

THE EMERGENCY NEXT TIME

Noa Ben-Asher*

This Article offers a new conceptual framework to understand the connection between law and violence in emergencies. It is by now well-established that governments often commit state violence in times of national security crisis by implementing excessive emergency measures. The Article calls this type of legal violence “Emergency-Affirming Violence.” But Emergency Violence can also be committed through governmental non-action. This type of violence, which this Article calls, “Emergency-Denying Violence,” has manifested in the crisis of the COVID-19 pandemic.

The Article offers a taxonomy to better understand the phenomenon of Emergency Violence. Using 9/11 and COVID-19 as examples, the Article proposes that there are two types of Emergency Violence: Emergency-Affirming Violence and Emergency-Denying Violence. Emergency-Affirming Violence occurs when the government (1) declares and emphasizes the magnitude of an emergency; (2) calls for robust deference to experts; and (3) aggressively pursues emergency measures. Emergency-Denying Violence, by contrast, occurs when the government (1) denies or minimizes the existence of an emergency; (2) ignores or undermines experts; and (3) declines to take significant emergency measures. The Article demonstrates how the three branches of government can engage in both types of Emergency Violence.

Analyzing the legal responses to the two national crises of 9/11 and COVID-19 side-by-side, the Article underscores the vulnerable individuals and communities against whom Emergency Violence is unleashed via both Emergency-Affirming and Emergency-Denying Violence.

INTRODUCTION	52
I. EMERGENCY-AFFIRMING VIOLENCE	60
A. Declaring a war-on-terror	60
B. Deferring to national security experts	63
C. Enacting robust national security measures	65
1. Guantanamo Bay	65
2. Muslim Ban	68
II. EMERGENCY-DENYING VIOLENCE	70
A. Downplaying the COVID-19 public health crisis	72

* Noa Ben-Asher, Professor of Law, Elisabeth Haub School of Law at Pace University. For insightful conversations about this project, I thank Margot Pollans, Sarale Ben-Asher, Amy Levine, and Emily Waldman. For excellent research, I thank Katherine Boyd, Olivia Brenner, Gregory Bruno, Lindsay Carter, and Yitzhak Maurer. I also thank Saraswati Pradipsinh Rathod for a thoughtful and rigorous editing process.

B.	Undermining science and public health experts	75
C.	Enacting minimal public health measures	78
1.	Social distancing measures	78
a.	Stay-at-home orders	78
b.	Mandatory face covering	80
2.	The Defense Production Act	82
III.	THE ROLE OF JUDICIAL REVIEW IN EMERGENCY VIOLENCE	84
A.	Robust deference to national security measures	85
B.	Weak deference to public health measures	86
IV.	THE EMERGENCY NEXT TIME	92
A.	The sacrificial lives of emergency violence	92
1.	Muslim lives	92
2.	Black and Brown lives	93
B.	Beyond the rule of law: Toward emergency non-violence	96
	CONCLUSION	98

INTRODUCTION

This Article offers a new conceptual framework to understand the connection of law, emergencies, and state violence. What this Article calls “Emergency Violence” consists of two opposite types of state violence: “Emergency-Affirming Violence” and “Emergency-Denying Violence,” the former being the consequence of *excess* emergency response, the latter of its *deficiency*. Emergency-Affirming Violence occurs when the executive branch declares and emphasizes the magnitude of an emergency, listens to and relies on the advice of relevant experts, and pursues emergency measures. Emergency-Denying Violence, by contrast, occurs when the executive branch denies or minimizes the existence of an emergency, ignores or undermines relevant experts, and declines to adopt significant emergency measures. All three branches of government may participate in Emergency Violence.

To develop a better understanding of the phenomenon of Emergency Violence, this Article examines and compares two of the major national crises in the twenty-first century: the terrorist attacks of September 11, 2001 (“9/11”) and the coronavirus pandemic (“COVID-19”).¹ Emergency-Affirming Violence is vividly illustrated by the legal response of the three branches of government to 9/11—and Emergency-Denying violence, by the legal responses of the Trump administration to COVID-19. Many have criticized the violence that the U.S.

1. Coronavirus disease 2019 (COVID-19), caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), was first identified in December 2019 in Wuhan, China, and has since spread across the globe. *Basics of COVID-19*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> (last visited Nov. 18, 2021).

government unleashed in the past two decades in the name of national security.² And since early 2020, many have criticized the passivity of the Trump administration's response to COVID-19.³ This Article demonstrates that both of these governmental responses to crisis constitute one phenomenon—Emergency Violence—with two faces: one that appeared in the War-on-Terror (Emergency-Affirming Violence), and the other in the unwar-on-COVID-19 (Emergency-Denying Violence.)

Of course, the legal and political phenomenon of Emergency Violence is not limited to 9/11 and COVID-19. This Article offers an analytical framework that sheds light on many other past and future emergencies. For example, Japanese internment during World War II, McCarthyism in the 1950s, and the construction of the Border Wall during the Trump administration all nicely fit within the framework of Emergency Affirming Violence.⁴ By contrast, the lackluster response of the Reagan administration to the HIV/AIDS crisis, the Bush administration to Hurricane Katrina, and multiple administrations to the rise of far-right extremism in the last two decades could be viewed as instances of Emergency-Denying Violence.⁵

2. See, e.g., Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1015, 1017, 1038 (2008); David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2015, 2024-25 (2006); Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 296-97, 329-30 (2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005); JUDITH BUTLER, *FRAMES OF WAR: WHEN IS A LIFE GRIEVABLE?* (2010); JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY* 30-32 (2013). But see ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15-18 (2007) (arguing for the necessity of such state violence).

3. See, e.g., David Leonhardt, *The Unique U.S. Failure to Control the Virus*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/us/coronavirus-us.html>; Michael D. Shear et al., *Inside Trump's Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html>; Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, 11 J. NAT'L SEC. L. & POL'Y 27, 28 (2020); David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608, 611-13 (2020).

4. *Japanese-American Internment During World War II*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/japanese-relocation#background> (last visited Sept. 28, 2021); Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1399-1401 (2005); Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> ("President Trump declared a national emergency on the border with Mexico on Friday in order to access billions of dollars that Congress refused to give him to build a wall there.").

5. Joseph Bennington-Castro, *How AIDS Remained an Unspoken—But Deadly—Epidemic for Years*, HISTORY (June 1, 2020), <https://www.history.com/news/aids-epidemic-ronald-reagan>; Donald P. Francis, *Deadly AIDS Policy Failure by the Highest Levels of the*

Governments can inflict Emergency Violence by using emergency powers or by failing to do so. On September 14, 2001, President George W. Bush declared a national emergency, issued two quick executive orders,⁶ and requested an authorization of military power from Congress.⁷ Since then, the federal government has issued a number of national security measures which courts have upheld.⁸ By contrast, President Donald J. Trump and his administration met COVID-19 with denial, dismissal of its seriousness, and minimal action.

By examining the governmental responses to 9/11 and COVID-19 side-by-side, this Article reveals how two opposite attitudes to crisis, two decades apart, inflicted devastating state violence by killing, wounding, and financially injuring vulnerable individuals and communities, especially Black and Brown.⁹

Courts may also participate in Emergency Violence. They can inflict Emergency Violence by deferring to emergency measures or failing to do so. They decide when and how to defer to the political branches in emergencies. They decide whether an emergency measure falls within the rule-of-law or outside it.

U.S. Government: A Personal Look Back 30 Years Later for Lessons to Respond Better to Future Epidemics, 33 J. PUB. HEALTH POL'Y, 290 (2012); Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 245-246 (2006) (describing critiques of government response to the storm); Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It*, N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html>; SETH G. JONES, CTR. FOR STRATEGIC AND INT'L STUD., THE RISE OF FAR-RIGHT EXTREMISM IN THE UNITED STATES (Nov. 7, 2018), <https://www.csis.org/analysis/rise-far-right-extremism-united-states>; S. POVERTY L. CTR., THE YEAR IN HATE AND EXTREMISM 2020 4 (2021), https://www.splcenter.org/sites/default/files/yih_2020-21_final.pdf.

6. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) ("A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States. Now, therefore, I, George W. Bush, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes."); Exec. Order No. 13,223, 3 C.F.R. 196 (2003); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

7. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

8. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096-98 (2009) (arguing that courts after 9/11 have regularly deferred to many national security policies, and that this is necessary in times of emergency); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991, 1004-1009 (2018) (discussing post-9/11 cases involving national security where courts have deferred to the executive branch).

9. See, e.g., NETA C. CRAWFORD, WATSON INST. INT'L & PUB. AFFS., BROWN UNIV., HUMAN COST OF THE POST-9/11 WARS: LETHALITY AND THE NEED FOR TRANSPARENCY (2018), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Human%20Costs%20Nov%208%202018%20CoW.pdf> (finding that more than 240,000 civilians have been killed in Afghanistan, Pakistan, and Iraq).

Federal courts have historically deferred to the executive branch in national security emergencies, including during the War-on-Terror.¹⁰ By contrast, despite the acute public health emergency of COVID-19, the Supreme Court enjoined two heavily populated states that have been hard-hit by the pandemic, New York and California, from enforcing measures restricting indoor gatherings in houses of religious worship.¹¹ The Supreme Court's decisions in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) and *South Bay United Pentecostal Church v. Newsom* (2021) are paradigmatic examples of judicial Emergency-Denying Violence.¹²

The terms “emergency” and “violence” require unpacking. I define “emergency” broadly to mean any situation in which there is a real or perceived danger to the public that is beyond “ordinary” risks of modern life.¹³ As defined here, emergencies need not involve a formal governmental declaration that an emergency exists. However, declaring an emergency is a significant legal and political act that has real and symbolic consequences.¹⁴ For example, when a hurricane is predicted to hit a state, a governor's declaration of emergency may trigger allocation of funds, opening of emergency shelters, or implementation of evacuation orders.¹⁵ Declaring an emergency enables public officials to act in ways that

10. See, e.g., Cole, *supra* note 2 at 2565; Gross, *supra* note 2; Dyzenhaus, *supra* note 2 at 2017; sources cited *infra* note 161; see also Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WISC. L. REV. 273, 306 (2003).

11. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65-66 (2020) (per curiam) (enjoining capacity limit in houses of worship, based on likelihood of success of First Amendment claims); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (mem.) (enjoining state limits on indoor gatherings for religious worship, based on likelihood of success of First Amendment claims). The Court, as of early 2022, seems inclined to continue this same trajectory. See, e.g., Adam Liptak, *Supreme Court Blocks Biden's Virus Mandate for Large Employers*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html>.

12. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65-66; *S. Bay United*, 141 S. Ct. at 716.

13. But see Cole, *supra* note 2, at 2587 (positing that the distinction between “emergency” and “normal” periods cannot be maintained). For discussions of the meaning of emergency in the national security context, see generally Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L. REV. 699 (2010) (contrasting a Legalist view—which assumes that legal norms can offer proper responses to national security emergencies—with a Decisionist view that assumes that they cannot). See generally Dyzenhaus, *supra* note 2 at 2023-25 (arguing that emergencies must be governed by the rule of law, and that a Schmittian approach under which emergencies create “black holes” is dangerous for legal democracies); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 35 (Geoffrey R. Stone ed., 2006) (arguing that the United States had entered a ‘crisis of constitutionalism’ after 9/11, in which judges may legitimately narrow constitutional rights).

14. For discussion of speech acts that constitute reality see J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 5-6 (J.O. Urmson ed., 1962) (observing that humans use language to do things as well as to assert things. For instance, utterances such as “I do” are actions rather than descriptions of reality).

15. See, e.g., Velmanette Montgomery, *Governor Cuomo Declares State of Emergency*

would otherwise be considered unlawful.¹⁶ And while the declaration itself can be meaningful, more so is the governmental attitude toward the severity of the emergency and the measures taken or avoided under the declared emergency. The term “violence” here is used to describe more than direct physical assaults committed or enabled by the state.¹⁷ The state commits violence not only when it brutalizes and incarcerates Black people or curbs voting rights,¹⁸ but also when it *fails to act* to save lives or relieve suffering.¹⁹ The Article treats as violence state action or non-action that harms or endangers human life or livelihood.

The Article proposes that Emergency Violence is a unique form of state violence that calls for a separate analysis from other forms of state violence (“Non-Emergency Violence”). The key difference between Emergency and Non-Emergency State Violence is that the latter is typically governed by recognizable legal norms, standards, or practices.²⁰ A legal rule can be morally corrupt yet still be considered a valid legal rule.²¹ Consider, for instance, the fugitive slave laws or the Nuremberg laws. Emergency Violence, by contrast, occupies a different political and legal space: it *turns on its relation* to the non-emergency, “normal”

in New York in Preparation for Potential Impact of Hurricane Sandy, Press releases for Former N.Y. State Sen. Velmanette Montgomery, N.Y. STATE SENATE (Oct. 26, 2012), <https://www.nysenate.gov/newsroom/press-releases/velmanette-montgomery/governor-cuomo-declares-state-emergency-new-york>; N.Y. EXEC. LAW §§ 20-29-k (McKinney 2021) (establishing the legal framework for declaration of states of emergency and exercise of emergency powers in New York State); see also Lainie Rutkow, *An Analysis of State Public Health Emergency Declarations*, 104 AM. J. PUB. HEALTH 1601, 1601, 1603 (2014).

16. For example, temporary shelter-in-place orders enacted in the early months of the coronavirus pandemic were considered legitimate because of the national and global emergency created by the pandemic. See Bernadette Meyler, *Shelter-in-Place Orders Are Perfectly Legal*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/opinion/shelter-in-place-constitution.html>. (“[E]mergencies have often called for states to impose short-term economic restrictions, and the Supreme Court has affirmed their constitutionality, emphasizing that temporary steps that might otherwise infringe on economic rights may be permissible.”);

17. Legal scholars have offered different definitions of the term violence. Robert Cover, for example, characterizes the coercive effect of law as a form of violence. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 48 (1983).

18. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE ERA OF COLOR-BLINDNESS* 4-8 (rev. ed. 2012) (describing systemic state violence against Black bodies).

19. For instance, in the aftermath of Hurricane Katrina many attributed the scale of death and devastation to government inaction before, during, and after the storm. Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 246 (2006) (describing critiques of government response to the storm).

20. In *Critique of Violence*, Walter Benjamin offers a distinction between law-preserving and law-making violence. What I call here “Non-Emergency” violence overlaps to some extent with what Benjamin called “law-preserving violence,” which, for Benjamin, included the legal force that a regime uses to enforce its legal order. See generally, WALTER BENJAMIN, *CRITIQUE OF VIOLENCE* (1921), reprinted in WALTER BENJAMIN, *SELECTED WRITINGS VOLUME 1 1913-1926* 236-252 (Markus Bullock & Michael W. Jennings eds., 6th ed. 1996).

21. See generally, H.L.A. HART, *THE CONCEPT OF LAW* (1961). Hart further argued that there is a moral-ethical duty to disobey such rules. See generally, H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

state of affairs. It is violence that can be detected through whether the government decides to respond to an emergency. If it does, ordinary rules and standards may be amended, suspended, or cast aside to make way for extraordinary measures.²² If it does not, ordinary rules and standards continue to apply.

Contrasting two examples of state violence helps clarify the difference between Emergency and Non-Emergency State Violence: the murder of George Floyd by a white police officer by kneeling on his neck, and the torture of terror suspects after 9/11 in order to extract national security intelligence.²³ The first is an act of Non-Emergency State Violence; the second, an act of Emergency State Violence. The murder of George Floyd took place and was adjudicated *within* a biased and racist legal system with all its rules formally intact; changing that system involves improving policies, rules, standards, and their enforcement.²⁴ The torture of detainees after 9/11 was an act of Emergency State Violence. Torture was never pursued within the ordinary legal order, but instead as an *emergency measure*: The Bush administration (incorrectly) claimed that normal rules of procedure and constitutional rights did not apply to those declared “enemy combatants.”²⁵

22. See, e.g., Gross, *supra* note 2, at 1019; Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030-31 (2004); Cole, *supra* note 2, at 2567; Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1536 (2007); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 605-06 (2009); Dyzenhaus, *supra* note 2, at 2013; Ben-Asher, *supra* note 13, at 702; POSNER, *supra* note 13, at 39; Montgomery, *supra* note 15; N.Y. EXEC. LAW §§ 20-29-k (Consol. 2021). See also Rutkow, *supra* note 15.

23. Kim Barker & Serge F. Kovaleski, *Officer who Pressed His Knee on George Floyd's Neck Drew Scrutiny Long Before*, N.Y. TIMES, July 18, 2020, at A1; Michael Conte, *Newly Released Illustrations Depict Post-9/11 Torture Techniques*, CNN (Dec. 6, 2019, 3:12 PM), <https://www.cnn.com/2019/12/06/politics/torture-techniques-report/index.html>.

24. See, e.g., *About*, BLACK LIVES MATTER, <http://blacklivesmatter.com> (last visited Nov. 17, 2021) (calling for significant reform of the laws and systems that generated the death of Floyd and so many others); Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR-HIVE (June 14, 2016), <https://www.vanityfair.com/news/2016/07/data-police-racial-bias> (concluding that race plays a role in interactions between civilians and police); Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PNAS 16793, 16796 (2019) (concluding that Black men face the highest risk of being killed by police compared to other racial groups); EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4-5 (2010) (finding that racism persists in the jury selection process).

25. The Supreme Court disagreed. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that U.S. citizen detainees at Guantanamo Bay had the right to due process); *Rasul v. Bush*, 542 U.S. 466, 475, 483-85 (2004) (holding that foreign nationals detained at Guantanamo also had the right to *habeas corpus*); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (holding that detainees were entitled to the minimal protections listed under Common Article 3 of the Geneva Conventions); *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (holding that the Military Commissions Act of 2006 illegally stripped detainees of their constitutional right to petition for *habeas corpus*, and affirming “The laws and the Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.” *Id.* at 798).

Three key components appeared in the governmental responses to the national crises of 9/11 and COVID-19. First, after 9/11, the government declared a national security emergency and identified an enemy: Islamic Terrorism.²⁶ The opposite occurred with COVID-19. President Trump identified several enemies—China, the news media, Democrats—and the emergency was downplayed until it was too late.²⁷ Three months into the outbreak, the government still had not mobilized effectively to combat it.²⁸ Second, after 9/11, the Bush administration and its supporters claimed that other branches of government must defer to national security experts in responding to the emergency.²⁹ By contrast, during the COVID-19 pandemic, the federal government refused to follow the advice of science or public health experts, at times silencing them altogether.³⁰ Third, after 9/11 the Bush administration adopted and defended robust emergency measures, including detentions and torture, whereas during the COVID-19 crisis, the Trump administration initially pursued minimal public health emergency measures, often publicly flouting the recommendations of medical experts.³¹ The

26. Proclamation No. 7463, 3 C.F.R. 263 (2002). See George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 2 PUB. PAPERS 1142. See also sources cited *infra* notes 38, 40.

27. See Jeremy W. Peters, *Alarm, Denial, Blame: The Pro-Trump Media's Coronavirus Distortion*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/us/politics/hannity-limbaugh-trump-coronavirus.html>; Jonathan Lemire & Josh Boak, *President Trump Accuses Democrats of Making Coronavirus 'Their New Hoax' After Criticism of His Handling of Outbreak*, CHICAGO TRIBUNE (Feb. 29, 2020, 10:33 AM) https://www.chicagotribune.com/election-2020/ct-trump-democrats-coronavirus-hoax-20200229-guhfd-sau6fafvbothszzyhmry4_story.html; Lauren Egan, *Trump Calls Coronavirus Democrats' 'New Hoax'*, NBC NEWS (Feb. 28, 2020, 6:10 PM), <https://www.nbcnews.com/politics/donald-trump/trump-calls-coronavirus-democrats-new-hoax-n1145721>.

28. See Peters, *supra* note 27.

29. See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 463, 473-474 (4th Cir. 2003) (in which the administration argued in part for a deferential “some evidence” standard that would not allow detainees to rebut the factual basis for their detention); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (in which the administration argued for an expansive view of the state secrets privilege); POSNER & VERMEULE, *supra* note 2, at 4 (“Both Congress and the judiciary realize that they do not have the expertise or the resources to correct the executive during an emergency.”); Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361, 1366-68, 1374-75.

30. See, e.g., Katie Rogers, *Trump Pointedly Criticizes Fauci for His Testimony to Congress*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/politics/fauci-trump-coronavirus.html>; Sheryl Gay Stolberg, Maggie Haberman, & Noah Weiland, *Trump Calls Fauci 'a Disaster' and Shrugs Off Virus as Infections Soar*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/politics/trump-fauci-covid.html>; Morgan Chalfant, *Trump Says He Won't Issue National Mask Mandate*, HILL (July 17, 2020, 6:52 PM), <https://thehill.com/homenews/administration/507908-trump-says-he-wont-issue-national-mask-mandate>; Annie Karni, *Pence Tours Mayo Clinic and Flouts Its Rule That All Visitors Wear a Mask*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/politics/coronavirus-pence-mask.html>; Apoorva Mandavilli & Tracey Tully, *White House Is Not Tracing Contacts for 'Super-Spreader' Rose Garden Event*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/health/contact-tracing-white-house.html>.

31. See *infra* notes 57-61 and accompanying text; see also Anita Kumar, *Trump Fears*

following table summarizes these three components of the two types of Emergency Violence.

Summary Chart: Emergency Violence

	Emergency-Affirming Violence (9/11)	Emergency-Denying Violence (Covid-19)
Embraced The Emergency	<i>Yes</i>	<i>No</i> ³²
Attitude Toward Experts	<i>Respect/Trust</i>	<i>Disregard/Enmity</i>
Emergency Measures	<i>Enthusiastic Adoption</i>	<i>Rejection or Reluctant Adoption</i>

This Article proceeds in four Parts. Part I elaborates on the concept of Emergency-Affirming Violence through the example of the national response to 9/11, which included an immediate declaration of a national emergency and a war on

Emergency Declaration Would Contradict Coronavirus Message, POLITICO (Mar. 11, 2020, 6:46 PM), <https://www.politico.com/news/2020/03/11/trump-emergency-declaration-coronavirus-message-125902>; Ayesha Rascoe, *Trump Resists Using Wartime Law to Get, Distribute Coronavirus Supplies*, NPR (Mar. 25, 2020, 5:03 AM), <https://www.npr.org/2020/03/25/821285204/trump-sends-mixed-messages-about-invoking-defense-production-act>; *Coronavirus: Donald Trump Vows Not to Order Americans to Wear Masks*, BCC (July 18, 2020), <https://www.bbc.com/news/world-us-canada-53453468>; Eric Lipton et al., *He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html>; Philip A. Wallach & Justus Myers, *The Federal Government's Coronavirus Response—Public Health Timeline*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes>; Chalfant, *supra* note 30; Jessie Hellmann, *Fauci on Planned Trump Rallies: 'Now is Even More So a Worse Time to Do That'*, HILL (Oct. 12, 2020), <https://thehill.com/policy/healthcare/520675-fauci-on-planned-trump-rallies-now-is-even-a-worse-time-to-do-that>; *President Trump Rally in Greenville, North Carolina*, C-SPAN (Oct. 15, 2020), <https://www.c-span.org/video/?476882-1/president-trump-rally-greenville-north-carolina>; Shawn Boburg, *Trump Campaign Flouted Agreement to Follow Health Guidelines at Rally, Documents Show*, WASH. POST (Oct. 24, 2020), https://www.washingtonpost.com/investigations/trump-duluth-rally-covid-guidelines/2020/10/23/10c1367c-1317-11eb-82af-864652063d61_story.html.

32. Although the Trump administration did eventually declare a state of emergency, the declaration came relatively late in the development of the crisis and was incongruous with the administration's actions and rhetoric throughout. *See infra* Section II.A; *see also* Kumar, *supra* note 31; Rascoe, *supra* note 31; *Coronavirus: Donald Trump Vows Not to Order Americans to Wear Masks*, *supra* note 31; Lipton, *supra* note 31; Wallach, *supra* note 31; Chalfant, *supra* note 30; Hellmann, *supra* note 31; *President Trump Rally in Greenville, North Carolina*, *supra* note 31; Boburg, *supra* note 31; Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution and What to Do About It*, 44 THE HARBINGER 95, 97-98 (2020) (observing that "it is not even clear that the federal government's response to the COVID-19 pandemic has turned in any meaningful way on the President's invocation of the NEA").

Muslim terrorists (Part I.A), followed by heavy reliance on national security experts (Part I.B). It then examines two infamous emergency measures taken during the ongoing War-on-Terror (Part I.C).

Part II turns to Emergency-Denying Violence by examining the reversal of the three aspects of emergency powers in the governmental handling of the COVID-19 pandemic. First, it demonstrates how President Trump and his administration denied and ignored the seriousness of the virus even when it had already killed tens of thousands of people in the United States (Part II.A). Then, it demonstrates how the government refused to listen and follow the advice of public health experts (Part II.B). Consequently, this Part examines the administration's exercise of violence through resistance to potentially life-saving emergency public health measures (Part II.C).

Part III examines the role of the Judiciary in both types of Emergency Violence. It shows how Emergency-Affirming Violence involves robust judicial deference to the executive branch during emergencies, while Emergency-Denying Violence involves lesser or no judicial deference to emergency measures.

Part IV examines the consequences of Emergency Violence and offers some reflections. It discusses those against whom Emergency Violence is unleashed, at times through Emergency-Affirming Violence, and at other times, through Emergency-Denying Violence. It underscores the lives subjected to these two types of Emergency Violence: Muslim lives after 9/11 and Brown and Black lives during the COVID-19 public health emergency. In both instances, state violence—often accompanied by judicial deference to national security measures and non-deference to public health measures—has caused immense physical and financial hardship. Part IV.B offers thoughts for the next emergency. It proposes another principle, Emergency Non-Violence, which can remind lawmakers, policymakers, and courts of the real lives and bodies that will be made vulnerable in a given national crisis.

I. EMERGENCY-AFFIRMING VIOLENCE

Three key aspects in the ongoing “War-on-Terror” provide a vivid illustration of what this Article calls Emergency-Affirming Violence. First, an emergency was declared and an enemy was identified immediately after the attacks. Second, the Bush administration and its supporters argued for strong or even absolute deference to national security experts by other branches of government and the general public.³³ Third, the administration and its supporters enacted and defended robust emergency measures to combat terrorism.

A. Declaring a war-on-terror

On September 11, 2001, President George W. Bush announced: “Today our

33. *Supra* note 29.

fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts.”³⁴ Three days later, speaking at the National Cathedral, he said, “[i]n every generation, the world has produced enemies of human freedom. They have attacked America because we are freedom’s home and defender. And the commitment of our fathers is now the calling of our time.”³⁵ From then on, Bush would decidedly use the language of good and evil, light and dark, freedom and unfreedom, to characterize the War-on-Terror, and America’s righteous role in it.³⁶ Within three days, on September 14, he declared a national emergency, citing “the continuing and immediate threat of further attacks on the United States.”³⁷

President Bush’s emergency declaration came with a clear articulation of an enemy.³⁸ Addressing a joint session of Congress, Bush said, “the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows.”³⁹ He characterized the events of 9/11 as “an attack on the heart and soul of the civilized world,” adding that the American war is “against all those who seek to export terror, and a war against those governments that support or shelter them.”⁴⁰ Bush said on September 20, 2001 in a speech to Congress: “Our enemy is a radical network of terrorists and every government that supports them.”⁴¹ Many policymakers, lawmakers, scholars, and members of the public accepted this framework of national emergency and War-on-Terror.⁴² In fact,

34. George W. Bush, U.S. President, Address to the Nation on the Terrorist Attacks, (Sept. 11, 2001), in THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds., 2001), <https://www.presidency.ucsb.edu/documents/address-the-nation-the-terrorist-attacks>.

35. George W. Bush, U.S. President, Remarks at the National Day of Prayer and Remembrance Service, (Sept. 14, 2001), in 2 PUB. PAPERS OF THE PRESIDENTS OF THE U.S. at 1108, 1109.

36. See, e.g., GLENN GREENWALD, A TRAGIC LEGACY: HOW A GOOD VS. EVIL MENTALITY DESTROYED THE BUSH PRESIDENCY 53-57 (2007).

37. Proclamation No. 7463, 66 Fed. Reg. 48,635 (Sept. 14, 2001).

38. See, e.g., Todd S. Purdum, *After the Attacks: The White House; Bush Warns of a Wrathful, Shadowy and Inventive War*, N.Y. TIMES (Sept. 17, 2001), <https://www.ny-times.com/2001/09/17/us/after-attacks-white-house-bush-warns-wrathful-shadowy-inventive-war.html> (quoting Bush’s assessment after a war council: “This is a new kind of evil . . . this crusade, this war on terrorism, is going to take a while, and the American people must be patient.”).

39. Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, *supra* note 26, at 1142.

40. George W. Bush, Remarks on the State of War (Oct. 11, 2001), in WASH. POST (Oct. 11, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacks/transcripts/bush_text101101.html.

41. Bush, *supra* note 26, at 1141.

42. See, e.g., sources cited *infra* note 43; *Boumediene*, 553 U.S. at 827 (Scalia, J., dissenting) (“America is at war with radical Islamists . . . On September 11, 2001, the enemy brought the battle to American soil . . . It has threatened further attacks against our homeland; . . . the threat is a serious one.”); POSNER & VERMEULE, *supra* note 2, at 15-18. For a critical account of the harmful consequences of this logic and rhetoric of the War-on-Terror, see generally SPENCER ACKERMAN, REIGN OF TERROR: HOW THE 9/11 ERA DESTABILIZED

Bush enjoyed strong bipartisan support from Congress in declaring a War-on-Terror and expanding his executive authority.⁴³

Having declared a national emergency in no uncertain terms and with the support of Congress in hand, the President used his authority under the National Emergencies Act to immediately issue two key executive orders.⁴⁴

The first allowed the executive branch to call troops from reserve units or retirement, apportion military funding, and exercise more discretion over promoting military officers and generals.⁴⁵ The second allowed the State and Treasury departments to designate entities as terrorists and apply economic sanctions.⁴⁶ Years later, the Obama administration (2009-2017) and Trump administration (2017-2021) renewed President Bush's declaration of the terrorism-related national security emergency and operated under its authorization.⁴⁷

AMERICA AND PRODUCED TRUMP (2021) (arguing that while the ongoing War-on-Terror has yielded neither peace nor victory, it has transformed the country, in that what began as persecution of Muslims and immigrants has become a normalized and paranoid feature of American politics).

43. The Authorization for the Use of Military Force passed unanimously in the Senate. *S.J. Res. 23 (107th): Authorization for Use of Military Force*, GOVTRACK, <https://www.govtrack.us/congress/votes/107-2001/s281> (last visited Dec. 15, 2021). It passed by a vote of 420-1 in the House. *H.J. Res. 64 (107th): Authorization for Use of Military Force*, GOVTRACK, <https://www.govtrack.us/congress/votes/107-2001/h342> (last visited Dec. 15, 2021). Two days after the attacks, Republican Senator Kit Bond of Missouri advocated for expanding the authority of the President and intelligence agencies: "The President's hands ought not to be tied," he stated. "So we can ensure our Nation is never dealt a similar blow, we must give the President the authority, support him and give him the resources and provide him the freedom to act, to preempt the acts of terrorism." 147 CONG. REC. S9344 (daily ed. Sept. 13, 2001) (statement of Sen. Kit Bond). On the other side of the aisle, Senator Robert Torricelli, a New Jersey Democrat, offered his support for expanding law enforcement powers: "Our instinct is, because we understand there is no liberty without security, that we must immediately enhance law enforcement with money, with people, and with new powers," he said. "Everything from increasing electronic surveillance to expanding wiretap authority to giving the CIA greater access to grand jury materials is being proposed." 146 CONG. REC. S9845 (daily ed. Sept. 26, 2001) (statement of Sen. Robert Torricelli). Representative Bob Barr, Republican of Georgia, put it most succinctly. On the subject of terrorists, he told the *New York Times*, "We are not interested in reading them their Miranda rights. We are interested in taking them out, lock, stock, barrel, root, limb." Alison Mitchell & Philip Shenon, *After the Attacks: Congress; Agreement on \$40 Million for Aid and a Response*, N.Y. TIMES (Sept. 14, 2001), <https://www.nytimes.com/2001/09/14/us/after-the-attacks-congress-agreement-on-40-million-for-aid-and-a-response.html>.

44. National Emergency Act, 50 U.S.C. § 1621; see Exec. Order No. 13,223, 3 C.F.R. 196 (2003); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

45. See Exec. Order No. 13,223; *supra* note 44; see also Sarah Grant, *Summary: Executive Order Allowing Pentagon to Recall Retired Service Members*, LAWFARE (Oct. 24, 2017, 12:38 PM), <https://www.lawfareblog.com/summary-executive-order-allowing-pentagon-recall-retired-service-members>.

46. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

47. See Gregory Korte, *A Permanent Emergency: Trump Becomes Third President to Renew Extraordinary Post-9/11 Powers*, USA TODAY (Sept. 14, 2017, 12:18 PM), <https://www.usatoday.com/story/news/politics/2017/09/14/permanent-emergency-trump-becomes-third-president-renew-extraordinary-post-9/11-powers/661966001/>; Zac Copeland,

The violence that the government unleashed against Muslim individuals and communities under the legal justification of a national emergency has received much deserved criticism.⁴⁸ The declaration of a national emergency, the persistent messaging of enmity, the issuing of executive orders expanding the executive's emergency powers, and the highly deferential congressional support for these measures combined to create the foundation for Emergency Violence in the War-on-Terror.

B. Deferring to national security experts

The argument for a strong and independent executive branch in emergencies relies on deference to national security experts.⁴⁹ Following the official declaration of a national emergency, the Bush administration and its supporters asserted that the President and the executive branch—guided by national security experts—should take the lead in the War-on-Terror. Other branches of government, they argued, must defer to the experts.⁵⁰ Indeed, courts have historically deferred

The National Emergency Under Executive Order 13224 Moves into Year 16, LAWFARE (Nov. 3, 2016, 11:00 AM), <https://www.lawfareblog.com/national-emergency-under-executive-order-13224-moves-year-16>.

48. See, e.g., Cole, *supra* note 2; BUTLER, *supra* note 2, at 11 (noting that photos of Abu Ghraib facilitated a “widespread visceral turn against the war”); BRAVIN, *supra* note 2, at 33, 35 (discussing the use of warrantless surveillance, unreasonable searches and seizures, and secretive military commissions during the War on Terror).

49. See generally POSNER, *supra* note 13; POSNER & VERMEULE, *supra* note 2, at 15-18; Vermeule, *supra* note 8, at 1096-98; Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT 179, 201-05 (2006) (arguing that the executive branch deserves deference in times of war because it has more expertise in international affairs and is more politically accountable).

50. See, e.g., POSNER & VERMEULE, *supra* note 2, at 4 (“Both Congress and the judiciary realize that they do not have the expertise or the resources to correct the executive during an emergency.”). Hamdi v. Rumsfeld, 316 F.3d 450, 463, 473-474 (4th Cir. 2003) (in which the administration argued for a deferential “some evidence” standard that would not allow detainees to rebut the factual basis for their detention); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1193 (9th Cir. 2007) (in which the administration argued for an expansive view of the state secrets privilege); Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361, 1366-68, 1374-75 (discussing the Bush administration’s contention that the executive branch is better suited than courts to exercise military judgement and that failing to defer to the executive branch would harm ongoing military operations). *But see* Dyzenhaus, *supra* note 2 (arguing that states of emergency are inside the legal order and must be governed by the rule of law); David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIA. L. REV. 249, 261-66 (2008) (examining the sacrifice of legal norms in the name of the War-on-Terror under the Bush administration); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 444 (2005) (“[C]ourts have relied on the expertise and experience of the President and the military in dealing with issues of national security to a degree far out of proportion with their concomitant reliance upon the competence of civilian administrative agencies. This deference conflicts with administrative law’s ‘hard look review’ and ‘substantial evidence’ doctrines, according to which courts must act at least to ensure that executive and legislative bodies are operating within the factual scope of governing law, even

to governmental decisions in matters of foreign affairs and national security.⁵¹ And in the twenty-first century as well, much War-on-Terror related litigation has ended in significant deference to the executive branch and its national security experts.⁵²

The idea of deference to national security professionals seems to have conquered popular imagination, as demonstrated by the success of shows like *24*, *Homeland*, and *Fauda*, which embody a kind of reverence for gifted national security experts.⁵³ The message has been clear: If you listen (or had we listened) to the national security experts, disaster can be (or could have been) avoided. By following and admiring the protagonist, a national security expert, through a life-threatening journey into the “terrorist mind,” viewers can experience what it

when the legal topic is one with which courts are comparatively unfamiliar.”).

51. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936) (calling for deference to executive branch claims of authority to act in the realm of foreign affairs); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PENN. L. REV. 675, 737 (2004) (“History strongly suggests, however, that deference to government claims of national security imperatives has often led courts to uphold government actions that in hindsight appeared unjustified. Indeed, history has revealed numerous cases in which government officials have knowingly misrepresented the nature of the threat to the courts”); Chesney, *supra* note 29, at 1362 (“Should judges defer to factual judgments made by the executive branch in litigation involving national security? The executive branch frequently argues that judges should do precisely that, and though courts often express reservations, they often comply in the end.”); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100-03 (2008) (“Curtiss-Wright deference is distinguishable from Chevron deference. Because it rests in part upon the President’s Article II powers, rather than just on Congress’s Article I authority, Curtiss-Wright deference does not depend upon a statutory delegation of lawmaking responsibilities, although the power of its presumption would be augmented by such delegation.”).

52. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006) (acknowledging that complete deference is owed to President Bush’s official determination that it would be “impracticable to apply the rules and principles of law that govern” criminal cases in the U.S. district courts to the defendant’s commission. The Court notes that the President did not, however, make the same official determination about the application of the rules for courts-martial.); *Trump v. Hawaii*, 138 S. Ct. at 2401, 2410, 2423 (validating the travel ban as consistent with statutory authority and the Establishment Clause).

53. See, e.g., Alexis Soloski, *The Stars of ‘Homeland’ Get Their Final Debriefing*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/arts/television/homeland-claire-danes-mandy-patinkin.html>; Ben Harris, *Locked Down? Open up to . . . Premier Israeli TV Series ‘Fauda’*, TIMES OF ISRAEL (May 29, 2020, 4:32 AM), <https://www.timesofisrael.com/locked-down-open-up-to-premier-israeli-tv-series-fauda/>; see also Anne Thomas, *‘The Looming Tower’: How Lawrence Wright’s 9/11 Mission Became Must-See Television*, INDIEWIRE (June 11, 2018, 4:06 PM), <https://www.indiewire.com/2018/06/the-looming-tower-lawrence-wright-9-11-jeff-daniels-hulu-emmys-1201972242/>; Joe Otterson, *‘24’: Behind the Scenes of Hit Fox Drama’s Road to Success*, WRAP (Nov. 29, 2016, 6:08 AM), <https://www.thewrap.com/24-15th-anniversary-behind-scenes-sandy-grushow-kiefer-sutherland-fox/>.

would be like to intercept or respond to the next terrorist attack.⁵⁴

Unfortunately, the Bush administration's reliance on overconfident intelligence officials and biased law enforcement officers proved detrimental to civilians caught in the crossfire of the War-on-Terror—both at home and abroad.⁵⁵ Countless lives have been shattered by the Department of Justice's racial profiling of Brown men after 9/11, by the twenty-year invasion of Afghanistan, and by the war in Iraq—which was justified by false intelligence regarding Weapons of Mass Destruction.⁵⁶

C. Enacting robust national security measures

Among the many security measures issued by the federal government after the attacks of September 11, 2001, the detention camp at Guantanamo Bay (established in 2002) and the Muslim Ban (first issued in 2017) vividly illustrate Emergency-Affirming Violence. In both cases, the issuing presidents—George W. Bush and Donald J. Trump—and their administrations first affirmed the existence of a national emergency and then utilized it to inflict state violence by suspending existing rules or creating new ones for those considered to be a threat to national security.

1. Guantanamo Bay

On September 18, 2001, Congress passed a resolution, drafted by White House lawyers John Yoo and Timothy Flanigan, that granted the president broad powers to use “all necessary and appropriate force” against those “he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”⁵⁷ President

54. See, e.g., Lindsay Steenberg & Yvonne Tasker, “Pledge Allegiance”: Gendered Surveillance, Crime Television, and “Homeland”, 54 CINEMA J. 132, 133 (2015); Yvonne Tasker, *Television Crime Drama and Homeland Security: From Law & Order to “Terror TV”*, 51 CINEMA J. 44, 44, 47 (2012); Rachel Shabi, *The Next Homeland? The Problems with Fauda, Israel’s Brutal TV Hit*, GUARDIAN (May 23, 2018, 1:00 PM), <https://www.theguardian.com/tv-and-radio/2018/may/23/the-next-homeland-problems-with-fauda-israel-brutal-tv-hit>.

55. See Richard K. Betts, *Two Faces of Intelligence Failure: September 11 and Iraq’s Missing WMD*, 122 POL. SCI. Q. 585, 585, 598 (2007). See also ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11, at 5 (2004), <https://www.aclu.org/sites/default/files/FilesPDFs/racial%20profiling%20report.pdf> (“On Nov. 9, 2001 Attorney General Ashcroft directed the FBI and other law enforcement officials to search out and interview at least 5,000 men between the ages of 18 and 33 who had legally entered the U.S. on non-immigrant visas in the past two years, and who came from specific countries linked by the government to terrorism. The list of individuals was compiled solely on the basis of national origin, and even the Justice Department acknowledged that it had no basis for believing that any of these men had any knowledge relevant to a terrorism investigation.”).

56. Sources cited *supra* note 55.

57. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. For a detailed account of these events, see BRAVIN, *supra* note 2, at 30-32.

Bush had an open-ended green light from Congress to use military force that he deemed “necessary and appropriate.”⁵⁸ On November 13, he signed a Military Order, under which terrorist suspects and their aiders could be “detained at an appropriate location designated by the Secretary of Defense outside or within the United States.” They could also be “tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.”⁵⁹ Scholars publicly doubted the Military Order’s legality.⁶⁰

In January 2002, the Department of Defense opened the Guantanamo Bay detention camp within the Guantanamo Bay Naval Base in Cuba.⁶¹ Since then, almost 800 men have been detained there and subjected to brutal treatment, torture, and indefinite detention without trial.⁶² The vast majority were not terrorist leaders but “low-level foot soldiers” or innocent men turned over to coalition forces by local warlords for a hefty bounty—“enough to feed your family for life,” as advertised in one U.S. leaflet.⁶³

58. Authorization for Use of Military Force, *supra* note 57.

59. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). Section 7(b) of the Military Order stated that “(1) military tribunals shall have exclusive jurisdiction with respect to the offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly . . . in (i) any court of the United States, or and State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.” *Id.* at 57835-36. See also Jess Bravin, *Bush Orders Creation of Military Tribunals to Try Noncitizens Suspected of Terrorism*, WALL ST. J. (Nov. 14, 2001, 12:01 AM), <https://www.wsj.com/articles/SB1005694874305574320>.

60. See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260, 1265-66, 1277 (2002) (examining judicial precedent on war powers and concluding that “the President’s Order establishing military tribunals for the trial of terrorists is flatly unconstitutional,” specifically because the Constitution is defied when “the executive branch acts as lawmaker, law-enforcer, and judge.”).

61. *Background on Guantanamo Bay Prison*, HUM. RTS. FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/background-guantanamo-bay-prison>; Jeannette L. Nolen, *Guantánamo Bay Detention Camp*, ENCYC. BRITANNICA (Mar. 13, 2020), <https://www.britannica.com/topic/Guantanamo-Bay-detention-camp>; Naval Station Guantanamo Bay, *Joint Task Force - GTMO*, U.S. NAVY, https://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/about/tenant_commands/joint_task_force_gtmo.html (last visited Dec. 15, 2021); Naval Station Guantanamo Bay, *Departments*, U.S. NAVY, https://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/about/departments.html (last visited Dec. 15, 2021).

62. *Guantánamo Bay Detention Camp*, ACLU, <https://www.aclu.org/issues/national-security/detention/guantanamo-bay-detention-camp> (last visited Dec. 30, 2020); Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1714-15 (2009) (discussing indefinite detention and torture at the facility, including waterboarding, rendition, and prolonged stress positions). See generally BRAVIN, *supra* note 13 (revealing the history of Guantanamo Bay and its centrality in the imperial expansion plans since the 18th century and on).

63. Connie Bruck, *Why Obama Has Failed to Close Guantánamo*, NEW YORKER (July 25, 2016), <https://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to>

Several years later, in a series of opinions, the Supreme Court rejected the administration's position that the detainees were not entitled to the protections of the Geneva Conventions or habeas corpus.⁶⁴ In 2009, President Obama declared that he would close the base within a year, but he did not.⁶⁵ In January 2018, President Trump signed an executive order to keep the prison camp open indefinitely.⁶⁶ In early 2021, the White House Press Secretary announced President Biden's intention to close the base.⁶⁷

The federal response to 9/11 was quick, determined, and harsh. Within two months of the attacks, the Bush administration responded to the national crisis by declaring a national emergency and getting broad Congressional authorization to use violence.⁶⁸ To this day there are dozens of prisoners being held in Guantanamo Bay.⁶⁹ The ongoing state violence against these individuals and their

close-guantanamo. See also Lawrence Wilkerson, *Some Truths About Guantanamo Bay*, CTR. FOR THE STUDY OF HUM. RTS. IN THE AMERICAS: WASH. NOTE BLOG (Mar. 17, 2009), <https://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-foreign-affairs-officials/some-truths-about-guantanamo-bay> ("[I]t has never come to my attention in any persuasive way—from classified information or otherwise—that any intelligence of significance was gained from any of the detainees at Guantanamo Bay other than from the handful of undisputed ring leaders and their companions, clearly no more than a dozen or two of the detainees, and even their alleged contribution of hard, actionable intelligence is intensely disputed in the relevant communities such as intelligence and law enforcement.").

64. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 475, 484 (2004) (holding that foreign nationals detained at Guantanamo Bay also had the right to *habeas corpus*); *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (holding that detainees were entitled to the minimal protections listed under Common Article 3 of the Geneva Conventions); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that the Military Commissions Act of 2006 illegally stripped detainees of their constitutional right to petition for *habeas corpus*). For an early discussion of the rights of detainees, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-33, 553-54 (2004) (holding that U.S. citizen-detainees have a due process right to notice and a fair opportunity to rebut their classification as enemy combatants). Many have criticized the lawlessness of Guantanamo Bay. See, e.g., Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMPAR. L.Q. 1, 13 (2004); KAREN J. GREENBERG, *ROGUE JUSTICE: THE MAKING OF THE SECURITY STATE* 3 (2016); Bravin, *supra* note 59.

65. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (ordering review of individuals detained and closure of the detention facility); Bruck, *supra* note 63.

66. Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

67. Ellie Kaufman, *Biden Administration Has Made Little Progress Towards Goal of Closing Notorious Guantanamo Bay Prison*, CNN (Sept. 19, 2021), <https://www.cnn.com/2021/09/19/politics/guantanamo-state-of-play/index.html> ("The Biden administration first announced it intended to close the facility during a White House press briefing in February 2021. When asked by a reporter if the prison would be closed by the time Biden leaves office, White House press secretary Jen Psaki said, 'that's certainly our goal and our intention.'").

68. See Proclamation No. 7463, 66 Fed. Reg. 48,197 (Sept. 18, 2001); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

69. As of December 2021, there were 39 prisoners in the camp—only 12 of whom had been charged or convicted by military commissions. Many have already been recommended for transfer to another country. *The Guantánamo Docket*, N.Y. TIMES, <https://www.ny-times.com/interactive/2021/us/guantanamo-bay-detainees.html#held-table> (last updated Dec.

families is one of the most blatant instances of Emergency-Affirming Violence in the history of the United States.⁷⁰

2. Muslim Ban

President Donald Trump's Muslim Travel Ban is another example of how Emergency-Affirming State Violence against Muslims has persisted since 9/11.⁷¹ Trump's bigoted violence against Muslim people began before his presidency. During his presidential campaign, he endorsed the idea of a "Muslim registry," surveillance, and banning the entrance of Muslims to the United States.⁷² Shortly after he entered office, Trump signed an Executive Order that banned the entry of individuals from seven Muslim-majority countries for ninety days.⁷³ A federal court enjoined it, and Trump announced a revised version, which was again enjoined.⁷⁴ Trump issued a third and final version of the ban on September 24,

9, 2021). In early 2022, the Biden administration announced its decision to release five detainees from Guantanamo Bay. Carol Rosenberg, *Biden Administration Approves Five More Guantánamo Releases*, N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/us/politics/guantanamo-releases-approved.html>.

70. For more on the state violence against Guantanamo detainees, see generally Safiyah Rochelle, *Encountering the "Muslim": Guantánamo Bay, Detainees, and Apprehensions of Violence*, 34 CANADIAN J.L. & SOC'Y 209 (2019).

71. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

72. See Alana Abramson, *What Trump Has Said About a Muslim Registry*, ABC NEWS (Nov. 18, 2016, 4:00 PM), <https://abcnews.go.com/Politics/trump-muslim-registry/story?id=43639946>; Donald J. Trump Statement on Preventing Muslim Immigration, MAKE AMERICA GREAT AGAIN! DONALD J TRUMP FOR PRESIDENT (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [<https://web.archive.org/web/20151207230751/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>]; Christine Wang, *Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing*, CNBC (May 8, 2017, 3:13 PM), <https://www.cnn.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html> (reproducing original statement). Trump also said he would kick Syrian refugees out of the country and would consider closing mosques. Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims>.

73. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017) (stating that the process of issuing visas plays a crucial role in "detecting individuals with terrorist ties and stopping them from entering the United States"); Alison Siskin, *President Trump's Executive Order on Suspending Entry of Select Foreign Nationals: The Seven Countries*, CRS INSIGHT (Feb. 1, 2017), <https://sgp.fas.org/crs/homesecc/IN10642.pdf>.

74. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit denied the Government's request to stay the injunction. *Washington v. Trump*, 847 F.3d 1151, 1156, 1169 (9th Cir. 2017) (per curiam). After that, Trump issued Version 2.0 of the travel ban. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of the Executive Order suspended for ninety days the entry of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen into the United States. *Id.* at 13,210-11, 13,213. Section 6(a) suspended for 120 days the entry of refugees into the United

2017.⁷⁵ On June 26, 2018, the Supreme Court allowed it to take effect,⁷⁶ ignoring Trump's anti-Muslim statements and deferring to his assessment that the ban was necessary for national security (despite evidence to the contrary).⁷⁷

The Muslim Ban and the Supreme Court's decision to uphold it have been heavily criticized.⁷⁸ It has caused, among other harms, the separation of at least a thousand families in just over a year, cultural and individual trauma, denial of student visas, and the public perception that American laws and policies are Islamophobic.⁷⁹ The Ban rests on high deference to the executive branch's national

States and decisions on applications for refugee status, and Section 6(b) cut by more than half the number of refugees that could be admitted to the United States in fiscal year 2017, from 110,000 persons to 50,000 persons. *Id.* at 13,215-16; *Presidential Determination—Refugee Admissions for Fiscal Year 2017*, The White House (Sept. 28, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/28/presidential-determination-refugee-admissions-fiscal-year-2017>. That version was again enjoined. *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), *aff'd in part & vacated in part*, 859 F.3d 741, 755-56, 786 (9th Cir. 2017) (per curiam) (vacating the district court's injunction as to the President only, but affirming the injunction against the remaining government Defendants), *vacated sub nom.*, *Trump v. Hawaii*, 138 S. Ct. 377 (2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff'd in part & vacated in part*, 857 F.3d 554, 605 (4th Cir. 2017) (lifting the district court's injunction as to the President only, but otherwise upholding the injunction), *vacated sub nom.*, *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017).

75. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). This version of the ban listed some countries, such as North Korea and Venezuela, that were not majority-Muslim. *Id.* at Sec 1 (g).

76. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408, 2413-15, 2416-17, 2423 (2018) (reversing an injunction on the ban and holding that the President fulfilled his statutory requirement under the Immigration and Nationality Act (INA) to find that entry of aliens from covered countries would be detrimental to the interests of the United States; that the INA prohibition on national origin discrimination in the issuance of visas does not constrain the President's delegated authority to suspend entry by aliens or classes of aliens; and that the plaintiffs' claim that the travel violated the Establishment Clause was unlikely to succeed).

77. *Id.* at 2433-48 (Sotomayor, J., dissenting).

78. See, e.g., Jessica A. Clarke, *Explicit Bias*, 113 NW. UNIV. L. REV. 505, 505 (2018) (arguing that "discrimination law should dispense with doctrines that shield explicit bias from consideration," and using Trump's early statements about the Muslim Ban as an example of such bias).

79. Noa Ben-Asher & Margot J. Pollans, *The Right Family*, 39 COLUM. J. GENDER & L., no. 1, 2020, at 1, 18; Sara Reardon, *Top US Court Upholds Trump Travel Ban: Student Visas Already in Decline*, NATURE (June 26, 2018), <https://www.nature.com/articles/d41586-018-05561-8>; *Trump v. Hawaii*, 138 S. Ct. at 2433 (Sotomayor, J., dissenting) ("The Court's decision today fails to safe-guard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy now masquerades behind a façade of national-security concerns."). Chicago resident Hussein Saleh, for example, hadn't seen his wife and kids in over two years. Moayed Kossa, a 30-year old pharmacist from Syria, lost his scholarship to attend an MBA program in Washington, D.C. when his student visa was canceled. "I never forget this moment, the extreme sadness and the frustration as a human being I felt because I was deprived from the right of education," he told NBC News. Isa Gutierrez, *'Psychological Trauma and Stress': The Lasting Impact of the 'Muslim Ban'*, NBC NEWS (Jan. 20, 2021), <https://www.nbcnews.com/news/asian-america/psychological-trauma-stress-lasting-impact->

security expertise.⁸⁰

Considered together, the detention camp at Guantanamo Bay and the Muslim Ban are illustrative twenty-first century examples of what this Article calls Emergency-Affirming State Violence. In the name of national security and in reliance on the executive branch's national security experts, the U.S. government has authorized torture, detention, physical exclusion, verbal humiliation, privacy-denial, and other harms against the perceived enemy: Muslim terrorists.

II. EMERGENCY-DENYING VIOLENCE

During the COVID-19 pandemic, the Trump administration engaged in a reverse strategy. Although Trump and his administration were warned and called to action by public health experts,⁸¹ they downplayed the public health crisis and failed to implement timely emergency measures. This Emergency-Denying Violence caused the death, illness, and financial distress of tens of thousands of Americans.⁸²

In the spring of 2020, observers compared the carnage from the virus to that of 9/11.⁸³ It was a landmark when the COVID-19 death toll first exceeded the toll of that single day, and then doubled it.⁸⁴ Although New York State responded

muslim-ban-n1254789.

80. See Ben-Asher & Pollans, *supra* note 79, at 17 (arguing that the deference in *Trump v. Hawaii* went far beyond the Court's deference to the government in the Bush years).

81. See, e.g., *Fauci Warns Young Americans About Spreading the Coronavirus*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/video/politics/fauci-warns-young-americans-about-spreading-the-coronavirus/2020/06/26/f4e303fa-4359-4cc0-8f5a-1558bc972b32_video.html (warning that young people were getting and spreading a virus to vulnerable community members).

82. Sen Pei, et al., *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, SCI. ADVANCES, Dec. 4, 2020, at 1, 4. (finding that United States could have prevented some 59,000 deaths if states had locked down two weeks sooner); Joe Neel, *NPR Poll: Financial Pain from Coronavirus Pandemic 'Much, Much Worse' Than Expected*, NPR (Sept. 9, 2020), <https://www.npr.org/sections/health-shots/2020/09/09/909669760/npr-poll-financial-pain-from-coronavirus-pandemic-much-much-worse-than-expected>.

83. See, e.g., Jack Brewster, *New York Governor Andrew Cuomo: Coronavirus Is Like 9/11*, FORBES (Mar. 19, 2020), <https://www.forbes.com/sites/jackbrewster/2020/03/19/new-york-governor-andrew-cuomo-coronavirus-is-like-911/?sh=1183ab342c5a>; Dana Rubinstein, *New York's Coronavirus Death Toll Surpasses That of 9/11*, POLITICO (Apr. 3, 2020), <https://www.politico.com/states/new-york/albany/story/2020/04/03/new-yorks-coronavirus-death-toll-surpasses-that-of-9-11-1271374>; Max Boot, *Opinion: I saw 9/11 in New York. This Is Worse*, WASHINGTON POST (Apr. 2, 2020), <https://www.washingtonpost.com/opinions/2020/04/02/i-saw-911-new-york-this-is-worse/>.

84. See Rubinstein, *supra* note 83; Michael Finnegan, *New York State's Coronavirus Deaths Now More Than Double 9/11 Fatalities*, L.A. TIMES (Apr. 8, 2020), <https://www.latimes.com/world-nation/story/2020-04-08/coronavirus-national-states-pandemic>.

to the pandemic with robust exercise of emergency powers,⁸⁵ the federal government instead responded with Emergency-Denying Violence. This violence was exerted not only through mere inaction, but also through *active resistance* to state level public health measures. For example, the Trump administration resisted calls to distribute equipment from the national stockpile, pushed for businesses to reopen when the pandemic was still raging, resisted using the Defense Production Act, fought mask-wearing mandates, threatened schools with financial consequences if they did not reopen in person, and adopted other such policies or positions.⁸⁶ As the data showed by April of 2020, the casualties of this Emergency-Denying Violence were born disproportionately by Black and Brown people.⁸⁷

Reverse-mirroring the three key aspects of Emergency-Affirming Violence, the Trump administration's response to COVID-19 consisted of (1) minimizing the public health crisis; (2) contesting the authority of public health experts; and (3) resisting emergency public health measures.

85. See N.Y. Exec. Order No. 202 (Mar. 7, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf. Even before the government declared a national emergency, then-Governor Cuomo had already deployed National Guard troops and had declared a disaster emergency in the state. After the national emergency, the state continued to act by delaying some elections, closing schools for two weeks, and deploying the US Navy Ship Comfort into the New York harbor. See *New York—Coronavirus State Actions*, NATIONAL GOVERNOR'S ASSOCIATION (Mar. 9, 2020), <https://www.nga.org/coronavirus-state-actions/new-york>.

86. See, e.g., Philip Rucker et al., *Trump Says He May Soon Push Businesses to Reopen, Defying the Advice of Coronavirus Experts*, WASH. POST (Mar. 23, 2020), https://www.washingtonpost.com/politics/trump-says-he-may-soon-lift-restrictions-to-reopen-businesses-defying-the-advice-of-coronavirus-experts/2020/03/23/f2c7f424-6d14-11ea-a3ec-70d7479d83f0_story.html; Robert Costa, Ashley Parker, Josh Dawsey & Felicia Sonmez, *Trump's Attempt to Enlist Businesses in Reopening Push Gets Off to Rocky Start*, WASHINGTON POST (Apr. 15, 2020), https://www.washingtonpost.com/politics/trumps-attempt-to-enlist-businesses-in-reopening-push-gets-off-to-rocky-start/2020/04/15/1f89df0a-7f48-11ea-a3ee-13e1ae0a3571_story.html; Katie Rogers et al., *Trump Resists Pressure to Use Wartime Law to Mobilize Industry in Virus Response*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/us/politics/trump-coronavirus-supplies.html>; *Donald Trump Vows Not to Order Americans to Wear Masks*, BBC (July 18, 2020), <https://www.bbc.com/news/world-us-canada-53453468>; Peter Baker et al., *Trump Threatens to Cut Funding if Schools Do Not Fully Reopen*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html>; Donald J. Trump (@realDonaldTrump), TWITTER (July 8, 2020), <https://twitter.com/realDonaldTrump/status/1280853299600789505> [<https://web.archive.org/web/20200709082834/https://twitter.com/realDonaldTrump/status/1280853299600789505>].

87. See, e.g., Julius M. Wilder, Commentary, *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 72 CLINICAL INFECTIOUS DISEASES, 709, 709 (2021) (“As of 1 June 2020, death rates in Chicago for African Americans (1.10/100 000) and Hispanic/Latinos (1.10/100 000) with COVID-19 were significantly higher in than [sic] non-Hispanic whites (0.4/100 000)”); Linda Villarosa, ‘A Terrible Price’: The Deadly Racial Disparities of COVID-19 in America, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/04/29/magazine/racial-disparities-covid-19.html>.

A. Downplaying the COVID-19 public health crisis

In contrast with the 9/11 attacks—after which it took less than one week for the president to declare a momentous national emergency and a global War-on-Terror⁸⁸—the COVID-19 emergency was received in early 2020 by the President and his administration with denial.⁸⁹ From January 2020—when COVID-19 was threatening to become a global and national crisis—through mid-March 2020, the President and his administration repeatedly downplayed the public health threat.⁹⁰ Granted, on January 31, Health and Human Services (HHS) Secretary Alex Azar issued a public health emergency declaration pursuant to the Public Health Service Act.⁹¹ Still, almost a month later Trump promised that “the 15 [people diagnosed with COVID-19] within a couple of days is going to be down to close to zero, that’s a pretty good job we’ve done.”⁹² The next day, Trump again minimized the outbreak, insisting, “It’s going to disappear. One day it’s like a miracle, it will disappear.”⁹³ When the miracle did not happen, Trump pushed for vaccines to arrive within a couple of months—a bewildering timeline, given scientists were still predicting a vaccine was a year or more away.⁹⁴ He made fantastical assertions about the availability of “beautiful” tests for all⁹⁵ and

88. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

89. See, e.g., Associated Press, ‘Stay Calm, It Will Go Away’: Trump Plays Down Coronavirus Threat, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/video/us/politics/100000007026448/trump-coronavirus.html>.

90. Daniel Wolfe & Daniel Dale, ‘It’s Going to Disappear’: A Timeline of Trump’s Claims That COVID-19 Will Vanish, CNN (Oct. 31, 2020), <https://www.cnn.com/interactive/2020/10/politics/covid-disappearing-trump-comment-tracker>; Ken Dilanian, et al., *Timeline: Trump Administration’s Response to Coronavirus*, NBC NEWS (Mar. 17, 2020, 3:03 PM), <https://www.nbcnews.com/politics/donald-trump/timeline-trump-administration-s-response-coronavirus-n1162206>; *CNBC Transcript: President Donald Trump Sits Down with CNBC’s Joe Kernen at the World Economic Forum in Davos, Switzerland*, CNBC (Jan. 22, 2020, 5:10 AM) <https://www.cnbc.com/2020/01/22/cnbc-transcript-president-donald-trump-sits-down-with-cnbc-joe-kernen-at-the-world-economic-forum-in-davos-switzerland.html>.

91. *Determination that a Public Health Emergency Exists*, U.S. DEP’T HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (determining that an emergency existed as of January 27, 2020). This early declaration expanded HHS authority to waive regulatory requirements, access funds, reallocate personnel, enter contracts, and conduct investigations. 42 U.S.C. § 247(d).

92. *President Trump with Coronavirus Task Force Briefing*, C-SPAN (Feb. 26, 2020), <https://www.c-span.org/video/?469747-1/president-trump-announces-vice-president-pence-charge-coronavirus-response>.

93. Stephen Collinson, *Trump Seeks a ‘Miracle’ as Virus Fears Mount*, CNN (Feb. 28, 2020), <https://www.cnn.com/2020/02/28/politics/donald-trump-coronavirus-miracle-stock-markets/index.html>.

94. Aaron Rupal, *Trump’s Ignorance Was on Public Display During Coronavirus Meeting with Pharmaceutical Execs*, VOX (Mar. 3, 2020, 11:30 AM), <https://www.vox.com/2020/3/3/21162772/trump-coronavirus-meeting-pharmaceutical-executives-white-house-covid-19> (“We had a great meeting today with a lot of the great companies and they’re going to have vaccines I think relatively soon.”).

95. Associated Press, *Trump: Anyone Who Wants Virus Test Can Get a Test*, YOUTUBE (Mar. 6, 2020), https://www.youtube.com/watch?v=1_XwC9IQKBc (“Anybody that needs a

the virus's practical similarity to the common flu.⁹⁶ He then declared the travel ban for those arriving from China a grand success, despite rising case numbers in the United States.⁹⁷

On March 13, President Trump changed his tune and declared a national emergency, relying on the National Emergencies Act of 1976 (NEA) and the Stafford Act of 1988, and stating that, "[t]he spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems."⁹⁸ He announced only one emergency measure under the National Emergencies Act—a delegation to the Secretary of HHS "to temporarily waive or modify certain requirements . . . throughout the duration of the public health emergency."⁹⁹ The measure was primarily designed to increase the capacity of

test, gets a test. They're there. They have the tests. And the tests are beautiful.").

96. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 9, 2020, 7:47 AM), https://twitter.com/realDonaldTrump/status/1237027356314869761?ref_src=twsrc%5Etfw [https://web.archive.org/web/20200310034954/https://twitter.com/realDonaldTrump/status/1237027356314869761?ref_src=twsrc%5Etfw] ("So last year 37,000 Americans died from the common Flu. It averages between 27,000 and 70,000 per year. Nothing is shut down, life & the economy go on.").

97. *Remarks by President Trump and Prime Minister Varadkar of Ireland Before Bilateral Meeting*, WHITE HOUSE, (Mar. 12, 2020, 11:00 AM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-prime-minister-varadkar-ireland-bilateral-meeting-3/> ("It's going to go away . . . The United States, because of what I did and what the administration did with China, we have 32 deaths at this point . . . when you look at the kind of numbers that you're seeing coming out of other countries, it's pretty amazing when you think of it."); *Total Number of COVID-19 Cases, by Date Reported*, CDC: PREVIOUS U.S. COVID-19 CASE DATA, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/previous-cases.html> (Aug. 27, 2020).

98. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; *Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act*, WHITE HOUSE (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/>; National Emergencies Act, 50 U.S.C. §§ 1601, 1621-1622 (lacking a definition of what constitutes a qualifying emergency). See also *President Trump Declares State of Emergency for COVID-19*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2020), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-Covid-19.aspx> ("[T]he president declared an emergency for COVID-19 under Section 501(b) of the Stafford Act, pledging \$50 billion in unspecified aid in the ongoing COVID-19 response efforts.").

99. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, *supra* note 98. See also Elizabeth Goitein, *Trump's Reasonable—And Yet Still Worrisome—Emergency Declaration*, ATLANTIC (Mar. 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/trumps-emergency-declaration-coronavirus/608083/> ("Specifically, the administration will ease constraints on the practice of telemedicine; waive provisions that limit the number of beds in critical-access hospitals to 25, and the length of stay to 96 hours; allow admission to nursing homes without a prior three-day hospital stay; and make it easier for hospitals to hire additional doctors, acquire new office space, and move patients within their facilities.").

hospitals during the outbreak.¹⁰⁰ Neither of Trump's emergency declarations explicitly mentioned social distancing, a measure which public health experts were desperately calling for.¹⁰¹

From then on, the President and his administration continuously minimized the scope of the threat from the virus. In April, Trump re-tweeted an unsupported conspiracy theory claiming that Democrats were falsely inflating COVID-19 mortality rates to win the 2020 election.¹⁰² In June, Vice President Mike Pence falsely claimed that the national curve had been flattened.¹⁰³ When the Centers for Disease Control and Prevention (CDC) opined that COVID-19 deaths were likely undercounted, the President and his administration reportedly suggested that they were *overcounted* and encouraged the CDC to change its counting methods.¹⁰⁴

Downplaying the threat of a public health crisis seemed primarily driven by

100. See Goitein, *supra* note 99.

101. *Id.*

102. Matthew Rosenberg & Jim Rutenberg, *Fight Over Virus's Death Toll Opens Grim New Front in Election Battle*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/09/us/politics/coronavirus-death-toll-presidential-campaign.html?action=click&module=Top%20Stories&pgtype=Homepage>; Aaron Blake, *4 Takeaways from President Trump's Monday Coronavirus News Conference*, WASH. POST (Apr. 27, 2020), <https://www.washingtonpost.com/politics/2020/04/27/trump-press-briefing-takeaways/>; Maegan Vazquez, *Trump Deflects Question About Retweeting Conspiracy Theory on Coronavirus Numbers*, CNN (Apr. 27, 2020, 6:53 PM), https://edition.cnn.com/us/live-news/us-coronavirus-update-04-27-20/h_368e0d5a5d8f8771094d02a347f483e8.

103. Linda Qiu, *As Cases Surge, Pence Misleads on Coronavirus Pandemic*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/coronavirus-pence-fact-check.html>.

104. Philip Bump, *Fauci Puts it Bluntly: Coronavirus Deaths Are Undercounted*, WASH. POST (May 12, 2020), <https://www.washingtonpost.com/politics/2020/05/12/fauci-puts-it-bluntly-coronavirus-deaths-are-undercounted/>; Erin Banco & Asawin Suebsaeng, *Team Trump Pushes CDC to Revise Down Its COVID Death Counts*, DAILY BEAST (May 13, 2020, 9:52 AM), <https://www.thedailybeast.com/team-trump-pushes-cdc-to-dial-down-covid-death-counts> ("President Donald Trump and members of his coronavirus task force are pushing officials at the Centers for Disease Control and Prevention to change how the agency works with states to count coronavirus-related deaths. And they're pushing for revisions that could lead to far fewer deaths being counted than originally reported, according to five administration officials working on the government's response to the pandemic."). See also *COVID-19: Safely Getting Back to Work and Back to School: Hearing Before the S. Health, Educ., Lab. and Pensions Comm.*, 116th Cong. 6–7 (May 12, 2020) (statement of Anthony Fauci, Dir. of the Nat'l Inst. of Allergy and Infectious Diseases), <https://www.help.senate.gov/imo/media/doc/HHS%20Testimony1.pdf> (discussing newly developed technology that allows for identification of COVID-19 cases that may have been missed).

the administration's attempts to stabilize the crashing economy and job-markets.¹⁰⁵ The administration and its supporters referred to the pandemic as primarily an *economic emergency*, rather than framing it as a public health crisis.¹⁰⁶ They posited a false tension between saving human life and saving the economy, despite the fact that economic experts contended that that only by stopping the spread of the virus would the economy be stabilized.¹⁰⁷

B. Undermining science and public health experts

In the early years of the War-on-Terror, the Bush administration lauded national security experts and relied on their advice to justify widespread use of emergency measures.¹⁰⁸ The Trump administration, by contrast, was dismissive and hostile toward public health experts during the COVID-19 crisis.¹⁰⁹ The administration resisted expert advice for appropriate public health measures and ignored scientific assessments of the pandemic. The near-universal recommendation from public health experts that all people over the age of two should wear masks in public garnered the most defiant responses.¹¹⁰ The President held rallies

105. See Jeff Mason & Doina Chiacu, *Trump to Refocus Coronavirus Task Force on Economic Revival, Concedes Risks*, REUTERS (May 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa/trump-to-refocus-coronavirus-task-force-on-economic-revival-concedes-risks-idUSKBN22I20M>.

106. Jim Tankersley, Maggie Haberman & Roni Caryn Rabin, *Trump Considers Reopening Economy, Over Health Experts' Objections*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/03/23/business/trump-coronavirus-economy.html>; Susan Milligan, *Trump's Choice: The Economy or Human Lives*, U.S. NEWS (Mar. 24, 2020), <https://www.usnews.com/news/national-news/articles/2020-03-24/trumps-choice-on-coronavirus-the-economy-or-human-lives>; Chris Megerian, *As Coronavirus Cases Soar, Trump Continues Cheerleading for Reopening the Economy*, L.A. TIMES (July 2, 2020), <https://www.latimes.com/politics/story/2020-07-02/coronavirus-cases-soar-trump-cheerleading-reopening-economy>. Other governors and public officials were more reluctant to relax their states' coronavirus-related restrictions. See, e.g., *White House Sees Red State/Blue State Divide in Post-Coronavirus Economic Recovery*, REUTERS (June 12, 2020, 9:37 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-economy/white-house-sees-red-state-blue-state-divide-in-post-coronavirus-economic-recovery-idUSKBN23J2KS>.

107. See Jeanna Smialek, *Fed's Powell Says U.S. Must Get Virus Under Control Before Economy Restarts*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/business/economy/fed-powell-coronavirus-recession.html>; Rachel Werner & David Grande, *The Only Way to 'Reopen the Economy' Is to Stop the Spread of the Coronavirus*, WASH. POST (Mar. 30, 2020), <https://www.washingtonpost.com/outlook/2020/03/30/only-way-reopen-economy-is-stop-spread-coronavirus>.

108. *Supra* Section I.B.

109. See Ramesh Ponnuru, *Trump's War on Fauci May End in Defeat for Both*, BLOOMBERG NEWS (July 16, 2020, 11:45 PM), <https://www.bloomberg.com/opinion/articles/2020-07-16/coronavirus-trump-s-war-on-dr-fauci-may-end-in-defeat-for-both>; Editorial, *The White House is Waging a Dangerous and Inexplicable War on Public Health*, L.A. TIMES (July 17, 2020), <https://www.latimes.com/opinion/story/2020-07-17/editorial-the-white-houses-dangerous-war-on-public-health>.

110. Morgan Chalfant, *Trump Says He Won't Issue National Mask Mandate*, HILL (July 17, 2020), <https://thehill.com/homenews/administration/507908-trump-says-he-wont>

and public appearances without a mask and brazenly hosted “super-spreader” events.¹¹¹ When questioned, Vice President Pence cited the First Amendment as justification for disregarding CDC guidance to avoid large gatherings and wear masks in public.¹¹² In the spring of 2020, public health experts expressed concerns about the pace and manner of state reopening, and called for coordinated national efforts to reduce infections.¹¹³ The administration, in response, hid Dr. Fauci from public view by excluding him from national taskforce briefings.¹¹⁴ Trump called him an “alarmist.”¹¹⁵

Public health experts and China played the role of the political enemy for the Trump administration.¹¹⁶ The German jurist Carl Schmitt famously proposed that modern politics depends on enmity, and the political enemy is someone “different and alien” with whom extreme case conflicts are possible.¹¹⁷ While thinkers have challenged this crude definition of politics, it nicely characterizes the

issue-national-mask-mandate; Annie Karni, *Pence Tours Mayo Clinic and Flouts Its Rule That All Visitors Wear a Mask*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/politics/coronavirus-pence-mask.html>.

111. Apoorva Mandavilli & Tracey Tully, *White House Is Not Tracing Contacts for ‘Super-Spreader’ Rose Garden Event*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/health/contact-tracing-white-house.html>; Ian Millhiser, *Study: Trump Rallies May Be Responsible for an Estimated 700 COVID-19 Deaths*, VOX (Oct. 31, 2020), <https://www.vox.com/2020/10/31/21543277/trump-rallies-covid-19-deaths-superspreader-stanford-study-infections>.

112. Quint Forgey, *Pence Leans on ‘Constitutional Rights’ to Defend Trump Campaign Rallies Amid Pandemic*, POLITICO (June 26, 2020), <https://www.politico.com/news/2020/06/26/mike-pence-trump-campaign-rallies-coronavirus-341672>.

113. Leila Fadel, *Public Health Experts Say Many States Are Opening Too Soon To Do So Safely*, NPR (May 9, 2020), <https://www.npr.org/2020/05/09/853052174/public-health-experts-say-many-states-are-opening-too-soon-to-do-so-safely>; Oliver Milman, *Governors’ Push to Reopen States Risks Second Wave of Infection, Experts Warn*, GUARDIAN (Apr. 24, 2020), <https://www.theguardian.com/us-news/2020/apr/24/coronavirus-us-infection-public-health-experts>.

114. Matt Perez, *Dr. Fauci: ‘I Was Not Invited’ to The White House Coronavirus Task Force Briefing*, FORBES (July 21, 2020, 5:02 PM), <https://www.forbes.com/sites/mattperez/2020/07/21/dr-fauci-i-was-not-invited-to-the-white-house-coronavirus-task-force-briefing/#59605f311bad>; Peter Beaumont, *Fauci Sidelined as Trump’s White House Steps Up Briefing Campaign*, GUARDIAN (July 13, 2020), <https://www.theguardian.com/world/2020/jul/13/fauci-sidelined-as-trumps-white-house-steps-up-briefing-campaign>.

115. Katie Rogers, *Trump Leans into False Virus Claims in Combative Fox News Interview*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/us/politics/trump-fox-interview-coronavirus-race.html>.

116. See Rick Gladstone, *Trump Demands U.N. Hold China to Account for Coronavirus Pandemic*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/09/22/world/americas/UN-Trump-Xi-China-coronavirus.html>; sources cited *supra* notes 114–15.

117. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 27 (George Schwab trans., Univ. of Chi. Press expanded ed. 2007) (1932). Carl Schmitt has defined the political enemy as “the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.” *Id.* Lars Vinx, Carl Schmitt, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 29, 2019), <https://plato.stanford.edu/entries/schmitt/>.

Trump administration's response to COVID-19 and its governing approach more generally, which leaned heavily on enmity.¹¹⁸

When George W. Bush declared a national emergency after 9/11, he also declared a political enemy: Islamic terrorism.¹¹⁹ By contrast, the coronavirus, which could not be bombed or captured by elite combat units or even bleached away, proved to be a tricky political enemy for Trump and his administration.¹²⁰ They turned to China: barring travel from China, calling the virus "kung flu" and "Chinese virus," pushing intelligence agencies to search for evidence that the virus leaked from a lab in Wuhan, and severing ties with the World Health Organization (WHO) for allegedly being too soft on China.¹²¹ The Trump administration also identified an inside political enemy: public health experts. When the administration perceived their advice as threatening the economy, they were dismissed, vilified, and disparaged.¹²² In contrast to the elevated status of national security experts in the War-on-Terror, scientists and public health experts

118. Hannah Arendt has articulated a concept of the political that, in opposition to Schmitt, is not defined by enmity and violence but by plurality, freedom, and friendship of equals. HANNAH ARENDT, *THE PROMISE OF POLITICS* 16-18 (2005). Trump's strategy from the beginning of his campaign was to rally his supporters around common "enemies." See, e.g., Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <https://time.com/4473972/donald-trump-mexico-meeting-insult/> (calling people from Mexico rapists.); Jeremy Diamond, *Trump on 'Lock Her Up' Chant: 'I'm Starting to Agree'*, CNN (July 29, 2016, 8:33 PM), <https://www.cnn.com/2016/07/29/politics/donald-trump-lock-her-up/index.html> (suggesting Hillary Clinton should be "lock[ed] up").

119. See *supra* Section I.A.

120. Despite the President's comments to the contrary, it turned out that drinking bleach would not effectively fight the virus. Katie Rogers et al., *Trump's Suggestions That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html>.

121. See Proclamation No. 9984, 85 Fed. Reg. 6,709 (Jan. 31, 2020) ("[E]ntry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China . . . during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended . . ."); *President Trump Calls Coronavirus 'Kung Flu'*, BBC NEWS (June 24, 2020), <https://www.bbc.com/news/av/world-us-canada-53173436/president-trump-calls-coronavirus-kung-flu>; L.A. Times, *Trump Calls Coronavirus 'the Chinese Virus'*, YOUTUBE (Mar 18, 2020), <https://www.youtube.com/watch?v=0pjsx94m8qA>; Mark Mazzetti et al., *Trump Officials Are Said to Press Spies to Link Virus and Wuhan Labs*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2020/04/30/us/politics/trump-administration-intelligence-coronavirus-china.html>; Jason Beaubien, *President Trump Announces That U.S. Will Leave WHO*, NPR POLITICS (May 29, 2020, 4:02 PM), <https://www.npr.org/2020/05/29/865685798/president-trump-announces-that-u-s-will-leave-who>.

122. Benjamin Din, *Trump Lashes Out at Fauci and Birx After CNN Documentary*, POLITICO (Mar. 29, 2021, 7:53 PM), <https://www.politico.com/news/2021/03/29/trump-fauci-birx-cnn-documentary-478422> (quoting Trump's characterization of Dr. Birx, who was then-head of the coronavirus taskforce, and Dr. Fauci, as "two self-promoters trying to reinvent history to cover for their bad instincts and faulty recommendations, which I fortunately almost always overturned"); Katie Rogers, *Trump Pointedly Criticizes Fauci for His Testimony to Congress*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/politics/fauci-trump-coronavirus.html>; Sheryl Gay Stolberg et al., *Trump Calls Fauci 'a Disaster'*

were positioned by the administration as the problem, not the solution.

C. Enacting minimal public health measures

The Trump administration's choice to spurn its own public health experts set the stage for its resistance to most of their recommended public health measures. Two high profile examples of this dynamic involved the administration's resistance to issuing national social distancing measures and its reluctance to use the Defense Production Act.

1. Social distancing measures

a. Stay-at-home orders

Early advice from public health experts was that without a vaccine, the best mechanism to prevent the spread of coronavirus was social distancing.¹²³ Despite expert opinion that a national order would be preferable to a state-by-state approach, the federal government never issued a national stay-at-home order.¹²⁴ In fact, federal officials, including Trump and Pence, urged states to reopen quickly, and the White House Press secretary framed masking as a question of individual choice.¹²⁵ California Governor Gavin Newsom's statewide stay-at-home order went into effect on March 19, 2020, and was shortly followed by New York

and Shrugs Off Virus as Infections Soar, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/politics/trump-fauci-covid.html>; Matt Perez, *Dr. Fauci: 'I Was Not Invited' to The White House Coronavirus Task Force Briefing*, FORBES (July 21, 2020, 5:02 PM), <https://www.forbes.com/sites/mattperez/2020/07/21/dr-fauci-i-was-not-invited-to-the-white-house-coronavirus-task-force-briefing/#59605f311bad>; Peter Beaumont, *Fauci Sidelined As Trump's White House Steps Up Briefing Campaign*, GUARDIAN (July 13, 2020), <https://www.theguardian.com/world/2020/jul/13/fauci-sidelined-as-trumps-white-house-steps-up-briefing-campaign>.

123. Francis Collins, *To Beat COVID-19, Social Distancing is a Must*, NIH DIR. BLOG (Mar. 19, 2020), <https://directorsblog.nih.gov/2020/03/19/to-beat-covid-19-social-distancing-is-a-must/> (written by the director of the National Institutes of Health, this piece is based on scientific research that recommends social distancing).

124. See, e.g., RACHEL MADDOW SHOW (MSNBC television broadcast July 22, 2020) (interviewing David Ho, a virus researcher who had warned in early April 2020 that, in order to defeat the virus, a simultaneous national federal lockdown is preferable to a sequential, state-by-state lockdown. The latter, he argued, would prolong the spread of the virus).

125. See, e.g., Collin Binkley, *Trump Urges States to Consider Opening Schools Before Summer*, ASSOCIATED PRESS (Apr. 28, 2020), <https://apnews.com/article/virus-outbreak-donald-trump-ap-top-news-education-jared-polis-07bad05ecf6971e5863548e21c040293>; Jeanine Santucci, *The White House Has Sent Conflicting Messages on Wearing Masks and the New Coronavirus Cases*, USA TODAY (July 6, 2020, 10:16 AM), <https://www.usatoday.com/story/news/politics/2020/07/05/trump-white-house-give-mixed-messages-masks-coronavirus-spread/5368455002>.

Governor Andrew Cuomo's statewide stay-at-home order.¹²⁶ Many states followed.¹²⁷ When protests erupted against these orders, President Trump encouraged the angry protesters through tweets such as "LIBERATE MINNESOTA!" "LIBERATE MICHIGAN!" and "LIBERATE VIRGINIA!"¹²⁸ The President and his administration's open hostility to stay-at-home orders seems to have set an example for businesses, politicians, and private individuals to challenge the legality of these public health focused stay-at-home orders, or simply disobey them.¹²⁹

126. Governor Gavin Newsom Issues Stay at Home Order (Mar 19, 2020), <https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/>; Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>; Bill Chappell & Vanessa Romo, *New York, Illinois Governors Issue Stay at Home Orders, Following California's Lead*, NPR (Mar. 20, 2020, 12:15 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/20/818952589/coronavirus-n-y-gov-cuomo-says-100-of-work-force-must-stay-home>.

127. E.g., Mark Ballard & Sam Karlin, *Louisiana Issues Statewide Stay-At-Home Order to Combat Coronavirus Spread*, ADVOCATE (Mar. 22, 2020, 1:47 PM), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_922869e8-6c6d-11ea-aece-6b6fd5e8f4bd.html; *Stay-At-Home Order Issued in Delaware Starting Tuesday*, ASSOCIATED PRESS (Mar. 22, 2020), <https://apnews.com/article/0692f5c364f07045809a734775e1b260>; Press Release, Office of Governor Charlie Baker, Governor, Commonwealth of Massachusetts, Governor Charlie Baker Orders All Non-Essential Businesses to Cease in Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory for Two Weeks (Mar 23, 2020), <https://www.mass.gov/news/governor-charlie-baker-orders-all-non-essential-businesses-to-cess-in-person-operation>; *Michigan Residents Ordered to Stay at Home to Slow COVID-19 Spread*, WOODTV (Mar. 24, 2020, 12:23 PM), <https://www.woodtv.com/health/coronavirus/official-gov-whitmer-to-issue-stay-at-home-order-to-combat-covid-19>; *Indiana Gov. Eric Holcomb Issues 'Stay-at-Home' Order Amid Coronavirus Pandemic*, NBC CHICAGO (Mar. 23, 2020, 11:49 AM), <https://www.nbcchicago.com/news/coronavirus/indiana-gov-eric-holcomb-issues-stay-at-home-order-amid-coronavirus-pandemic/2242781>.

128. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 11:22 AM), <https://twitter.com/realDonaldTrump/status/1251169217531056130> [<https://web.archive.org/web/20200419012113/https://twitter.com/realDonaldTrump/status/1251169217531056130>]; 'LIBERATE MINNESOTA': President Donald Trump Calls for States to Be Reopened, CBS MINNESOTA (Apr. 17, 2020, 2:00 PM), <https://minnesota.cbslocal.com/2020/04/17/liberate-minnesota-president-donald-trump-calls-for-states-to-be-reopened>.

129. See Neil MacFarquhar, *Lawsuits Swell as Owners, From Gun Shops to Golf Courses, Demand to Open*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/corona-virus-lawsuits.html>; Veronica Stracqualursi, *Republican-Led Wisconsin Legislature Sues to Reopen State From Stay-at-Home Order*, CNN (Apr. 22, 2020, 10:22 AM), <https://www.cnn.com/2020/04/22/politics/wisconsin-legislature-sues-to-reopen-state-coronavirus/index.html>. But see Bernadette Meyler, *Shelter-in-Place Orders Are Perfectly Legal*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/opinion/shelter-in-place-constitution.html> ("[E]mergencies have often called for states to impose short-term economic restrictions, and the Supreme Court has affirmed their constitutionality, emphasizing that temporary steps that might otherwise infringe on economic rights may be permissible."); Noah Feldman, *Elon Musk Is Breaking the Law by Reopening Tesla*,

b. Mandatory face covering

Facial covering became a top polarizing and politicized issue by the spring of 2020.¹³⁰ In the early days of the pandemic, the Surgeon General of the United States and other federal officials advised the public not to acquire or use masks.¹³¹ But by April of 2020, a growing body of literature suggested that asymptomatic people might unknowingly transmit the virus to others.¹³² Around that time, public health officials advocated wearing masks or other facial coverings when in public.¹³³ The CDC first took this position on April 3, 2020.¹³⁴ Yet the President did not appear in a mask in public until July 11.¹³⁵

In fact, the Trump administration avoided issuing a national mask mandate,

BLOOMBERG OPINION (May 12, 2020, 8:30 AM), <https://www.bloomberg.com/opinion/articles/2020-05-12/elon-musk-tesla-sue-alameda-county-to-reopen-and-it-s-weird?sref=jmiD-ULpC> (“There is a perfectly valid legal process for Tesla to work with county officials to create conditions that would make reopening safe.”).

130. Rick Rojas, *Masks Become a Flash Point in the Virus Culture Wars*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-masks-protests.html>; Poppy Noor, *No Masks Allowed: Stores Turn Customers Away In US Culture War*, GUARDIAN (May 22, 2020, 2:35 PM), <https://www.theguardian.com/us-news/2020/may/22/us-stores-against-face-masks> (“Shops around the US make headlines for denying entry to those wearing masks as protesters argue against preventative measures in the name of freedom.”).

131. Maria Cramer & Knvul Sheikh, *Surgeon General Urges the Public to Stop Buying Face Masks*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2020/02/29/health/coronavirus-n95-face-masks.html> (“The surgeon general on Saturday urged the public to stop buying masks, warning that it won’t help against the spread of the coronavirus but will take away important resources from health care professionals.”).

132. Camilla Rothe et al., *Transmission of 2019-nCoV Infection from an Asymptomatic Contact in Germany*, 382 NEW ENG. J. MED. 970, 970–71 (2020); Lirong Zou et al., *SARS-CoV-2 Viral Load in Upper Respiratory Specimens of Infected Patients*, 382 NEW ENG. J. MED. 1177, 1179 (2020); Xingfei Pan et al., *Asymptomatic Cases in a Family Cluster with SARS-CoV-2 Infection*, 20 LANCET INFECTIOUS DISEASES, 410, 410–11 (2020).

133. *Guidance for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#recent-studies> (“Masks are a simple barrier to help prevent your respiratory droplets from reaching others. Studies show that masks reduce the spray of droplets when worn over the nose and mouth.”); Paul P. Murphy, *Over 100 Experts Are Calling on States to Mandate Masks, Face Coverings*, CNN (May 15, 2020, 11:30 AM), <https://www.cnn.com/2020/05/15/us/masks-face-coverings-coronavirus-trnd/index.html> (“Experts, medical professionals—even Nobel Prize winners—are urging governors in an open letter to mandate that anyone in public or at work wear masks and face coverings to prevent spreading COVID-19.”).

134. Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings in Public*, NPR (Apr. 3, 2020, 5:49 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public>.

135. Kelly Mena & Veronica Stracqualursi, *Trump Wears a Mask During Visit to Wounded Service Members at Walter Reed*, CNN (July 11, 2020, 10:24 PM), <https://www.cnn.com/2020/07/11/politics/trump-walter-reed-visit-mask/index.html>.

despite widespread support for one—including from the financial sector.¹³⁶ Instead, administration officials declined to act, hailing principles of individual freedom, federalism, and state and local decision-making.¹³⁷ By contrast, many governors and mayors mandated mask wearing in public, and leading businesses adopted such rules for customers.¹³⁸ In refusing a national mask mandate, the federal government forced an uncoordinated state-by-state response to the pandemic. Many experts have opined that the United States has been among the least effective responders to COVID-19.¹³⁹

Whereas the Bush administration quickly enacted forceful national security measures after the attacks of 9/11, the main social distancing measures recommended by public health experts during the COVID-19 pandemic—stay-at-home orders and mask mandates—were not only rejected by the federal government; they were mocked and attacked by Trump and his administration.

136. Aaron Schildkrout et al., *Wearing Masks Must Be a National Policy*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/opinion/trump-coronavirus-masks.html> (“The most important new policy the government can implement to contain the spread of COVID-19 is to immediately recommend that everyone wear masks or face-coverings in public—#masksforall”); Sarah Hansen, *A National Mask Mandate Could Save the U.S. Economy \$1 Trillion, Goldman Sachs Says*, FORBES (June 30, 2020, 9:51 AM) <https://www.forbes.com/sites/sarahhansen/2020/06/30/a-national-mask-mandate-could-save-the-us-economy-1-trillion-goldman-sachs-says/#3c0e454856f1>; Julia Manchester, *79 Percent Say They Support National Face Mask Mandate: Poll*, THE HILL (July 27, 2020, 12:14 PM), <https://thehill.com/homenews/coronavirus-report/509177-majority-say-they-support-national-face-mask-mandate-poll>.

137. Nicky Robertson, *Trump Doesn’t Think US Needs A National Mask Mandate*, CNN (July 18, 2020), <https://www.cnn.com/2020/07/18/politics/trump-us-mask-mandate-coronavirus/index.html> (reporting that when Trump was asked in an interview whether he would consider instituting a mandate, he responded, “no, I want people to have a certain freedom, and I don’t believe in that, no.”); Mark Moore, *Mike Pence, Nancy Pelosi Clash over Implementing Face Mask Mandate*, N.Y. POST (June 28, 2020, 2:41 PM) <https://nypost.com/2020/06/28/mike-pence-pelosi-clash-over-implementing-face-mask-mandate/> (quoting Pence in an interview stating: “[o]ne of the elements of the genius of America is the principle of federalism, of state and local control. We’ve made it clear that we want to defer to governors. We want to defer to local officials.”).

138. Allen Kim et al., *These Are the States Requiring People to Wear Masks When Out in Public*, CNN (Aug. 17, 2020, 5:20 PM), <https://www.cnn.com/2020/06/19/us/states-face-mask-coronavirus-trnd/index.html> (listing the states with mandatory face covering requirements, including Alabama, Arkansas, California, Colorado, Connecticut, Delaware, New York, and many others); Kelly Tyko, *Target, McDonald’s, Old Navy Now Require Face Masks Amid COVID-19. See The Full List of Businesses Requiring Them*, USA TODAY (July 16, 2020, 2:13 PM), <https://www.usatoday.com/story/money/2020/07/16/masks-required-shopping-these-stores-walmart-target-costco-coronavirus/5446365002>.

139. A *Global Comparison of Coronavirus Cases*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/briefing/a-global-comparison-of-coronavirus-cases.html> (“Some countries responded aggressively from the start of the pandemic, while others instituted lockdowns and began reopening carefully after initial outbreaks. Then there’s the U.S.”).

2. The Defense Production Act

Another striking example of the Trump administration's reluctance to implement emergency measures was its sparse use of the Defense Production Act (DPA).¹⁴⁰ In early March 2020, mayors across the country warned that shortages of critical supplies, such as personal protective equipment, testing kits, and ventilators, would hinder the virus response and put medical personnel at risk.¹⁴¹ On March 18, Trump issued an executive order that defined ventilators and protective equipment as "essential to the national defense,"¹⁴² but indicated that he intended to use his DPA authority only in a "worst case scenario."¹⁴³ After political pressure to require companies to produce needed hospital equipment for the coming surge, he issued an executive order prohibiting hoarding and price gouging of "health and medical resources necessary to respond to the spread of COVID-19."¹⁴⁴ He also directed the HHS Secretary to acquire as many N95 masks as necessary from the manufacturer 3M or its subsidiaries, and to require General Motors to accept and prioritize contracts for ventilators.¹⁴⁵

140. See Andrew Jacobs et al., *'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html> (identifying lack of personal protective equipment as a serious problem in New York hospitals). The Defense Production Act of 1950 was enacted on September 8, 1950. Defense Production Act of 1950, Pub. L. 81-774 (1950) (codified in various sections of 50 U.S.C.).

141. Nick Miroff, *U.S. Cities Have Acute Shortages of Masks, Test Kits, Ventilators as They Face Coronavirus Threat*, WASH. POST (Mar. 27, 2020), https://www.washingtonpost.com/national/coronavirus-mayors-mask-equipment-shortage/2020/03/27/fc2a45a4-701f-11ea-96a0-df4c5d9284af_story.html.

142. 50 U.S.C. § 4511(b) (requiring that material controlled under the DPA be "essential to the national defense"); Exec. Order No. 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020) (finding ventilators and personal protective equipment "meet the criteria specified in" 50 U.S.C. § 4511(b)).

143. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 18, 2020), <https://twitter.com/realDonaldTrump/status/1240391871026864130> [<https://web.archive.org/web/20200321004055/https://twitter.com/realDonaldTrump/status/1240391871026864130>]; see also Maegan Vazquez, *Trump Invokes Defense Production Act to Expand Production of Hospital Masks and More*, CNN (Mar. 18, 2020, 6:00 PM), <https://www.cnn.com/2020/03/18/politics/trump-defense-production-act-coronavirus/index.html>; Nathaniel Weixel, *Frustration Mounts at Trump's Reluctance to Use Emergency Production Powers*, THE HILL (Mar. 19, 2020, 5:55 PM), <https://thehill.com/policy/healthcare/488526-frustration-mounts-at-trumps-reluctance-to-use-emergency-production-powers>.

144. Weixel, *supra* note 143; Exec. Order No. 13,910, 85 Fed. Reg. 17,001 (Mar. 23, 2020).

145. Brett Samuels, *Trump Uses Defense Production Act to Require GM to Make Ventilators*, THE HILL (Mar. 27, 2020, 4:10 PM), <https://thehill.com/homenews/administration/489909-trump-uses-defense-production-act-to-require-gm-to-make-ventilators>; Memorandum on Order Under the Defense Production Act Regarding 3M Company, 2020 DAILY COMP. PRES. DOC. 230 (Apr. 2, 2020) ("The Secretary, through the Administrator of the Federal Emergency Management Agency (Administrator), shall use any and all authority available under the Act to acquire, from any appropriate subsidiary or affiliate of 3M Company, the number of N-95 respirators that the Administrator determines to be appropriate.").

But by July 2020, experts, medical workers, and elected officials urged the administration to increase use of the DPA to secure critical medical supplies.¹⁴⁶ With a second surge hitting the country, experts criticized the administration for not doing enough to “create a permanent, sustainable, redundant, domestic supply chain for all things pandemic: testing, swabs, N95 masks, etc.”¹⁴⁷ Nurses were forced to reuse N95 masks, a measure which the CDC generally frowns upon, except in times of shortage.¹⁴⁸ Faced with mounting criticism and an election on the horizon, Trump invoked the DPA in late July to give a company a loan to produce generic drugs in the fight against COVID-19.¹⁴⁹

Not only did the Trump administration use its powers under the DPA only minimally to help reduce the spread of the virus; in at least one instance, it used it to do just the opposite.¹⁵⁰ On April 28—despite the fact that by that point more than 5,000 workers at meat processing plants across the country had already been diagnosed with COVID-19 and at least 20 had died—Trump used his authority under the DPA to direct the Secretary of Agriculture to “take all appropriate action . . . to ensure that meat and poultry processors *continue operations*.”¹⁵¹ The order did not technically force plants to open or compel employees to work, but it showed disregard for the health and safety of plant workers in factories where

146. Aishvarya Kavi, *Virus Surge Brings Calls for Trump to Invoke Defense Production Act*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/us/politics/coronavirus-defense-production-act.html>.

147. *Id.* (quoting Jamie Baker, a former legal adviser to the National Security Council). The article also quotes the criticism of the recently retired director of the Defense Production Act program at the Federal Emergency Management Agency. *Id.* (“I’m frustrated that there appears to be no national strategy . . . Why isn’t this administration using the act to prevent shortages?”).

148. *Id.* (citing Deborah Burger, a president of National Nurses United).

149. Tom Howell Jr., *Donald Trump Doles Out \$765M Loan to Kodak to Make Drug Ingredients*, WASH. TIMES (July 28, 2020), <https://www.washington-times.com/news/2020/jul/28/donald-trump-doles-out-765m-loan-kodak-make-drug-i>.

150. Notably, the federal government does not release reports outlining each order placed under the Defense Production Act. However, based on what has been announced, interviews with experts, and conversations with advocates for medical workers’ needs, the *New York Times* concluded that there is little evidence that the administration has made widespread use of the act to control the supply chain to combat the coronavirus. See Aishvarya Kavi, *Virus Surge Brings Calls for Trump to Invoke Defense Production Act*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/us/politics/coronavirus-defense-production-act.html>.

151. Exec. Order 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020). See also Margot J. Polans, *Op-Ed: Everything Wrong with Our Food System Has Been Made Worse by the Pandemic*, L.A. TIMES (May 4, 2020), <https://www.latimes.com/opinion/story/2020-05-04/meat-processing-plants-coronavirus-executive-order>; Richard Trumka, *Trump’s Dangerous Decision on Meatpacking Plants*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/opinion/trump-meat-plants-coronavirus.html>. See generally H. Claire Brown & Jessica Fu, *We’re Mapping COVID-19-Related Slaughterhouse Closures and Reopenings*, THE COUNTER (Apr. 21, 2020), <https://thecounter.org/mapping-Covid-19-related-slaughterhouse-closures-coronavirus> (illustrating the prevalence of COVID-19 outbreaks at slaughterhouses).

the virus was already widespread.¹⁵²

In sum, while the Bush and later administrations committed Emergency-Affirming Violence, adhering to the advice of experts in the War-on-Terror, the Trump administration inflicted Emergency-Denying Violence in the COVID-19 crisis by following three basic steps.¹⁵³ First, the administration denied or played down the magnitude of the public health crisis.¹⁵⁴ Second, it ignored or contested the advice of public health experts.¹⁵⁵ Third, it avoided taking significant emergency measures to slow the spread of the virus and help front-line workers manage it.¹⁵⁶ As a result, tens of thousands more people have died than might have had the federal government quickly implemented mandatory public health measures.¹⁵⁷

III. THE ROLE OF JUDICIAL REVIEW IN EMERGENCY VIOLENCE

Courts play a decisive role in both Emergency-Denying and Emergency-Affirming Violence. They curb or enable the Emergency Violence inflicted by the political branches. They decide whether a governmental action in a real or perceived emergency is constitutional and otherwise consistent with the rule of law. In the twenty-first century, both Emergency-Denying Violence and Emergency-Affirming Violence have often been enabled and fortified by federal courts. Federal courts, with some qualifications, have historically deferred to the executive branch in national security emergencies, and that deference has persisted in the post-9/11 War-on-Terror.¹⁵⁸ By contrast, despite the fact that COVID-19 has claimed significantly more American lives than terrorist attacks,¹⁵⁹ the Supreme

152. Pollans, *supra* note 151 (“It is a cruel irony that Trump for so long refused to use the Defense Production Act to order production of lifesaving medical equipment, and now does it so readily to protect the multibillion-dollar meatpacking industry.”).

153. *See supra* Part I.

154. *See supra* Section II.A.

155. *See supra* Section II.B.

156. *See supra* Section II.C.

157. For instance, in December 2020, disease modelers at Columbia University found that the United States could have prevented some 59,000 of the 270,000-plus deaths that had occurred by that point if states had locked down two weeks sooner. Sen Pei et al., *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, 6 SCI. ADVANCES. 1, 4 (Dec. 4, 2020); THE ATLANTIC, *National Data: Deaths*, THE COVID TRACKING PROJECT, <https://covidtracking.com/data/national/deaths> (last updated Mar. 7, 2021) (reporting 270,375 cumulative deaths as of Dec. 4, 2020).

158. *See sources cited supra* note 13.

159. Prior to 9/11, fewer than 500 Americans had died due to terror attacks, making 9/11 the deadliest terror attack in the United States with 2,997 deaths directly attributable to the attack. NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, BACKGROUND REPORT: 9/11, TEN YEARS LATER, 1 (2011), https://www.start.umd.edu/sites/default/files/files/announcements/BackgroundReport_10YearsSince9_11.pdf. Since 9/11, 229 deaths have been attributed to terror attacks, with a notable increase in deaths resulting from “far-right terrorism” and “jihadists” beginning in 2009. Peter Bergen & David Serman, *Terrorism in America After 9/11: What is the Threat to the United States Today?*, NEW AMERICA

Court has not extended a similar level of deference to public health measures designed to combat the COVID-19 pandemic.¹⁶⁰

A. Robust deference to national security measures

Federal courts have been highly deferential toward the executive branch in the War-on-Terror.¹⁶¹ Debates about the actual and the desired judicial responses to emergency measures in matters of national security have proliferated since 9/11.¹⁶² Many courts, litigators, and scholars have argued for careful judicial scrutiny of national security measures that directly impact civil liberties;¹⁶³ others have argued for robust or even absolute judicial deference to national emergency measures.¹⁶⁴ And while federal courts have generally resisted absolute deference to the executive branch, they have extended robust deference to the executive branch in matters of national security and immigration.¹⁶⁵

In *United States v. Curtiss-Wright* (1936), the Supreme Court concluded that

26, <https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-to-day> (last visited Feb. 6, 2021). That puts the total number of American deaths attributed to terrorism at less than 4,000. As of November 3, 2021, the Center for Disease Control reports that 746,705 people have died from COVID-19 since January 2020. *COVID Data Tracker*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#data-tracker-home> (last visited Nov. 3, 2021).

160. See *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–19 (2021) (mem.); *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 66–68 (2020).

161. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006) (acknowledging that complete deference is owed to President Bush’s official determination that it would be “impractical to apply the rules and principles of law that govern” criminal cases in the U.S. district courts to the defendant’s commission. The Court notes that the President did not, however, make the same official determination about the application of the rules for courts-martial.).

162. See generally sources cited *supra* note 13.

163. See generally Ben-Asher, *supra* note 13.

164. See *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.D.C. 2002); *Hamdi v. Rumsfeld*, 316 F.3d 450, 463, 473–474 (4th Cir. 2003) (in which the administration argued for a deferential “some evidence” standard that would not allow detainees to rebut the factual basis for their detention); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (in which the administration argued for an expansive view of the state secrets privilege); Chesney, *supra* note 29; Posner & Vermeule, *supra* note 2, at 4. See also Ben-Asher, *supra* note 13 (arguing that Legalist arguments typically call on courts to enforce constitutional and other legal limits of state action in national security emergencies, while Decisionist arguments typically call on courts and legislators to defer to the executive branch in national security emergencies, emphasizing the need to act fast, swiftly, and with expertise in situations that legal norms cannot necessarily predict or govern).

165. See, e.g., *Boumediene*, 553 U.S. at 797; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–34; *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); *Hamdan*, 548 U.S. at 623–24; *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018); POSNER & VERMEULE, *supra* note 2. See generally Eskridge & Baer, *supra* note 51; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21 (1936) (calling for deference to executive branch claims of authority to act in the realm of foreign affairs); Brooks, *supra* note 51; Chesney, *supra* note 50.

the President has “plenary” and “exclusive” powers in the realm of international relations.¹⁶⁶ The Justices noted that because the executive has confidential intelligence sources, the President, “not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries,” especially in times of war.¹⁶⁷ In more recent foreign affairs and national security cases involving an agency interpretation of an ambiguous statute, the Supreme Court has favored the executive’s interpretation roughly seventy-five percent of the time.¹⁶⁸

As critics have observed, such heavy judicial deference to governmental decision-making in matters of national security may result in judicial validation of what this Article calls Emergency-Affirming Violence.¹⁶⁹ That is, by rubber stamping or lightly reviewing governmental restrictions of civil rights in real or perceived national security emergencies, the federal judiciary has effectively participated in state violence against Muslims in the War-on-Terror. For example, by upholding the Muslim Ban in 2018, the Supreme Court validated a blatantly discriminatory executive act that banned millions of Muslims, fleeing violence or hoping to reunite with their families or pursue careers, from entering the United States.¹⁷⁰ In so doing, the Court validated the violence unleashed by the Trump administration.

There is no doubt that the ongoing COVID-19 pandemic has posited a catastrophe of equal or greater historical, legal, and political significance to the War-on-Terror. Certainly, in terms of domestic casualties, COVID-19 has far eclipsed 9/11 and all other twenty-first century terrorist attacks on U.S. soil combined.¹⁷¹ How have federal courts responded when called upon to review emergency measures enacted to address it?

B. Weak deference to public health measures

The COVID-19 public health catastrophe offers a useful comparative lens for the law of judicial deference in national emergencies. As Part II has shown, the executive branch during the Trump administration was considerably more passive in this public health emergency than it (and previous administrations) had been in the War-on-Terror.¹⁷² After state and local governments adopted

166. *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

167. *Id.*

168. *Eskridge & Baer*, *supra* note 51 at 1099, 1102.

169. *See* sources cited *supra* note 51.

170. *Trump v. Hawaii*, 138 S. Ct. at 2429-31, 2433, 2440 (Breyer, J., dissenting), (Sotomayor, J., dissenting). *See also* Zainab Ramahi, Note, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 118 CAL. L. REV. 557, 583 (2020).

171. *Compare* Bergen et al., *supra* note 159 and NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, *supra* note 159 with CDC Nat’l Ctr. For Health Statistics, *Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (last visited Nov. 6, 2021) (showing 751,178 deaths involving COVID-19).

172. *See supra* Part II.C.

public health measures—such as stay-at-home orders and school and business closures—courts had to assess the legality of these measures.¹⁷³ In general, objectors have challenged the constitutionality or legality of public health measures, arguing that they infringe upon civil liberties.¹⁷⁴ Initially, several federal courts deferred to the state’s public health rationales and upheld the emergency measures.¹⁷⁵ But religious exercise challenges have had a different trajectory. While earlier in the pandemic federal courts upheld emergency measures limiting religious worship, this trend of deference changed abruptly in the fall of 2020.¹⁷⁶

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, a church and a synagogue sought an emergency injunction after challenging an executive order that imposed occupancy restrictions on houses of worship during the pandemic.¹⁷⁷ Plaintiffs claimed that the restrictions, issued by Governor Cuomo of New York, violated the Free Exercise Clause of the First Amendment and asked the Court to enjoin their enforcement in the process of appellate review.¹⁷⁸ In a shift from its earlier position, the Supreme Court issued the emergency injunction.¹⁷⁹ In a *per*

173. See MacFarquhar, *supra* note 131; see also Neil Vigdor, *Wisconsin Supreme Court Strikes Down Stay-at-Home Order*, N.Y. TIMES (May 13, 2020), <https://www.ny-times.com/2020/05/13/us/coronavirus-wisconsin-supreme-court.html>. But see Meyler, *supra* note 131 (“emergencies have often called for states to impose short-term economic restrictions, and the Supreme Court has affirmed their constitutionality, emphasizing that temporary steps that might otherwise infringe on economic rights may be permissible . . .”).

174. For a spreadsheet tracking high-profile legal challenges to various state pandemic response actions, including mask mandates and business closures, see Ballotpedia, *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic, 2020-2021*, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (last visited Nov. 6, 2021).

175. See, e.g., *Ass’n of Jewish Camp Operators v. Cuomo*, 470 F. Supp. 3d 197, 206, 213-17, 229 (N.D.N.Y. 2020); *Calvary Chapel of Bangor v. Mills*, 459 F. Supp. 3d 273, 277, 281-87 (D. Me. 2020); *High Plains Harvest Church v. Polis*, No. 1:20-CV-01480-RM-MEH, 2020 WL 4582720, at *1-2 (D. Colo. Aug. 10, 2020), *vacated and remanded*, 141 S. Ct. 527, 527 (2020) (mem.) (“the case is remanded to the United States Court of Appeals for the Tenth Circuit with instructions to remand to the District Court for further consideration in light of *Roman Catholic Diocese of Brooklyn v. Cuomo* . . .”).

176. Ballotpedia, *supra* note 174 (showing the state winning eighteen high-profile Free Exercise cases in federal district and appeals courts before *Roman Catholic Diocese of Brooklyn*, while only winning two afterward); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-70 (2020) (per curiam); sources cited *supra* note 175. See also *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020).

177. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65-66. The applications were filed by the Roman Catholic Diocese of Brooklyn and Agudath Israel of America and affiliated entities. Under the executive order, in areas designated as “red” zones, no more than ten persons could attend a religious service, and in orange zones, attendance was capped at twenty-five. *Id.*

178. *Id.* at 66.

179. *Id.* at 66-69 (holding that plaintiffs (1) were likely to succeed on merits; (2) would be irreparably harmed in absence of injunctive relief; and (3) public interest favored injunctive relief). The Court enjoined the governor from enforcing the Executive Order’s 10 and 25-person occupancy limits on applicants pending disposition of the appeal in the United States

curium decision, the Court reasoned that the restrictions violated the neutrality requirement by “singl[ing] out houses of worship for especially harsh treatment.”¹⁸⁰ The court concluded that “it [was] hard to see how the challenged regulations [could] be regarded as ‘narrowly tailored,’”¹⁸¹ and that “the challenged restrictions, if enforced, [would] cause irreparable harm.”¹⁸²

Writing for the majority, Justice Gorsuch declared that the Constitution is not suspended in times of crisis. “Government is not free to disregard the First Amendment in times of crisis,” he wrote, “[y]et recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.”¹⁸³ By imposing strict capacity restrictions on houses of worship but not on other businesses, Cuomo allegedly expressed preference for secular businesses in violation of the First Amendment.¹⁸⁴ Judicial deference to emergency public health measures is unnecessary “as we round out 2020” because “[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical . . . courts must resume applying the Free Exercise Clause.”¹⁸⁵ Gorsuch disparaged his fellow Justices for previously upholding pandemic-related restrictions on religious worship¹⁸⁶ and missing the point of *Jacobson v. Massachusetts*.¹⁸⁷ While “*Jacobson* hardly supports cutting the Constitution loose during a pandemic,”

Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari. *Id.*

180. *Id.* at 66.

181. *Id.* at 67 (“They are far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants’ services.”).

182. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (*per curiam*) (“If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred . . . Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.”).

183. *Id.* at 69 (Gorsuch, J., concurring) (adding “[a]t a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available.”).

184. *Id.* (“So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience? . . . The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as “essential” as what happens in secular spaces . . . in his judgment laundry and liquor, travel and tools, are all “essential” while traditional religious exercises are not.”).

185. *Id.* at 70.

186. *Id.* “Not only did the South Bay concurrence address different circumstances than we now face, that opinion was mistaken from the start. To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). But *Jacobson* hardly supports cutting the Constitution loose during a pandemic.” *Id.* (citations omitted).

187. *Id.*

wrote Gorsuch, “many lower courts quite understandably read its invocation [by Justice Roberts in *South Bay*] as inviting them to slacken their enforcement of constitutional liberties while COVID lingers.”¹⁸⁸ With a dramatic metaphor, Gorsuch avowed, “we may not shelter in place when the Constitution is under attack. Things never go well when we do.”¹⁸⁹

The dissenters in *Roman Catholic Diocese* voiced alarm that the majority ignored the relevant science and the authority of public health experts.¹⁹⁰ It is more risky to hold large and lengthy gatherings in churches and synagogues than it is to quickly go in and out of grocery stores, they reminded their fellow justices.¹⁹¹ Relying on science and public health experts, the dissenters maintained that in public health emergencies, such as COVID-19, courts must defer to public officials who have more access to scientific expertise. As Justice Breyer observed, “We have previously recognized that courts must grant elected officials ‘broad’ discretion when they ‘undertake to act in areas fraught with medical and scientific uncertainties.’”¹⁹² Deference to elected officials is necessary in an emergency of this scale because “[t]he elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to ‘changing facts on the ground.’ And they can do so more quickly than can courts.”¹⁹³

Justice Sotomayor was also alarmed by the Court’s lack of deference to public health measures.¹⁹⁴ She warned that “granting applications such as the one

188. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70-71 (2020) (noting that *Jacobson* “involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction[.]” and arguing that courts mistook *Jacobson* for “towering authority that overshadows the Constitution during a pandemic” in large part due to “a particular judicial impulse to stay out of the way in times of crisis.”).

189. *Id.* Justice Kavanaugh similarly observed that while federal courts must afford “substantial deference” to state and local authorities during a pandemic, “judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.” *Id.* at 74 (Kavanaugh, J., concurring).

190. *Id.* at 78. (“At the same time, members of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other. Thus, according to experts, the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces.” (citations omitted)).

191. *See id.*

192. *Id.* (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. at 1613 (2020) (mem.) (Roberts, C. J., concurring)).

193. *Id.* (citations omitted) (“That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.”)

194. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 78-79 (2020) (Sotomayor, J., dissenting) (“Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York’s public health measures aimed at containing the spread of COVID-19 in areas facing the most severe outbreaks. Earlier this

filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation's suffering."¹⁹⁵ By ignoring scientific expertise, she continued, "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily."¹⁹⁶

The Supreme Court continued this trend in *South Bay United Pentecostal Church v. Newsom*.¹⁹⁷ Here as well, a divided Court enjoined California from enforcing its prohibition on indoor worship services pending disposition of the petition for a writ of certiorari.¹⁹⁸ The justices who supported the injunction repeated the core principles from *Roman Catholic Diocese*. Chief Justice Roberts acknowledged the importance of judicial deference to state officials in public health emergencies, but reasoned that such deference was not fully justified in this case.¹⁹⁹ Justice Gorsuch reasoned that California "obviously target[ed] religion for differential treatment" and repeated his position that "especially in times of crisis—we have a duty to hold governments to the Constitution," and that

year, this Court twice stayed its hand when asked to issue similar extraordinary relief. I see no justification for the Court's change of heart . . . [These two decisions] provided a clear and workable rule to state officials seeking to control the spread of COVID-19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. New York's safety measures fall comfortably within those bounds." (citations omitted)).

195. *Id.* at 79.

196. *Id.* ("But Justice Gorsuch does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID-19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. Unlike religious services, which 'have every one of th[ose] risk factors,' bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time." (citations omitted)).

197. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (mem.). After being denied injunctive relief by the Supreme Court previously, South Bay, learning about the shift in the Court's ruling in *Roman Catholic Diocese*, requested to enjoin California Blueprint's Tier 1 prohibition on indoor gatherings. See *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1131, 1137-38 (9th Cir. 2021).

198. *S. Bay United Pentecostal Church*, 141 S. Ct. at 716. Other parts of the petition were denied. ("The application is denied with respect to the percentage capacity limitations, and respondents are not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. The application is denied with respect to the prohibition on singing and chanting during indoor services."). *Id.*

199. *Id.* at 716-17 (Roberts, C.J., concurring) ("The State has concluded, for example, that singing indoors poses a heightened risk of transmitting COVID-19. I see no basis in this record for overriding that aspect of the state public health framework. At the same time, the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake Deference, though broad, has its limits.").

“when a State so obviously targets religion for differential treatment, our job becomes that much clearer.”²⁰⁰ Admitting lack of scientific knowledge, he nonetheless avowed to stand up for religious freedom under attack.²⁰¹

Justice Kagan’s dissent turned on the Court’s lack of deference to science.²⁰² California, according to Kagan, did not violate the First Amendment.²⁰³ It limited indoor gatherings across all areas that “pose a heightened danger of COVID transmission.”²⁰⁴ This policy is “based on essentially undisputed epidemiological findings, that congregating together indoors poses a special threat of contagion.”²⁰⁵ The Court’s decision forces the state to ignore medical and scientific experts and “impairs [its] effort to address a public health emergency.”²⁰⁶ Kagan expressed alarm “that the Court second-guesses the judgments of expert officials, and displaces their conclusions with its own. In the worst public health crisis in a century, this foray into armchair epidemiology cannot end well.”²⁰⁷ The Supreme Court has become an active participant in worsening the national crisis of COVID-19.²⁰⁸

200. *Id.* at 717–18 (Gorsuch, J. in chambers).

201. *Id.* at 718 (“Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty.”).

202. *Id.* at 720 (Kagan, J. dissenting) (“Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic.”).

203. *See id.* at 721 (“The restricted activities include attending a worship service or political meeting; going to a lecture, movie, play, or concert; and frequenting a restaurant, winery, or bar . . . In all those communal activities, California requires mask wearing and social distancing, and bars indoor singing and chanting, to reduce the risk of COVID transmission.”).

204. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 721–22 (2021) (mem.) (quoting written testimony of Dr. James Watt, the Chief of Communicable Diseases at the California Department of Public Health, explaining: “‘There is broad consensus among epidemiologists that transmission (and thus spread) of the novel coronavirus is more likely’ at ‘[i]ndoor public gatherings,’ which ‘bring together [many] people from different households’ . . . The medical experts also testified [that] . . . shopping ‘involves less close proximity’ with other people—and for less time—than does an indoor worship service, lecture, or similar event . . . Given all that evidence, California’s choices make good sense.”).

205. *Id.* at 722.

206. *Id.* at 722–23 (adding “I am sure that, in deciding this case, every Justice carefully examined the briefs and read the decisions below. But I cannot imagine that any of us delved into the scientific research on how COVID spreads, or studied the strategies for containing it.”).

207. *Id.* at 723 (citations omitted) (Kagan, J. dissenting) (adding that “[t]he Court’s decision leaves state policymakers adrift, in California and elsewhere. It is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs.”).

208. *See id.* (“I fervently hope that the Court’s intervention will not worsen the Nation’s COVID crisis. But if this decision causes suffering, we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors. That would seem good reason to avoid disrupting a State’s pandemic response. But the Court

Under the conceptual analysis offered in this Article, these dissenting opinions in *Roman Catholic Dioceses of Brooklyn* and in *South Bay* can be viewed as criticizing the majority for inflicting Emergency-Denying Violence. That is, by denying or ignoring scientific and public health expertise, and by refusing deference to measures that implement this expertise, the majority of the Court, in the name of religious freedom, inflicts violence on vulnerable communities.

IV. THE EMERGENCY NEXT TIME

Emergency Violence occurs when governments and courts fail to assess and respond fittingly to crisis. They do so by inflicting Emergency-Affirming Violence when they respond to an emergency in an oversized or disproportionate manner, unleashing more violence than they prevent; or by inflicting Emergency-Denying Violence when they fail to sufficiently respond to an emergency.²⁰⁹ Emergency Violence is the violence of *too little or too much*. This final Part examines the consequences of Emergency Violence and offers an aspirational framework for policymakers, lawmakers, courts, and the public, as we face the next emergency.

A. The sacrificial lives of emergency violence

The consequences of both Emergency-Affirming Violence and Emergency-Denying Violence are similar: They sacrifice lives or livelihoods of some (or many) in the name of defending others. In the War-on-Terror, Muslim lives domestically and globally have become vulnerable to organized state violence.²¹⁰ In the COVID-19 pandemic, racial and ethnic minorities have suffered disproportionate illness, death, and financial hardship.²¹¹

1. Muslim lives

Much has been written about the lives and bodies made vulnerable in the ongoing War-on-Terror.²¹² The frameworks of War-on-Terror and national security emergencies have turned many innocent lives into disposable sacrifices. The financial costs of the War-on-Terror have been estimated at \$8 trillion between 2001 and 2022, and the number of casualties (including indirect deaths) may be

forges ahead regardless, insisting that science-based policy yield to judicial edict. I respectfully dissent.”).

209. See *supra* Parts I, II.

210. See *supra* Part I.

211. See *infra* notes 218-28 and accompanying text.

212. See, e.g., AGAMBEN, *supra* note 2; TALAL ASAD, ON SUICIDE BOMBING (2007); JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007); JUDITH BUTLER, PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE (2006).

more than 3.7 million.²¹³ The violence committed against Muslims during the ongoing War-on-Terror cannot be reduced to death. In recent years, American and non-American Muslims have continued to face pervasive discrimination and law enforcement scrutiny in many aspects of their lives.²¹⁴

The Emergency-Affirming Violence that followed the attacks of 9/11 did not begin by formally abandoning the rule-of-law, but by declaring a national emergency and temporarily suspending civil rights, immigration rights, and other legal protections for certain groups of people in the name of national security.²¹⁵ The Emergency-Affirming Violence committed at Guantanamo Bay and by the Muslim Ban are only two examples of lives made vulnerable and dispensable under a state of emergency, a declaration of enmity, and implementation of a long list of emergency measures in the War-on-Terror.²¹⁶ The Emergency-Affirming Violence that followed 9/11 has created the conditions in which a liberal-democratic legal system, through an extensive use of emergency measures and at the advice of experts, sacrifices Muslim lives.

2. Black and Brown lives

Public health experts urged that the emergency-denial and passivity of the

213. *Costs of the 20-year War on Terror: \$8 Trillion and 900,000 Deaths*, NEWS FROM BROWN (Sept. 1, 2021), <https://www.brown.edu/news/2021-09-01/costsofwar> (citing the data from The Costs of War Project, Brown University, Watson Instit. for Int'l and Pub. Affs.); COSTS OF WAR PROJECT, WATSON INST., HUMAN COST OF POST-9/11 WARS: DIRECT WAR DEATHS IN MAJOR WAR ZONES, AFGHANISTAN & PAKISTAN (OCT. 2001–AUG. 2021); IRAQ (MARCH 2003–AUG. 2021); SYRIA (SEPT. 2014–MAY 2021); YEMEN (OCT. 2002–AUG. 2021) AND OTHER POST-9/11 WAR ZONES (2021), <https://watson.brown.edu/costsofwar/figures/2021/WarDeathToll>; DAVID VINE ET AL., COSTS OF WAR PROJECT, WATSON INSTIT., CREATING REFUGEES: DISPLACEMENT CAUSED BY THE UNITED STATES' POST-9/11 WARS 24 (2020), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Displacement_Vine%20et%20al_Costs%20of%20War%202020%2009%2008.pdf (“According to the Geneva Declaration’s study of recent wars, there will be at least three and as many as fifteen ‘indirect deaths’ for every direct combat death.”). See also GENEVA DECLARATION, GLOBAL BURDEN OF ARMED VIOLENCE 32 (2008), www.genevadeclaration.org/fileadmin/docs/Global-Burden-of-Armed-Violence-full-report.pdf.

214. The American Civil Liberties Union (ACLU), for example, has focused on several issues facing Muslim people today, including bans on Sharia and International law, vandalism and resistance to new mosques, discrimination based on appearance, discrimination in the Armed Forces, infiltration and surveillance of Mosques and Muslim communities, Congressional hearings on the so-called “radicalization” of the American Muslim community, unconstitutional administration of the “No Fly List”, FBI mapping of local communities and businesses based on race and ethnicity, anti-terrorism financing laws, invasive questioning at U.S. borders, government discrimination against Muslims, and discrimination against Muslims in public schools. *Protecting the Religious Freedom of Muslims*, ACLU, <https://www.aclu.org/issues/national-security/discriminatory-profiling/protecting-religious-freedom-muslims> (last visited Nov. 7, 2021).

215. *Supra* Part I.

216. *Id.*

federal government would cost many American lives.²¹⁷ The Emergency-Denying Violence of COVID-19 impacted the entire population, but despite the saying that the virus “does not discriminate,” from early in the pandemic it became clear that those most vulnerable to it in the United States are racial and ethnic minorities.²¹⁸ Growing evidence shows that Black and Brown people, at least in the earlier and more deadly phases of the pandemic, were more likely to contract COVID-19 and were later disproportionately impacted by unequal vaccine distribution.²¹⁹ Black communities, in these early phases, were also more likely to experience hospitalization and death from COVID-19, compared to non-Black communities.²²⁰

217. See Lena H. Sun & Josh Dawsey, *Top Trump Adviser Bluntly Contradicts President on COVID-19 Threat, Urging All-out Response*, WASH. POST (Nov. 2, 2020), <https://www.washingtonpost.com/health/2020/11/02/deborah-birx-covid-trump/>; Christie Aschwanden, *Contact Tracing, a Key Way to Slow COVID-19, Is Badly Underused by the U.S.*, SCIENTIFIC AMERICAN (July 21, 2020), <https://www.scientificamerican.com/article/contact-tracing-a-key-way-to-slow-covid-19-is-badly-underused-by-the-u-s/>.

218. See Editorial Board, Opinion, *The Coronavirus Doesn't Discriminate Along Racial Lines. But America Does*, WASH. POST (Apr. 10, 2020), https://www.washingtonpost.com/opinions/the-coronavirus-doesnt-discriminate-along-racial-lines-but-america-does/2020/04/10/08420e46-79c9-11ea-a130-df573469f094_story.html; *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [hereinafter *Health Equity Considerations*]; *What We Can Do: Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/what-we-do.html> (“Long-standing systemic health and social inequities have put many people from racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19.”); *Too Many Black Americans Are Dying from COVID-19*, SCIENTIFIC AMERICAN (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-Covid-19/> (“A report from the Centers for Disease Control and Prevention on a sample of 580 people hospitalized with confirmed cases of COVID-19 found that 33 percent of patients were black in a population sample where just 18 percent of the people were black. White people made up 59 percent of the same population, but only 45 percent were infected . . . the coronavirus has infected and killed an outsize number of black people across the U.S.”).

219. See Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance—United States, January 22–May 30, 2020*, 69(24) MORBIDITY AND MORTALITY WKLY. REP. 759, 759, 763 (2020); Gregorio A. Millett et al., *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS OF EPIDEMIOLOGY 37, 38–40 (2020); Jessie Hellmann & Marty Johnson, *Communities of Color Getting Left Behind in Vaccine Rollout*, THE HILL (D.C.) (Jan. 30, 2021), <https://thehill.com/policy/healthcare/536576-communities-of-color-being-left-behind-in-vaccine-rollout>; Emma G Fitzsimmons, *Black and Latino New Yorkers Trail White Residents in Vaccine Rollout*, N.Y. TIMES <https://www.nytimes.com/2021/01/31/nyregion/nyc-covid-vaccine-race.html> (Sept. 29, 2021).

220. Marie E. Killerby et al., *Characteristics Associated with Hospitalization Among Patients with COVID-19—Metropolitan Atlanta, Georgia, March–April 2020*, 69 (25) MORBIDITY AND MORTALITY WKLY. REP. 790, 790–92 (2020); Jeremy A.W. Gold et al., *Characteristics and Clinical Outcomes of Adult Patients Hospitalized with COVID-19—Georgia, March 2020*, 69 (18) MORBIDITY AND MORTALITY WKLY. REP. 545, 545, 547–48 (2020); Eboni G. Price-Haywood et al., *Hospitalization and Mortality Among Black Patients and White Patients with COVID-19*, 382 NEW ENG. J. MED. 2534, 2541 (2020); Millett, *supra* note 220, at

These disproportionate effects of COVID-19 may be attributed to structural inequalities, including discrimination, unequal healthcare access and utilization, more exposed working conditions, crowded housing, and educational, income, and wealth gaps.²²¹ More specifically, studies have suggested the following explanations for the disproportionate effects of COVID-19. First, discrimination across areas of life (housing, education, healthcare) causes stress that may add to risk for more severe COVID-19 outcomes.²²² Second, individuals from racial and ethnic minority groups are more likely to be uninsured than Whites, and may hesitate to seek care due to distrust in government and healthcare institutions.²²³ Third, racial and ethnic minority groups are disproportionately represented in “essential worker” groups who are more exposed to COVID-19, including those who work in healthcare facilities, farms, and public transportation.²²⁴ As one New York City transit worker protested, “The conditions created by the pandemic drive home the fact that we essential workers—workers in general—are the ones who keep the social order from sinking into chaos. Yet we are treated with the utmost disrespect, as though we’re expendable.”²²⁵ Fourth, racial and ethnic minority groups are more likely to live in conditions, including multiple generational households, which make it challenging to follow social distancing

38-39.

221. *Health Equity Considerations*, *supra* note 219.

222. *Id.*; Price-Haywood, *supra* note 221, at 2534, 2541-42; Millett, *supra* note 220, at 37, 39-40; Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health*, 35 INT’L J. EPIDEMIOLOGY 888, 893 (2006); Ronald L. Simons et al., *Discrimination, Segregation, and Chronic Inflammation: Testing the Weathering Explanations for the Poor Health of Black Americans*, 54 DEVELOPMENTAL PSYCH. 1993, 2003-04 (2018). For examples of anti-Black racial bias in housing, education, and healthcare, *see, e.g.*, MICHELA ZONTA, CTR. FOR AM. PROGRESS, RACIAL DISPARITIES IN HOME APPRECIATION (2019), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation>; Moriah Balingit, *Racial Disparities in School Discipline Are Growing*, *Federal Data Show*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html; Heidi Ledford, *Millions of Black People Affected by Racial Bias in Health-Care Algorithms*, NATURE, <https://www.nature.com/articles/d41586-019-03228-6#ref-CR1> (Oct. 26, 2019).

223. *Health Equity Considerations*, *supra* note 219 (citing EDWARD R. BERCHICK ET AL., CURRENT POPULATION REPORTS P60-267(RV), U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2018 (2019); INST. OF MEDICINE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 131, 648 (Brian D. Smedley et al. eds., 2003)).

224. *Health Equity Considerations*, *supra* note 219 (citing U.S. BUREAU OF LAB. STAT. LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2018 5, 37-39, 41, 51-53 (2019), <https://www.bls.gov/pub/reports/race-and-ethnicity/2018/pdf/home.pdf>).

225. Sujatha Gidla, ‘We Are Not Essential. We Are Sacrificial,’ N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/opinion/coronavirus-nyc-subway.html> (adding “[m]y co-workers say bitterly: ‘We are not essential. We are sacrificial.’”). *See also* Pollans, *supra* note 151 (The executive order keeping meat plants open “reveals the president’s utter disregard for plant workers who could face a high risk of contracting COVID-19 from workplaces contaminated with the coronavirus.”).

measures.²²⁶ Finally, high income and stable job options with flexibility to work from home are less accessible to those who did not have equal access to high quality education.²²⁷

The wounds and casualties from the Emergency-Denying Violence committed by the federal government, several state governments, and many courts during the COVID-19 pandemic are disproportionately born by racial and ethnic minorities. These are the lives and bodies that suffered the immediate blow of the pandemic while the more privileged hid from it. They are deemed by the government dispensable and sacrificial for achieving goals such as economic recovery. These are the lives and bodies who would have benefited from a quick and clear declaration of a national security emergency, robust mandatory social distancing measures, government-paid financial support, meaningful utilization of the Defense Production Act, easy access to vaccines and other treatments, and other life-saving measures.

B. Beyond the rule of law: Toward emergency non-violence

Emergency Violence can take opposite forms. In the War-on-Terror, the Emergency-Affirming Violence of the Bush administration, Congress, federal courts, and later administrations was invoked by *affirming* the existence of a national security emergency.²²⁸ In the COVID-19 crisis, the Emergency-Denying Violence of the Trump administration, its supporters, and the Supreme Court was invoked by *denying* or downplaying the existence of a public health emergency.²²⁹ In both crises Emergency Violence was unleashed on vulnerable individuals and communities: Muslims in the War-on-Terror, and racial and ethnic minorities in COVID-19.²³⁰ If the State can unleash violence by embracing or denying emergency measures, what principles can help guide lawmakers and policymakers to reduce Emergency Violence? The key is finding the delicate balance between enduring legal rules (Legalism) and time-sensitive executive decisions (Decisionism).

The War-on-Terror prompted debates among lawmakers, judges, scholars, and the public regarding the lawfulness of security measures such as Guantanamo Bay, military tribunals, wiretapping, and the Muslim Ban.²³¹ Conservatives typically argued that a strong executive branch must take swift action (make

226. *Health Equity Considerations*, *supra* note 219. See also April Simpson et al., *One Home, Many Generations: States Addressing COVID Risk among Families*, CTR. FOR PUB. INTEGRITY (Mar. 26, 2021), <https://publicintegrity.org/health/coronavirus-and-inequality/one-home-many-generations-covid-risk-families>.

227. *Health Equity Considerations*, *supra* note 219.

228. *Supra* Part I.

229. *Supra* Part II, Section III.B.

230. *Supra* Sections IV.A.1, IV.A.2.

231. See, e.g., Steyn, *supra* note 64, at 1; GREENBERG, *supra* note 64, at 5-8; Bravin, *supra* note 59; *Trump v. Hawaii*, 138 S. Ct. at 2408; Charlie Savage & James Risen, *Federal*

decisions) in national security emergencies and may temporarily suspend or curtail civil and human rights to do so effectively.²³² I have called this position “Decisionism.”²³³ Liberals, in response, insisted that many of the emergency measures in the War-on-Terror were not necessary or lawful.²³⁴ They have argued that the Constitution and its promises (and not mere executive decisions) ought to meaningfully control in emergencies. I have elsewhere called this position “Legalism.”²³⁵

Interestingly, in the COVID-19 crisis, the rule-of-law debate between liberals and conservatives has flipped. In assessing emergency measures such as mandatory face masks, stay-at-home orders, and utilizing the Defense Production Act,²³⁶ liberals and conservatives have mostly switched positions (compared to their positions on the War-on-Terror). Conservatives have argued that legal rules and constitutional rights such as liberty, economic freedom, and freedom of assembly should not be curtailed by emergency measures.²³⁷ Unlike their position on the War-on-Terror, conservatives have taken a Legalist position on public health emergency measures. Liberals, meanwhile, have maintained that in the COVID-19 public health crisis, emergency measures are necessary to save lives and that administrations are reckless for not adopting them.²³⁸ In contrast with the War-on-Terror, liberals have mostly taken Decisionist positions on emergency COVID-19 measures. To be clear, liberals are promoting the sensible argument that government must restrict or even suspend normal rules in times of crisis. I call this Decisionism because it reflects the position that sometimes *decisions matter more than written rules*. Sometimes it is timely executive decisions that save lives and democracies; and sometimes it is pre-planned legal rules.

Judge Finds N.S.A. Wiretaps Were Illegal, N.Y. TIMES, (Mar. 31, 2010), <https://www.nytimes.com/2010/04/01/us/01nsa.html>; Ed Pilkington, *Trump and Carson Back Use of Waterboarding in Fight Against ISIS*, GUARDIAN (Nov. 22, 2015), <https://www.theguardian.com/us-news/2015/nov/22/donald-trump-ben-carson-isis-support-waterboarding>.

232. See, e.g., POSNER, *supra* note 13; POSNER & VERMEULE, *supra* note 2, at 15-18; Vermeule, *supra* note 8, at 1096-98; Ku & Yoo, *supra* note 49, at 179-80, 205. See also John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 436-38 (2003).

233. Decisionism calls for utilizing emergency measures and temporarily suspending normal rules and standards during an emergency. Ben-Asher, *supra* note 13.

234. See, e.g., Martinez, *supra* note 2, at 1015, 1053; Dyzenhaus, *supra* note 2, at 2008-09, 2024-27; Issacharoff & Pildes, *supra* note 2, at 297, 320; Cole, *supra* note 2, at 2566-67, 2587-88; Katyal & Tribe, *supra* note 60, at 1259-60.

235. Legalism calls for reliance on existing legal rules and standards instead of emergency measures; Ben-Asher, *supra* note 13 at 703.

236. *Supra* Part II.

237. *Id.*

238. *Supra* Section III.B; Tommy Beer, *Top Democrats Push for Nationwide Mask Mandate, Trump Pushes Back*, FORBES (June 29, 2020), <https://www.forbes.com/sites/tommybeer/2020/06/29/top-democrats-push-for-nationwide-mask-mandate-trump-pushes-back/?sh=3c7194afad14>.

In the two largest scale twenty-first century national emergencies to date, conservatives and liberals have switched jurisprudential positions (Legalism/Decisionism) to emergency powers and the rule-of-law. From crisis to crisis, it is unpredictable whether emergency measures will be necessary and what their content and extent will be. That is the nature of emergencies.²³⁹ Setting the humanist policy goal of Emergency Non-Violence proposed in this Article involves defending and caring for those whose lives become sacrificial or expendable in a given emergency.²⁴⁰ With the goal of defending vulnerable individuals and communities from the consequences of Emergency Violence, there are times when a lawmaker, advocate, or policymaker ought to take a position *against* emergency measures, such as the examples above in the War-on-Terror, and there are times when lawmakers, advocates, or policymakers ought to take a position *in favor* of emergency measures, such as in the national attempt to contain COVID-19.²⁴¹

Given the Emergency Violence that has been unleashed in both national crises, this Article ends by proposing that alongside rule-of-law concerns, lawmakers, policymakers, courts, and the public ought to integrate a commitment to Emergency Non-Violence in times of national crisis. This means that in conjunction with the many governing considerations and calculations that go into the decision of whether or not to invoke emergency measures, which emergency measures to invoke, and to what extent, courts, lawmakers and policymakers ought to consider who will be *most vulnerable* if emergency measures are invoked, and who will be most vulnerable if they are not. This framework is not a decision rule, and it is not simply a utilitarian call to select the policy that will save the largest number of lives. It is an invitation to acknowledge that by deciding to exercise emergency measures or not, and by deciding to defer to emergency measures or not, public officials and courts create new and exacerbate existing vulnerabilities. These vulnerabilities must be given due consideration.

CONCLUSION

Among the important lessons of 9/11 and COVID-19 is that times of crisis reveal the true values of government and the people. This is not only because individual and collective resilience is put to test. Crises of such magnitude reveal

239. For the sources of my distinction between Legalism and Decisionism, see CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 3 (George Schwab trans., Univ. Chi. Press 2005) (1922) (“The pure normativist thinks in terms of impersonal rules, and the decisionist . . . by means of a personal decision”); Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1163 (2001) (“What makes the thinker a decisionist is not that he has a global or ontological critique of justificatory closure, but that, after coming upon a situation of choice where governing norms contradict one another or ‘run out,’ he refuses the enterprise of either repairing the discourse or replacing it with a new discourse that will be more determinate.”).

240. *Supra* Section IV.A.

241. *Supra* Sections I.C., II.C.

the nature and values of a leader, an administration, a country, and its people, precisely *because* they require creative use of legal and political toolkits. When planes fly into crowded commercial buildings on a mundane Tuesday morning, and when a once-in-a-century deadly virus ravages the globe, public officials must make decisions that mastery of legal rules and exceptions has not prepared them for. In those moments, it is not the knowledge or compliance with law that ultimately determines decision-making; it is core values. In such times, decisionmakers are forced to ask themselves, “What really matters?” As this Article has shown, the answer to this question will determine, in times of national crisis, who will come to the other side of the emergency relatively unscathed and who will be sacrificed. In the twenty-first century, so far, the values expressed by the federal government through its action and non-action in national emergencies are not the values that many of us live for and believe in. Perhaps in the next emergency, those will shine through.

