–254; Chris Edelson, "No Watchman in the Night: How Presidential and Congressional Responses to the Coronavirus Pandemic Undermine the Hamiltonian-Madisonian Model of Accountability," *Congress & the Presidency* 49, no. 3 (2022): 299–328.

26. This is discussed in detail in Chapter 9.

27. Trump v. United States, 603 U.S. 593 (2024). Before the Supreme Court's 2024 decision, the Department of Justice had declined to prosecute presidents while

they were in office; *Trump v. United States* means that former presidents generally cannot be prosecuted even after leaving office. Randolph D. Moss, "A Sitting President's Amenability to Indictment and Criminal Prosecution," Office of Legal Counsel, 24 Op. O.L.C. 222, 236–38, 255 (2000), https://www.justice.gov/file/146241-0/dl?inline.

28. *Trump v. US,* 603 U.S. at 659 (Sotomayor, J., dissenting).
29. *Trump v. US,* 603 U.S. at 602–603.
30. *Trump v. US,* 603 U.S. at 598.
31. *Trump v. US,* 603 U.S. at 618.