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Note

Navigating Uncertain Times – Bioterrorism, the Constitution, and National Security – Addressing Threats without Trampling Individual Liberties. Who’s in Charge in a Time of Crisis?

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**I. Introduction**

This Note is designed to use the SARS-CoV-2 coronavirus (COVID-19) pandemic to explore responses to biological disasters. Some of the aspects up for discussion include a review of response mechanisms implemented through COVID-19; executive action taken and whether there are any limits to the executive’s response; and, finally, what role Congress should play in such a time of crisis. This Note will look in some detail at what issues have been presented by COVID-19—though it is not thought to be a bioterror attack—and how issues we have faced during COVID-19 might be similar to those presented by a real bioterror attack.

The first half of this Note is dedicated to understanding what bioterrorism is and how important it is to learn from naturally derived biological events and any thwarted human-caused events so we can effectively manage and prevent future biological disasters. The second half of this Note is primarily devoted to understanding the relationship between individual rights and executive authority. It discusses how pervasive executive power is and to what degree the executive possesses the proper authority for responding to something like COVID-19 in the future, whether that be a natural public health crisis or an intentionally released agent. The second part of this Note requires a careful analysis, because of the United States Supreme Court’s treatment of executive authority in foreign versus domestic affairs—as well as other factors, such as emergency powers.

Because the COVID-19 pandemic is mostly behind us in many parts of the world, now is an opportune moment to conduct a post-operative analysis of the entire COVID-19 pandemic and acknowledge successes, failures, and ways to improve future responses. The scope of this Note is agnostic about whether the crisis is a generic public health crisis or an evil terroristic plot.

This Note is not designed or written to tell the reader what to think about a given issue, but rather to inform and create a discussion. Therefore, our shared experience, the work of the courts, the work of the legislature, and scientific studies should be able to speak for themselves. The purpose of this Note is to provoke questions. We cannot grow and learn if we do not take the time to ask questions. Unfortunately, what we learn from these questions may require us to draw disappointing conclusions from time to time, and to acknowledge failures where appropriate. Nevertheless, we should take heart in the fact that we can learn from any disappointments and flaws that are uncovered. Now let us together face the music. Let the quest begin.

**II. Defining Bioterrorism**

The concept of bioterrorism is deceptively easy to define. The term “bioterrorism” is a compound of the words “biological” and “terrorism.” In this context, biological is probably best understood as meaning the use of natural pathogens, or “agents,” as we will see referenced quite frequently. Defining “terrorism” is harder because it is a somewhat subjective term with both statutory and dictionary definitions which do not align in all respects. The Tenth Edition of *Black’s Law Dictionary* defines terrorism at length—though one may argue the definition describes the characteristics of the actor rather than the act itself:

‘Terrorism . . . has a very long history and generally refers to the intentional use of terror induced fear by an individual or group to amplify the effects of a strategic act of violence. It has often been associated with actors who are at a distinct military or tactical disadvantage against a larger threat or enemy, and who have a limited capacity to strike back on an equal or sustained basis; hence, the perceived need to use a strategy that would enhance an otherwise limited capacity. Nevertheless, it is also possible for dominant actors, including states, to utilize terror-based tactics, sometimes due to a perceived lack of more creative options, and sometimes due to a sense of impunity and superiority. Regardless of the actors or their motivation . . . terrorism is [universally a] violation of international law.’[[2]](#footnote-2)

This definition is not especially useful for understanding what events or conduct would inherently count as terrorism. On the other hand, it does provide a set of factors against which we might compare an alleged terror attack. This suggests that the concept of terrorism is more intricate and worthier of contemplation than it would appear at first glance. This definition also provides some notable key words that will be important later, particularly the words “intentional” and “fear.” These terms are particularly important once we get to the statutory definitions of terrorism in the following section. Also, many people—perhaps, due to the era in which they were raised—may hold the misconception that only small, non-state actors such as ISIS and Al Qaeda can launch terror attacks. Upon even a cursory review, this is not true today nor has it been true over the larger scope of world history. The broad definition of terrorism used above also tells us, correctly, that any act of terror is absolutely forbidden by international law.

Many individuals today are probably uncomfortably familiar with allegations of terror tactics used by state actors. One possible example of this is Russia’s alleged use of thermobaric weapons, or “vacuum bombs,” in the 2022 Russian-Ukrainian war.[[3]](#footnote-3) Although the article cited focuses more on the lawfulness of such weapons under the major principles of law of armed conflict—proportionality, distinction, necessity, and unnecessary suffering—it is entirely possible that in future years scholars and analysts may begin to consider the use of such weapons from the perspective of terrorism. At the risk of simplifying the concept too far, in many cases the only thing separating lawful use of weaponry and a terror attack is motive (for example, instilling fear in the populace rather than engaging a legitimate military target).[[4]](#footnote-4) While lawful weapons may be used to instill terror, bioterrorism and chemical weapons have been forbidden by international law in all circumstances.[[5]](#footnote-5) This Note focuses on those types of weapons and their derivatives.

**A.** **Dictionary Definitions**

Dictionaries define biological terrorism in different ways, but all arrive at the same basic conclusion regarding the substantive meaning of the term. The Ninth Edition of *Black’s Law Dictionary* states that bioterrorism is “[t]errorism involving the intentional release of harmful biological agents, such as bacteria or viruses, into the air, food, or water supply, esp. of humans.”[[6]](#footnote-6) This is simple on its face, but the United States Code complicates things by defining two types of terrorism, one being *international terrorism* as defined in 18 U.S.C. § 2331(1) and the other being *domestic terrorism* as defined in 18 U.S.C. § 2331(5). If you combine the more narrowly focused definition of *bioterrorism* found in the Ninth Edition of *Black’s Law Dictionary* with the broader definition of *terrorism* found in the Tenth Edition of *Black’s Law Dictionary*, you uncover a very workable and useful definition of the sort of actions we are looking for in our quest to resolve ambiguity surrounding the concept of bioterrorism.

**B. As Defined by Statute**

*International terrorism* is defined by statute as:

(1) . . . activities . . . (A) involv[ing] violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; [and] (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . .[[7]](#footnote-7)

By contrast, *domestic terrorism* is defined by statute as:

activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States . . . . [[8]](#footnote-8)

Definitions are important because whatever definition is accepted by a court or by statute will dictate, to a large degree, what may be officially defined as a terror attack. As such, it is indisputable that the definition of terrorism will have an effect on the discussion of bioterrorism. To illustrate, it is worthwhile to explore a few other commonly accepted definitions of bioterrorism.

One common definition is offered by the Centers for Disease Control and Prevention (CDC). The CDC offers its definition in a February 2006 document entitled “Bioterrorism Overview,” in which this definition is found:

A bioterrorism attack is the deliberate release of viruses, bacteria, or other germ[] (agents) used to cause illness or death in people, animals, or plants. These agents are typically found in nature, but it is possible that they could be changed to increase their ability to cause disease, make them resistant to current medicines, or to increase their ability to be spread into the environment. Biological agents can be spread through the air, through water, or in food. Terrorists may use biological agents because they can be extremely difficult to detect and do not cause illness for several hours to several days. Some bioterrorism agents, like the smallpox virus, can be spread from person to person and some, like anthrax, can not.[[9]](#footnote-9)

This definition is certainly helpful, but does it distinguish between a novel illness and an intentionally dispersed “agent”? While this might seem to be a pedantic question of semantics, one research article suggests the “most important step in the event of a bioterrorist attack is the identification of the event.”[[10]](#footnote-10)

**III. Brief History of Bioweapons and Associated Research**

Bioterrorism is not a new phenomenon. To better understand the evolution of bioterror as a form of warfare, it is useful to spotlight a few notable events from history. One article dates the use of biological agents to at least the year 1155 A.D., when Emperor Barbarossa poisoned water wells with dead human bodies in the city of Tortona, Italy.[[11]](#footnote-11) In more recent history, biological weapons have been used by governments in pursuit of their military goals. During the “Great War,”[[12]](#footnote-12) Germany was one of the first countries in the modern era to deploy bioweapons as a weapon of war.[[13]](#footnote-13) Following the Great War, the imperial Japanese armed forces used bioweapons in its conquest and defense of the Pacific region during the Second World War.[[14]](#footnote-14) While these events are history, the fear of similar events in the modern age is not. In the World Economic Forum’s (WEF) Global Risks Report for the year 2022, the Global Risks Perception Survey—which has underpinned the WEF report since 2006[[15]](#footnote-15)—lists “infectious diseases” as a “critical short-term threat to the world.”[[16]](#footnote-16) Although this recognition is generally based on the world’s collective battle against COVID-19, it also signals recognition among experts that biological crises will continue to affect global safety and wellbeing.

Following the horrors caused by use of biological agents in the First World War, there was a worldwide effort to regulate biological agents. This ultimately resulted in a framework contained in certain provisions of the 1925 Geneva Protocol.[[17]](#footnote-17) This was only the tip of the iceberg, as the world has since taken significant steps to manage biological weapon research much more effectively. One major effort was the Biological and Toxin Weapons Convention (BWTC), signed into effect by President Richard Nixon in 1972. Unfortunately, while agreements like the BTWC were designed with good intentions and have no doubt been helpful—and perhaps even successful—their efficacy has been met with some degree of skepticism. The primary criticism is the fact that the BTWC does not provide a means of verifying adherence to its terms.[[18]](#footnote-18) Considering the purported objective of the convention, this certainly seems like a legitimate if not fatal critique. Criticism of the BTWC again arose when President George W. Bush allowed the proposed addition of a verification protocol to fail in 2002.[[19]](#footnote-19) This only added to the soiled history of the BTWC. This short history of the BTWC illustrates the larger and also unfortunate story of many of the actions aimed at the regulation of biological agents. Fortunately, despite the alleged failings of the BTWC, many other regulatory attempts have followed.[[20]](#footnote-20)

All of these responses should underscore the fact that that the United States and the rest of the world have spent considerable time addressing the threats posed by biological agents. This is clearly a boon for overall safety; however, we must always strive for better solutions as threats evolve and change over time. We should be using these frameworks as a foundation to create a much more secure world. Failing to do so could leave our world largely powerless to respond adequately to threats posed by bioterrorism. Proactively designing an effective regulatory framework would significantly reduce the confusion and lethargic response that is inevitable when society is caught off guard by some unexpected event or attack.

**IV. Bioterrorism Response in the Twenty-First Century**

**A. Public Health and Bioterrorism Response Act of 2002**

Most of the United States’ response in the 21st century has been heavily shaped by the events of September 11, 2001. It is difficult to avoid concluding that these events have greatly impacted how the United States and the rest of the world have sought to prepare for, and to guard against, threats of terrorism at large—as well as specific forms of terror, such as the use of biological agents. At the signing of H.R. 3448, known as the Public Health and Bioterrorism Response Act of 2002 (PHBRA), President George W. Bush observed that “[s]hortly [after the events of September 11, 2001], we learned how evil people can use microscopic spores as weapons of terror [referring to the recent anthrax attacks]. Bioterrorism is a real threat to our country. It’s a threat to every nation that loves freedom.”[[21]](#footnote-21) Broadly speaking, according to a contemporary article written by the University of Minnesota Center for Infectious Disease Research and Policy (CIDRAP), PHBRA was expected to increase preparedness of state and local medical facilities, provide for an expanded National Pharmaceutical Stockpile, increase inspections and regulations of imported edible goods, review the security of drinking-water supply systems, and provide for upgraded facilities at the CDC.[[22]](#footnote-22)

PHBRA is noteworthy because of how broadly it made changes to the way federal and state resources were aligned against threats posed by bioterrorism. The following is an amended summary of the highlights of the more than 100-page bill. Included in the notes is a link where the full text of the bill may be located.[[23]](#footnote-23) The following provisions are found under Title 1 of the Act—which deals with general preparedness—and are helpfully distilled by the CIDRAP into the following list:

* Establishes the position of assistant secretary of the Department of Health and Human Services (HHS) for public health emergency preparedness;
* Calls for establishing temporary advisory committees to make recommendations on protecting children and on emergency public information and communications;
* Recommends the establishment of a federal Internet site on bioterrorism;
* Requires HHS to develop and disseminate training materials on responding to bioterrorism;
* Authorizes loans, grants, and other funding mechanisms to help train healthcare professionals in bioterrorism-response skills that are in short supply;
* Directs the HHS secretary to designate ‘priority countermeasures’ against bioterrorism as fast-tracked products under the Federal Food, Drug, and Cosmetic Act (FFDCA); and)[]
* Directs the Department of Energy and the National Nuclear Security Administration to increase research on the rapid detection of pathogens likely to be used in bioterrorist attacks.[[24]](#footnote-24)

**B. Regulating Biological Agents in Interstate Travel**

One of the significant aspects of PHBRA is a requirement that HHS “establish and maintain a list of biological agents and toxins that could threaten the public health.”[[25]](#footnote-25) The law also requires HHS to exercise regulatory authority over the transportation and transfer of agents and toxins on the list, as well as to design mechanisms (such as security and registration requirements) to regulate the possession and use of such agents.[[26]](#footnote-26) The law is also not blind to the needs of researchers. As the CIDRAP noted, PHBRA provides exemptions for “[c]linical laboratories [which] may possess listed agents in diagnostic specimens . . . but they must report any agents identified.”[[27]](#footnote-27)

**C. Food Security**

To show the scope of PHBRA, select examples have been chosen to illustrate how broadly this act attempts to regulate. First, the Act references the United States Department of Agriculture (USDA) in the anti-bioterrorism scheme. As one might reasonably expect, the USDA plays a role under the food-security portion of the law. This portion of PHBRA should cause one to seriously consider how much we take food security for granted in the United States and in many other developed parts of the world as well. The USDA is designated to watch for “agents and toxins that could threaten animal or plant health or animal or plant products.”[[28]](#footnote-28) The food-security title of the bill contains provisions for the following increases in the government’s regulatory authority:[[29]](#footnote-29)

* Provides for more inspectors for imported food;
* Provides for research to develop methods for quickly detecting adulterants in food;
* Authorizes the FDA to detain food items when there is ‘credible evidence’ that they pose a serious health risk to people or animals;
* Provides for halting food imports by businesses that commit repeated or serious violations;
* Requires food importers to give prior notice of shipments so they can be inspected;
* Gives inspectors access to records regarding food suspected of being contaminated; and
* Calls for expanding the capacity of the USDA’s Animal and Plant Health Inspection Service and the Food Safety and Inspection Service.[[30]](#footnote-30)

**D. Safety of Water Supply**

Finally, PHBRA also contains a section devoted entirely to protecting the security of the drinking-water supply which, according to the CIDRAP article, requires “each water system serving more than 3,300 people to [be] assess[ed] [for] . . . vulnerability to sabotage and [for creation or] revis[ion of existing] emergency response protocols.”[[31]](#footnote-31) Drinking-water is a significant avenue through which a bad actor could conceivably attempt to target large quantities of people without much skill, training, or effort. For example, Claudia Copeland—a specialist in resources and environmental policy—illustrated the scope of the challenge associated with securing our water supply and related infrastructure, writing that “[a]cross the country, these [water infrastructure] systems comprise approximately 77,000 dams and reservoirs; thousands of miles of pipes, aqueducts, water distribution, and sewer lines; 168,000 public drinking water facilities (many serving as few as 25 customers); and about 16,000 publicly owned wastewater treatment facilities.”[[32]](#footnote-32) Many experts are skeptical, however, with some believing that it would be difficult to introduce enough of a given agent to do more than superficial harm.[[33]](#footnote-33) Choosing which side is correct is beyond the objective of this Note. However, consider an instance in Bethany, Oklahoma where a small amount of *E. coli*, found in a localized part of the city, caused the entire city of Bethany to go under a boil order from May 28, 2022[[34]](#footnote-34) to June 2, 2022.[[35]](#footnote-35)

**E. Assessing Risks in a Post-9/11 World**

Aside from the clear risks that were assessed following the September 11 terror attacks, we must ask what the real threat posed by bioterrorism is today. One article from as recent as 2018 suggests that we have much to learn, citing deficiencies in the local and international response to various pathogens, such as the 2014 Ebola virus epidemic.[[36]](#footnote-36) More recently, when considering events surrounding the COVID-19 pandemic, it is clear that our response—though heroic and unprecedented—was imperfect. If you have spent any amount of time following television, social media, talk shows, and podcasts you have likely seen a wide range of misinformation,[[37]](#footnote-37) conspiracy theories,[[38]](#footnote-38) and bipartisan political gamesmanship.[[39]](#footnote-39) Even at the time of this Note, in the first half of 2022, we are being told by studies that lockdowns—one of the most controversial public health remedies administered in the wake of the first cases—were not as effective as previously believed. Specifically, a working paper published by the Johns Hopkins Institute for Applied Economics, Global Health, and the Study of Business Enterprise suggests that lockdowns during the first wave of COVID-19 “had little to no public health effects”[[40]](#footnote-40) while “impos[ing] enormous economic and social costs where they have been adopted.”[[41]](#footnote-41) This study is not cited for any other reason than to show how analysis of our response has changed and will continue to change as we look back at the actions the world took to stop COVID-19.

Nonetheless, even if the opinions expressed in the working paper are disregarded, it is undeniable that some of the major costs associated with lockdowns have been cataloged by news outlets and even the CDC. These sources include statistics such as an increase in drug overdose deaths from 78,056 to 100,306 between the 2019–2020 records and the 2020–2021 records, respectively.[[42]](#footnote-42) Similarly, incidents of domestic violence increased by 8.1% after lockdown orders were issued.[[43]](#footnote-43) Public health experts and politicians in charge of choosing a certain path forward, such as mass lockdowns, cannot simply ignore any consideration of secondary effects such as those listed above. Failing to take as many factors into consideration as possible may in some instances result in trading one evil for another. Was the benefit of lockdowns greater than the fallout apparently caused by them? You be the judge.

Unfortunately, in the years after legislation such as PHBRA, we have seen a large increase in executive action being used to respond to new threats. PHBRA seems as though it is largely the last major piece of legislation related to biological agents to have enjoyed broad bipartisan support. As will be discussed in a later section of this Note, there is a palpable concern that our nation is undergoing a shift in our political process, whereby Congress has taken a backseat in the policymaking function of our country.[[44]](#footnote-44) This is not a healthy trend, as increasing executive action blurs the lines between executive and legislative authority and intrudes into the constitutional mandate of each branch.

**V. COVID-19: A Case Study on Executive Authority in Relation to Emergencies**

Conveniently, the COVID-19 pandemic is, in many respects, the perfect case study on executive branch action. The COVID-19 pandemic is not very far behind us in many parts of the world and is still greatly affecting people in countries such as China[[45]](#footnote-45) and North Korea,[[46]](#footnote-46) creating social unrest and generalized havoc. With COVID-19 still relatively fresh in our minds in the United States, this section will explore the executive response framework. Without further ado, it is time to switch gears into a discussion of the various tools available in the United States to respond to some biological event—whether naturally occurring, unintentionally released, or in the worst-case scenario, intentionally released by a bad actor.

The purpose of this section is to pose a question—a question that might not be very popular with most members of society, academia, healthcare, and government for any number of reasons. That question is: what if, hypothetically, a disease similar to COVID-19 were to be *intentionally* released by some bad actor? While this question is the primary focus of our discussion, other questions will surface in varying degrees of detail, such as whether our response to COVID-19 was adequate, whether more should have been done, whether less should have been done, whether our response was based on facts and reason, whether we armed society with the facts they need to understand what was going on, or whether we simply told them what they wanted to hear. These are without a doubt difficult questions. However, rather than supplying an opinion on these questions, this Note should arm the reader with the information for them to make their own determination.

The primary purpose of the final half of this Note is to discuss the government’s responsibility to protect and, in some instances, provide for its citizens. In doing so, particular attention will be paid to some of the legal tools that were utilized during the pandemic, those that were not, and to what extent the different branches of government possess the proper tools to address a public health crisis. The end goal of this Note is to provide the reader with the knowledge to understand what role all three branches of our government should play when we confront another biological public health crisis.

The reader should remember that this discussion must always orbit the *sol* that is the United States Constitution along with the other laws of the land, and must always extend great deference to our individual liberties. In the end, this Note should promote conversation and discourse so we can learn from both our successes and failures during the COVID-19 pandemic. We can use COVID-19 as a vehicle to discuss the future and ensure that we are making well-informed decisions while also ensuring that we limit the impact and damage that might be caused by making bad decisions. Should our government and our society choose to learn from COVID-19, anything that is learned will be very applicable to future threats of biological terrorism—specifically how we plan for, and ultimately respond to, these threats.

**VI. Governmental Intervention and the Constitution**

**A. Executive Authority: Inherited Power From King George III**

The scope of executive authority has *always* been a topic of much debate, even before our founding. Two primary groups clamored for attention during the early development of our federal Constitution. These groups were the Federalists and the Anti-Federalists. The Federalists, led by Alexander Hamilton, were generally in favor of a strong central government and opposed too much state sovereignty.[[47]](#footnote-47) By comparison, the Anti-Federalists, led by Thomas Jefferson, generally opposed the creation of a strong central government and supported a wider degree of state sovereignty.[[48]](#footnote-48) In keeping with their divergent viewpoints, the Federalists advocated for a more powerful executive[[49]](#footnote-49) while the Anti-Federalists advocated for a much weaker executive to lead the federal government.[[50]](#footnote-50) Ultimately, after much debate, the United States Constitution as we know it was adopted. As adopted, we can see this tension between the Federalists and Anti-Federalists within the document. Probably the clearest example of this was the adoption of a list of enumerated rights. The Bill of Rights, the first ten amendments to the federal Constitution, was one of the largest concessions made in favor of the Anti-Federalists.[[51]](#footnote-51) The idea behind the Bill of Rights was to protect individuals from significant overreaches of federal power.

**B. Extra-Constitutional Power**

One theory propagated over the years by judges and legal scholars is that the United States government possesses what could be classified as extra-constitutional powers. These powers have been suggested as being an inherent part of a nation’s sovereignty. The foundation for this power predates the Constitution, tracing its roots to the Declaration of Independence. This power is often associated with a phrase which, though not often recited, is significant in its implications. The Founders wrote in the Declaration “that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and *to do all other Acts and Things which Independent States may of right do*.”[[52]](#footnote-52) This relatively broad statement of governmental authority is by no means a settled doctrine, and has been the source of great debate throughout history. Nonetheless, one Supreme Court justice notably favored the argument in the memorable case *United States v. Curtiss-Wright Export Corp.*[[53]](#footnote-53)

Justice George Sutherland wrote in *Curtiss-Wright* that “since the states . . . never possessed international powers, such powers could not have been carved from the mass of state powers . . . [which necessarily requires these powers to have been] transmitted to the United States from some other source.”[[54]](#footnote-54) Sutherland went on to find that during the colonial era these powers were possessed by, and exercised solely by, the British Crown. This power did not transfer to the individual states, but rather to what would become the United States generally, and was embodied in what would soon become the new United States federal government. Sutherland believed that this took place when:

‘the Representatives of the United States of America’ declared the United . . . Colonies [note the use of “United” rather than “Several”] to be free and independent states . . . [with the] ‘full Power to levy War, conclude Peace, contract Alliances, establish Commerce and *to do all other Acts and Things which Independent States may of right do*.’[[55]](#footnote-55)

Sutherland’s view on this issue has been the subject of debate, but it has remained as a popular starting point for defining the outer limits of the solar system of federal executive power.

The primary critique of Sutherland’s argument is that this view allows for an executive to act with a degree of latitude not generally associated with the United States’ principles of limited governance. Opponents of this viewpoint suggest that it creates something of an imperial presidency.[[56]](#footnote-56) However, Sutherland gave us a glimpse into his reasoning behind interpreting history in this manner. He stated that “[r]ulers come and go; governments end and forms of government change; but sovereignty survives . . . society cannot endure without a supreme will somewhere.”[[57]](#footnote-57) Therefore, “[w]hen in the course of human events”[[58]](#footnote-58) the new United States cast off the sovereignty of England, that sovereignty transferred instantly to the newly formed government of the United States of America.[[59]](#footnote-59) Although it is certainly possible to disagree with Sutherland, it is hard to deny that he presents a compelling history of executive power.

Consider here whether the fear of an imperial president is without merit. No matter your conclusion, concern and debate over this issue is certainly not a new concept. In fact, such a concern was expressed by the Anti-Federalists, even if not in the same language.[[60]](#footnote-60)

**C. *Curtiss-Wright* to *Youngstown*—Shifting Sands of Executive Authority**

As we have seen throughout the COVID-19 pandemic, a great deal of executive authority has been used in various efforts to control the virus and sustain the nation. This is very likely the way things would be dealt with after a bioterror attack as well, which is what makes the COVID-19 pandemic such a good example of how we should approach possible future events. Since executive authority is likely to be the most widely used in the United States’ response to an attack, we would do well to understand what the outer limits of that authority might be. In so doing, *Youngstown Sheet & Tube Co. v. Sawyer* would be a reasonable place to start. *Youngstown* is significant because it was the first major case after *Curtiss-Wright* to address the overall scope of executive authority. To this day, *Youngstown*—by way of Justice Robert H. Jackson’s tripartite framework found in his concurring opinion—is still the basis of controlling authority against which much executive action is weighed.

*Youngstown* arose out of a labor dispute between the steel workers and the Youngstown Sheet and Tube Company during the Korean War. After labor negotiations were unsuccessful, President Harry Truman—fearful of how an ongoing labor dispute might affect the war effort and thus national security—signed Executive Order 10340.[[61]](#footnote-61) The executive order effectively seized the Youngstown steel mill and placed it under control of the federal government.[[62]](#footnote-62)

Although Justice Hugo Black wrote the majority opinion for the Court, it is Jackson’s concurring opinion that is most often cited as the controlling authority. Jackson tells us in relatively concise terms when and in what circumstances presidential or executive authority may be acceptable. That language is produced below:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority *is at its maximum*, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure [or other action] executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the *imperatives of events and contemporary imponderables* rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its *lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[[63]](#footnote-63)

Note how significantly Jackson’s tripartite framework departs from *Curtiss-Wright*. It is a stark contrast from the proposition that the executive has plenary authority to act as the “sole organ” of the government in certain affairs such as national security.[[64]](#footnote-64) In this way, *Youngstown* stands as a significant limitation of executive authority. There has been much debate as to why this frame shift occurred. At least one plausible explanation involves understanding a little background history on Justice Jackson.   
 Jackson served as a prosecutor at the Nuremburg trials following the end of World War Two. Some believe he saw what absolute power could do to a country if a leader were to misuse their power—thus, it seems that he spent his post-Nuremburg years dedicated to restraining governmental overreach.[[65]](#footnote-65) This is certainly not to say that Jackson was drawing parallels between Truman and Hitler. Nonetheless, David McCullough wrote in his biography of Truman that “[Truman] was called a Caesar, a Hitler, a bully and lawbreaker” for his order to seize the steel mills.[[66]](#footnote-66) Truman addressed these accusations in a special message to Congress on April 9, 1952 stating “[t]he idea of government operation of the steel mills is thoroughly distasteful to me and I want to see it ended as soon as possible.”[[67]](#footnote-67)   
 Rather than being about any ill-will against Truman, Jackson and the other justices’ written opinions seem to address some degree of concern over an imperial presidency. In fact, McCullough wrote that the Court at that time was considered overall to be very favorable to Truman, with all nine justices either appointed by Presidents Franklin Roosevelt or Truman.[[68]](#footnote-68) Interpretation aside, *Youngstown* was a significant blow to executive apologists who were very fond of telling the other branches of government that the president’s power is plenary in external affairs.[[69]](#footnote-69)

**D. The Vinson Dissent in *Youngstown***

Chief Justice Fred M. Vinson, joined by Justices Stanley F. Reed and Sherman Minton, offered the only voice supporting President Truman’s seizure of the steel mills. Vinson’s first defense of President Truman’s action was the lack of congressional advice on the issue even though the president promptly delivered two letters to Congress.[[70]](#footnote-70) This is significant because without anything to the contrary, the president saw congressional silence as somewhat of a blank check to act.[[71]](#footnote-71)  
 In part III of the Vinson dissent, reference is made to President Washington’s use of the militia “to secure faithful execution of the laws” during a time when revenue laws were being ignored in parts of Pennsylvania.[[72]](#footnote-72) Again, in part III, Justice Vinson observed that President Washington also invoked executive power to respond to the French Revolution when Washington issued the “Proclamation of Neutrality.”[[73]](#footnote-73) Vinson noted other less remarkable instances of executive authority in part III as well. However, what is pointedly absent from his dissent is any justification for why the steel mill seizure should be viewed in the same light as those situations.   
 Justice Vinson’s best argument in favor of President Truman is contained in part IV of his dissent. Justice Vinson noted the Universal Military Training and Service Act[[74]](#footnote-74) and the Defense Production Act[[75]](#footnote-75) as statutory backing. Take Title V of the Defense Production Act of 1950, for example. This Act provides, “[i]t is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and to maintain uninterrupted production, that there be effective procedures for the settlement of labor disputes affecting national defense . . . .”[[76]](#footnote-76) This arguably gives the president a great degree of authority which could be then attributed to the “Take Care” clause of Article II.

**E. Youngstown: Doomed to Fail from the Start?**

Although what is written above is far less than what *could* be written about *Youngstown*, it is sufficient to serve as a primer on the historical backdrop of the case. However, there is one final piece of history that may be important. Before *Youngstown* got to the Supreme Court, it was heard by Judge David A. Pine in the district court. When Judge Pine asked the government’s counsel about the extent of executive power and what role the judiciary might play, the following conversation took place.

**The Court:** So you contend the Executive has unlimited power in time of an emergency?

**Mr. Baldridge:** He has the power to take such action as is necessary to meet the emergency.

**The Court:** If the emergency is great, it is unlimited, is it?

**Mr. Baldridge:** I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.

**The Court:** Then, as I understand it, you claim that in time of emergency the Executive has this great power.

**Mr. Baldridge:** That is correct.

**The Court:** And that the Executive determines the emergencies and the *Courts cannot even review whether it is an emergency*.

**Mr. Baldridge:** *That is correct*.[[77]](#footnote-77)

This is a bold statement to say the least. No one really knows what drove the government’s counsel to make these assertions, but one thing is certain: the government would never recover from these statements in either the courts or the media.[[78]](#footnote-78) It is surprising that an attorney would so conclusively state that the court system, particularly the Supreme Court, would lack all authority to review executive action. Such a claim cuts against one of the most fundamental concepts in constitutional law: judicial review. The concept of judicial review is almost as old as the United States itself. It was first advanced during the early days of the United States Supreme Court, in the seminal case *Marbury v. Madison*. Through the invalidation of Section 13 of the Judiciary Act of 1789, we learned that the Court has the final say over the constitutionality of a government act.[[79]](#footnote-79) Thus, the government, either by sheer accident, ignorance, or unpreparedness, may have destroyed any chance they had to preserve the broader powers grounded in *Curtiss-Wright*. Essentially, the government plainly claimed that judicial review does not extend to executive action during a time of emergency.   
 In the face of *Marbury*, such bold assertions are probably one of the easiest ways to make enemies with a judge. This is a lesson that the government attorneys no doubt learned very well. How does this fit with the story, you may ask? It fits because it begs the question: was *Youngstown* doomed to fail from the beginning? In other words, was the *Youngstown* ruling predestined from the start as a way for the Court to rein in an executive which the Court thought might be going rogue?   
 It is appropriate to ask these questions after considering Justice Vinson’s dissent. Most law school classes will focus on Justice Black’s majority opinion and Justice Jackson’s concurrence because they contain the modern rules. As noted above, the majority and concurrences seem unmoved by Vinson’s arguments for then-existing congressional approval of Truman’s actions.[[80]](#footnote-80) If you find Justice Vinson’s argument convincing, then recall that the Court was comprised of nine individuals either appointed by President Roosevelt or President Truman.[[81]](#footnote-81) For President Truman, McCullough wrote that “[*Youngstown*] was a humiliating defeat . . . at the hands of old friends and fellow spirits.”[[82]](#footnote-82) Though a defeat for Truman, tempers cooled when Justice Black invited the president and the other justices to his home where Justice Douglas later recalled “after the bourbon and canapes were passed, [Truman] turned to [Justice Black] and said ‘Hugo, I don’t much care for your law, but, . . . this bourbon is good.’”[[83]](#footnote-83)

**VII. Roles of the Executive, Legislative, and Judicial Branches in the Post-September 11th Age. Where do We the People Fit in?**

**A. Outer Limits of Executive Authority—Has *National Federation of Independent Business v. Department of Labor* Changed the Framework?**

*National Federation of Independent Business v. Department of Labor* (*NFIB* or *OSHA*) is an illustrative case regarding the Court’s interpretation of the relationship between health issues and executive authority.[[84]](#footnote-84) In that case, the Court determined that the Occupational Safety and Health Administration (OSHA), acting through the Department of Labor, overstepped its authority from Congress. Although neither *Curtiss-Wright* nor *Youngstown* was directly mentioned, you would be forgiven for seeing shades of Jackson’s tripartite framework found in *Youngstown*. Specifically, the Court notes in *NFIB* that “[t]he Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.”[[85]](#footnote-85) Furthermore, “[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”[[86]](#footnote-86) Justice Neil Gorsuch got the closest to invoking the *Youngstown* framework when he wrote:

The federal government’s powers, however, are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution’s separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: ‘We expect Congress to speak clearly’ if it wishes to assign to an executive agency decisions ‘of vast economic and political significance.’ We sometimes call this the major questions doctrine.[[87]](#footnote-87)

This language is important because it clearly expresses the fact that we may not sacrifice key tenets of our system of government, even to address a significant public health crisis.   
 As noted above, while *NFIB* does not directly implicate *Curtiss-Wright* or *Youngstown*, there are definite overtones that should not be missed. For example, in *NFIB*, it is recounted that the Secretary of Labor wanted to make COVID-19 vaccines mandatory through OSHA. However, to be clear, the Secretary did provide for an “exception for workers who obtain a . . . test each week at their own expense . . . and also wear a mask.”[[88]](#footnote-88) However, the language used by the Secretary was not especially supportive of businesses who chose to take that path. To this point, the Court noted language stating that “[c]overed employers must ‘develop, implement, and enforce a mandatory COVID-19 vaccination policy.’”[[89]](#footnote-89) Furthermore, the Court noted that “employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary.” Unvaccinated employees who do not comply with OSHA’s rule must be ‘removed from the workplace.’ And employers who commit violations face hefty fines.”[[90]](#footnote-90) Clearly, the mere existence of the exception for testing and masking was unpersuasive for the Court as they concluded both the vaccine mandate and the masking/testing requirement was not a typical use of federal authority and that it was in reality “a significant encroachment into the lives—and health—of [eighty-four million] employees.”[[91]](#footnote-91)

Notably, in his opinion, Justice Gorsuch does not foreclose the possibility that the Secretary could mandate vaccines if there were congressional support for such action. In this way, it certainly appears as though Gorsuch was trying to fit the Secretary’s exercise of executive power into one of the categories of executive power set forth by Justice Jackson in *Youngstown*.[[92]](#footnote-92) For example, according to Gorsuch, if Congress had signed off on the Secretary’s directive on COVID-19 vaccines, the Secretary might have the authority to propagate such a requirement. A reasonable interpretation of this reasoning could cast this as an act which would fit within Jackson’s first category of executive power.[[93]](#footnote-93) If this is not enough, Gorsuch specifically stated that “Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA’s regulation.”[[94]](#footnote-94) With this assertion, the Secretary’s use of executive authority almost certainly places it within Jackson’s third category where executive authority is at its “lowest ebb.”[[95]](#footnote-95)   
 *Curtiss-Wright* and *Youngstown* dealt with executive action under slightly different circumstances than *NFIB*. First, these two cases very clearly involved issues of national security. Second, the executive action in each was in response to events outside the United States, or at least related to external issues. This could be why the Court chose not to mention them directly, but still chose to apply a Jacksonian approach to the power exercised.

**VIII. The Future—Executive Versus Legislative Authority**

**A. Principles of Executive Authority**

This Note has covered a lot of ground, having touched on concepts ranging from terrorism, COVID-19, individual rights, and separation of powers. All of this has been in an effort to explain how and in what cases executive authority—as understood through the lens of cases such as *Curtiss-Wright*, *Youngstown*, and others—might apply. Through this historical arc we become aware that the executive has some serious limitations on its authority within the United States, even in times of national emergency.

At this point you may be wondering how two cases from the first half of the 20th century, one dealing with the Chaco War and one dealing with steel production and the Korean War, can possibly matter in the era of a global pandemic in the 21st century. To be certain, this is a reasonable question.

These cases are important because they are stars which define the borders of the constellation of executive authority. Since COVID-19 was never declared as an attack on the United States by a foreign actor, the executive is arguably automatically restricted in its ability to respond. Because COVID-19 is an internal affairs issue, the president is basically confined to their enumerated powers. If, as my hypothetical proposes, COVID-19 were declared an attack, there is no doubt that the executive could take more action.[[96]](#footnote-96) As an example, during the war years of 1941-1945, 1,033 executive orders were issued by Presidents Roosevelt and Truman.[[97]](#footnote-97) Not all of those were directly applicable to the war, but they illustrate that a president may engage in much more activity than normal during a time of war. As another example, there were 383 executive orders signed in 1941 when the United States realized it might become personally involved in the war, while only 139 were signed in 1945 when the war ended.[[98]](#footnote-98)

**B. When is Executive Action Warranted?**

Based on the data gathered from the National Archives, it seems clear that Executive action is at least arguably given more deference during a time of war. However, since COVID-19 was never treated as an act of war, where does that leave us in our analysis? The answer is that we have to start with traditional modes of legislative interpretation. Justice Gorsuch tells us in *NFIB* that the proper consideration for executive action (specifically the vaccine mandate) requires considering that “a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed [in the past]. A vaccin[e] . . . ‘cannot be undone at the end of the workday.’”[[99]](#footnote-99) What Gorsuch is saying is that traditional OSHA regulations[[100]](#footnote-100) are easily cast off at the end of each workday. OSHA has not and cannot under the current scheme tell a worker to, for example, wear a hardhat to the grocery store or to wear a safety harness when putting up Christmas lights at home. None of this is true for the COVID-19 vaccine, which if received under edict from OSHA, cannot be left behind at the workplace.  
 Although the OSHA mandate was not supported by the Supreme Court, this is not to say that the executive lacks authority where it is clearly given such authority by statute. In March of 2020, during the height of the COVID-19 pandemic, President Donald Trump issued a rule that would allow the CDC to suspend entry into the United States for people from certain areas of the world. What is commonly known as Title 42 traces its history to the Public Health Services Act of 1944, codified at 42 U.S.C. § 265. The goal of this Act was to “permit[] the [CDC] upon finding the existence of ‘any communicable disease in a foreign country’ to ‘prohibit, in whole or in part the introduction of persons and property from such country’ if continued introduction would increase the danger of that disease’s introduction to the United States.”[[101]](#footnote-101) Clearly, the COVID-19 pandemic, or any other disease outbreak, would give the CDC authority to act. If one compares OSHA’s mandate to Title 42, they may broadly look like they are both sensible public health responses. However, this is simply not so, since Title 42 is part of a statutory body of law which gives express power to the executive to take some affirmative action. Under this interpretation, the OSHA mandate could not stand because it was never supported by legislation.   
 Noting the difference between the OSHA mandate and Title 42 serves two purposes. First, this comparison again illustrates Justice Jackson’s tripartite framework.[[102]](#footnote-102) Second, a court’s view of OSHA compared to Title 42 shows how different the outcome can be when Congress has spoken rather than when the executive acts in reliance on their own power, whether enumerated or not. This second purpose also illustrates how important the legislature is to advancing the business of government.

**C. Legislative Authority**

As previously established, we heard a lot about executive action during the COVID-19 pandemic. We did not, however, hear nearly enough about legislative action. Consequently, those unfamiliar with the doctrine of separation of powers might be justified in concluding that the executive is the sole authority in charge of responding to a pandemic. However reasonable this belief might be, it is misguided. Clearly, the executive has authority over executive agencies. What is often missed is that Congress *also* has some authority over executive agencies, and it is probably much broader than many might assume. The debate over this issue has been ongoing since at least 1789 and will no doubt continue *ad infinitum* as a sort of Constitutional tug-of-war.[[103]](#footnote-103)  
 Though there has not been a lot of guidance on the issue of congressional interference in executive affairs, the Supreme Court gave some guidance in *Zivotofsky v. Kerry*, holding that broad congressional authority “is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation’s foreign affairs.”[[104]](#footnote-104) A Congressional Research Service (CRS) article interprets this and other language in *Zivotofsky* to mean that “separation of powers is not violated merely by Congress directing, prohibiting, or otherwise legislating on most forms of agency action.”[[105]](#footnote-105) This limitation does not seem to suggest that Congress would lack the authority to respond to a pandemic in ways that would have more force than the executive. This has often been attributed to a generalized congressional attitude of deference to the other branches of government in an effort to insulate their congressional seats from reelection threats. [[106]](#footnote-106)   
 If one steps back for a moment, it theoretically makes sense for Congress to pass its responsibilities to some other part of the government, so that it can have some form of insulation if things go poorly. While this might be beneficial in a political sense, it is reckless, dangerous, and irresponsible in a constitutional sense. It is so dangerous because such action (or inaction as the case may be) carries with it the risk that our whole form of governance may become off balance,[[107]](#footnote-107) for at the very foundation of our government lies a concept that there are three separate but equal branches of government and each of these is designed to keep the others in check. [[108]](#footnote-108)  
 No matter your political persuasion, one cannot deny that each branch is endowed with unique responsibilities. Many of these responsibilities are outlined in varying degrees of detail in Articles I, II, and III of the federal Constitution. Even though these responsibilities are laid out in some detail, some political writers have noted the branches retreating from embracing their uniqueness in recent years. The theory of co-equal branches seems to have been replaced by political acquiescence to whatever party controls the executive and legislative branches. For this proposition, consider former Congressman Mickey Edwards’ writing on this issue, where he suggests that “today’s federal government is, for practical purposes, made up of either two branches or one, depending on how you do the math. The modern presidency has become a giant centrifuge, sucking power from both Congress and the states, making de facto law through regulation and executive order.”[[109]](#footnote-109) The overall arc of Congressman Edwards’ article is that Congress has consistently shirked its responsibility to legislate and control abuses of other branches of government.

**D. *West Virginia v. EPA*—Returning Power to the Legislature**

*West Virginia v. EPA* is a case just recently released by the Supreme Court. Broadly speaking, this case addresses concerns over the Environmental Protection Agency’s (EPA) use of regulatory authority to make sweeping and significant changes to the energy market. Following these sweeping regulations, West Virginia and other states filed lawsuits in an effort to challenge the EPA’s implementation of rules that were tightly regulating certain forms of energy—namely coal—without much, if any, input from the states or the federal Congress.[[110]](#footnote-110)   
 This case is largely hailed as a victory by those advocating for returning to an active legislature. On the other hand, the decision is being derided as a failure and a major setback for the fight against climate change since Congress is slower to react than the executive.[[111]](#footnote-111) While some may look at this case as being about climate change, the real significance of it is in showing what role Congress should play in setting rules for executive regulatory agencies. *West Virginia v. EPA* marks the adoption of the “Major Questions Doctrine.” Justice Gorsuch, writing in a concurrence joined by Justice Samuel Alito, discusses this doctrine at length, how it works, and what it is generally designed to prevent.[[112]](#footnote-112) The basic rule of this doctrine is this: “the Government must—under the major questions doctrine—point to ‘clear congressional authorization’ to regulate in that manner.”[[113]](#footnote-113)   
 The message that should be derived from the Court’s opinion in *West Virginia v. EPA* is that an executive agency cannot act contrary to “clear constitutional authorization” and that we should “‘typically greet’ [executive] assertions of ‘extravagant statutory power over the national economy’ [or other areas] with ‘skepticism.’”[[114]](#footnote-114) The arrival of this doctrine has profound consequences for reining in power of regulatory agencies, many of which are housed within the executive branch. *West Virginia v. EPA* sets the record straight on this issue, holding that:

[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.[[115]](#footnote-115)

Where this case will lead us is still somewhat unknown, as we will not know whether this doctrine will be modified, strengthened, or left the same until other challenges are brought.   
 As it is, this doctrine remains in many ways a major open question. One thing is for certain, however, and that is that *West Virginia v. EPA* greatly diminishes the capacity of the executive to act with grand assertions of regulatory authority. *West Virginia v. EPA* requires that Congress take up its constitutional mantle of responsibility and act in accordance with the duties spelled out by Article I of the Constitution. Gorsuch aptly reminds us that “the Constitution’s rule vesting federal legislative power in Congress is ‘vital to the integrity and maintenance of the system of government ordained by the Constitution.’”[[116]](#footnote-116) The framers of our republic envisioned that a body of individuals accountable to the people would be much more inclined “to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’”[[117]](#footnote-117) This line of reasoning expressed by Justice Gorsuch sounds very much like the concerns surrounding an “imperial president”[[118]](#footnote-118) as well as concerns about the balance required to maintain a three-branch government.[[119]](#footnote-119)

**E. Making Law and Sausage: A Messy Process**

Accurate or not, the old saying[[120]](#footnote-120) about lawmaking and sausage making may have some parallels with Justice Gorsuch’s suggestion in *West Virginia v. EPA*. Insofar as this may be true, Gorsuch tells us that the process of passing legislation is designed to be difficult for “[t]he framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty.”[[121]](#footnote-121)   
 When Congress is empowered by the Constitution with relatively broad authority,[[122]](#footnote-122) and it chooses to cede it to another governmental entity, this sends mixed messages to the electorate. It seems to signal that Congress is either incapable, inept, or otherwise unwilling to act. It also may send a message that congressional members are more concerned with their political careers rather than with adhering to principles of working toward good governance. Even though congressional members frequently come up for reelection and reelection is often a concern, they must *always* remember that they are, as envisioned by the Framers, a body “deriving their just powers from the consent of the governed.”[[123]](#footnote-123) This may be a “glass half-full” view as compared to the view expressed by Justice Gorsuch in his concurring opinion in *West Virginia v. EPA*. Gorsuch envisioned an even worse outcome, where allowing “Congress to divest its legislative power to the Executive Branch would ‘dash [this] whole scheme.’”[[124]](#footnote-124) Justice Gorsuch envisioned that at that point “[l]egislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him.”[[125]](#footnote-125) Gorsuch seems to recognize that whether the glass is “half-full” or “half-empty” depends in large part on whether you are pouring or drinking.[[126]](#footnote-126) It is simply a matter of perspective.

**IX. Conclusion**

I hope that the reader of this Note is able to take away a few key concepts. First, even if readers believe that this Note has completely missed the mark, they should still at least agree that no matter the circumstance, the Constitution must not take a back seat. Justice Gorsuch said it best in *Roman Catholic Diocese*, “[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.”[[127]](#footnote-127) Second, Congress needs to be more proactive in defining the authority that the various agencies have, for nowhere in any of the sources has the Supreme Court suggested that Congress cannot make up for authority that the executive may lack. Finally, the United States cannot afford to be laden with controversy, mistrust of people or government, fear tactics, and pointless political posturing. We must remember to declare war on the issue at hand, not each other. We are so burdened with identity politics and finger pointing today that we are almost crippled when the time comes to react.[[128]](#footnote-128) Consider these final thoughts sourced from President Abraham Lincoln’s first inaugural address:

We are not enemies, but friends—We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.[[129]](#footnote-129)

Of course, President Lincoln was addressing the rising threat of a dangerous civil war that threatened to destroy the “Great Experiment” that was and continues to be America, less than 100 years after the nation’s founding.[[130]](#footnote-130) You must consider whether we are facing a new civil war. Not one waged with swords, firearms, and cannons but rather a war of intellect, politics, and philosophy that is nonetheless certain to turn families upon one another. We must focus not on what divides us but on what unites us. We must remember “that the things that unite us—America’s past of which we’re so proud, our hopes and aspirations for the future of the world and this much-loved country—these things far outweigh what little divides us.”[[131]](#footnote-131)

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27. . *Id.* [↑](#footnote-ref-27)
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