

STEVE VLADECK: Good morning, everybody.

AUDIENCE: Hello.

STEVE VLADECK: Hello. Yes, if you learn nothing else from me today, learn that James Garfield was not in fact killed by Charles Vito. Right? That had the doctors literally left the bullet in his body, he would have survived.

But there you go. An early lesson in medical ethics. There's a great book about this, if you actually care, called *Destiny Of The Republic*, which basically walk through the whole story and why Garfield's assassination was this turning point we ever talk about.

All right. But I am not here to talk about 19th-century American history. As Dave said, he invited me to talk about the National Emergencies Act. And I looked at the schedule and saw that there was an hour and a half devoted to this presentation, and thought that would fill about 15 minutes, and that would be kind of boring, and then we'd all be looking at each other like, what do we do now.

So I thought instead I would use the National Emergencies Act as a foil for a broader discussion of the problem that I think we are especially seeing these days of overdelegation by Congress of power to the executive branch, especially in the context of national security and/or other emergencies.

So that's my plan for this morning. Hopefully, it will make some sense. Hopefully, we'll also get to see why a lot of this is actually less about President Trump than it is about sort of longer-term irrigation of power by the executive, longer-term acquiescence by Congress, and indeed why the courts, and the US Supreme Court in particular, are actually fairly responsible and central players in our story.

All right. So to begin I want to tell a story about a 1983 decision by the US Supreme Court that we teach in the first year of constitutional law classes in the United States, but that I think students don't ever appreciate. And the case is called *INS v. Chadha-- Immigration and Naturalization Service v. Chadha*.

Here's the background. For the first 150 to 160 years of American history, if you were a non-citizen subject to being removed from the country-- and in the 19th century, this doesn't happen that often, but in the 20th century, this starts to ramp up-- one of the only ways to get

relief from removal, one of the only ways is to basically have your removal aborted was through something called a private bill.

So a private bill or a private law-- this is legislation that goes through both houses of Congress, has to be signed by the president. But as opposed to a public law, which is on some matter of public concern, these were bills passed specifically for the relief of individual parties. So sometimes, this would happen in the context of paying damages claims to victims of misconduct by government officers. It happened all the time in the immigration context-- private bills basically as relief from deportation.

And what that meant was, if you were a non-citizen and the government wanted to somehow prevent your removal, even if you were otherwise qualified, you needed buy-in from three different actors. The House of Representatives had to pass the bill. The Senate had to pass the bill. And the president had to sign it. Right? That all three of these actors were playing some role in the process.

All right. So fast forward to 1950. Congress starts to believe that these kinds of procedures are deeply cumbersome and ruthlessly inefficient, right? As the country gets bigger, as Congress gets more and more power, as Congress is doing more and more stuff, especially during and after World War II, just doesn't want to be bothered with having to pass individual private bills, whether in the immigration context, or the damages context, or almost any other context.

And so Congress starts passing a series of statutes that try to replicate this structure, where you need buy-in from the House, the Senate, and the president, but more efficiently. Congress starts relying on something called the legislative veto.

And so the way it basically works is Congress will say, dear executive branch, you go first. Right? You decide if you want to exercise this special authority that it takes all three of us to do. And then we will allow that to happen unless either house disapproves-- unless the House disapproves or the Senate disapproves.

So you're still asking all players to sign off. The president goes first and says, I want this particular immigrant to stay in the country. And then the House approves by not disapproving. And then the Senate approves by not disapproving. And Congress thought this is much more efficient, right?

This puts the sort of moving ball in the hands of the executive branch, which is better situated

to do this, and we retain the ability to exercise the power we would have had under the old system to kick the guy out by not stopping the executive branch, right? In other words, we're basically all playing the same role. We're just [? trading ?] the timing.

This becomes a very common feature of statutes Congress passes after World War II. And one of those statutes is the Immigration and Nationality Act of 1952.

For decades, Congress legislates on this model with legislative vetoes, where basically Congress delegates power to the executive branch, but says, we can stop you if either house disapproves, again, on the model that this is the same thing as if we were all affirmatively authorizing the negative.

One example that we teach in national security law classes all the time is the War Powers Resolution, right? Passed in 1973, the War Powers Resolution basically says Congress can disapprove the introduction of US troops into hostilities through what's called a concurrent resolution-- through a resolution passed by both houses. Another example, which we'll come back soon a few minutes, is the National Emergencies Act of 1976.

So the National Emergencies Act of 1976 is one of these many post-Nixon statutes that Congress passes in this remarkable period starting in the mid-1970s that are designed to cure, or at least remedy or ameliorate, some of the structural problems that folks had seen arise during the Nixon administration.

And the National Emergencies Act specifically was focused on the proliferation of presidential declarations of national emergency and basically the lack of any meaningful check on how those declarations were made, on how long they lasted, on what kind of oversight Congress could exercise over them, right?

One of the ironies about the moment we're in today is that the National Emergencies Act was actually designed to constrain executive power, not to expand it.

And the way Congress did that was by saying, dear Mr. President, you must use this statute-- the National Emergencies Act-- if you're going to declare any national emergency going forward; there are procedural requirements you must meet if you're going to declare a national emergency; and there's a sunset, right-- you the president must re-certify on an annual basis that the national emergency is still going and if at any point Congress disagrees, we can terminate a national emergency by concurrent resolution. That is to say if the House and the

Senate vote to terminate a national emergency, it's over whether or not the president approves.

All right? This was deeply consistent with the post-World War II focus on legislative vetoes. And the idea was we, Congress, are not well suited to decide in the moment that there is some special need for special powers that we don't otherwise want the president to have.

So instead, we will let the president go first, right? All of these statutes are basically shifting the initial decision from the legislature to the executive branch with the idea being that the legislature can then come back and reclaim its power if it disapproves of how the president, the executive branch, is using it.

Does that makes sense so far? Still awake?

AUDIENCE: Mm-hmm.

STEVE VLADECK: If I lost you in the first seven minutes, that would be sad. OK. So far so good, right? And this is the model Congress legislates on in the national security space especially all throughout the 1970s. There are dozens-- indeed, by one count, there are 247 statutes that include some kind of legislative veto.

Now we come back to *INS v. Chadha*. So *Chadha* gets to the Supreme Court in 1983. And in *Chadha*, there is a constitutional challenge to the legislative veto. Chadha was an immigrant who was subject to deportation. Basically, what happened in his case was the attorney general said-- right, the executive branch moved first and said, we don't want to deport him. But then that was overridden because there was a legislative veto, right? One of the chambers objected. And so then there's this lawsuit.

The Supreme Court, in an opinion by Chief Justice Warren Burger, held in *Chadha* that legislative vetoes were unconstitutional. And this is where we start seeing how the story changes.

Writing for what was in some respect a 6-to-2-ish issue majority-- there was a weird concurring opinion by Justice Powell-- Chief Justice Burger writes a very formalistic opinion, where he says the US constitution in Article 1 Section 7 sets out a very specific procedure for lawmaking. There is even a song, right? *The Animaniacs*-- how a bill becomes a law. Right? The house passes the bill. The Senate passes the bill. The president signs the bill or he vetoes it. And then it gets overridden.

Bicameralism and presentment, right-- the two sort of dominant constitutional rules of Article 1 Section 7. And Burger says, this ain't that. Right? That whatever a legislative veto is, it's not legislation in the way that Article 1 Section 7 describes it. And because legislative vetoes are therefore substantive enactments that do not comport with Article 1 Section 7, Burger says they're unconstitutional.

Justice Byron White writes the principal dissent. And White makes a series of arguments. But the thrust of his opinion is, this is hyper-formalistic and ruthlessly inefficient, right? What White says is, wait a second, the same players are making the same decision. No one is given power they didn't have under the old system.

No one is given the ability to do something they couldn't have done before. All that Congress has done through these legislative vetoes is change the timing. All the Congress has done has made it more efficient. And by taking away the legislative veto, White says, the court is going to make it far harder for Congress to carefully calibrate its delegations of power to the executive branch. It's going to make it much harder for Congress to say, we want to be able to play a part on an ongoing basis in how the executive branch takes advantage, enforces, applies these authorities we've delegated.

And Chief Justice Burger says, yes, that's exactly the point. And if it were so important, guess what-- Congress can just pass new legislation. Right? The gravamen of the majority opinion is, there's one way to make law under the Constitution and only one.

We teach *Chadha* in the first year of constitutional law classes as this canonical separation of powers case. But I don't think we ever really do a good job of underscoring just how important it is in changing the relationship between Congress and the executive branch.

Because under *Chadha*, the basic gist is, once Congress delegates power to the president, the only way to pull it back is through a new statute. And that may have sounded nice and easy to Chief Justice Burger, but there's one really big problem with a new statute. Can you guys guess what the one related problem is?

AUDIENCE: The veto.

STEVE VLADECK: The veto, because Congress pulling back power from the president can't do it without the president. And so we have this modern completely bipartisan phenomenon where presidents

tend to not like having their power taken away, right? The only exception is Jimmy Carter. In modern US history, the only president who has happily signed on to statutes taking away the power the executive branch is President Carter. Maybe we'll have another one in a few years.

All right. Why does this matter? Well, it matters in two sort of historical respects. And then it really matters when we fast forward to today. So let me do the historical respects first.

Number one, Congress reacts to *Chadha* in just about the stupidest way possible. So if you're Congress and the Supreme Court says, hey, guys, you can't have legislative vetoes anymore, which means you're going to have real trouble delegating power to the executive branch, you might think Congress's reaction would be, well, let's delegate less power.

Instead, Congress goes back and amends not all of the legislative vetoes, but some of them to turn what had been a legislative veto provision into a new bill provision. And the National Emergencies Act is actually the foremost example of this, right?

Congress says, whereas before *Chadha*, you could terminate a national emergency through a concurrent resolution-- both houses of Congress and not the president-- now guess what, everybody? You can still terminate a national emergency-- just pass a new bill.

Mind you, Congress didn't have to say this. You didn't need to amend the NEA to say that. But the upshot was, we're going to create special procedures where a bill to terminate a national emergency will get fast-tracked. It'll go through the House quickly, where it can't be amended.

It will have to be voted on once one chamber votes on it. So Congress says, we're going to replace the legislative veto with a new bill termination provision. But don't worry, everybody, when the time comes to terminate a national emergency, we'll move quickly, and that will save us.

That happened in 1985. And for about 33, years no one noticed because presidents tended to not take advantage of the breadth of those delegations. They were there. But even as President Reagan, George HW Bush, Bill Clinton, George W bush, President Obama-- even as all of these presidents used the National Emergencies Act, none of those indications are especially controversial, right? None of them are portrayed as partisan. None of them sort of provoke this whole backlash that we've seen with President Trump. And so this problem has been there for 33-34 years, but no one has really noticed.

All right. So that's big historical feature number one. Big historical feature number two that I

think has also been largely overlooked is that the court itself has basically said it therefore can't be up to Congress to circumscribe an existing delegation unless they're going to get the president's permission or, heavens to Betsy, enough votes to override a veto-- so 2/3 of both chambers.

That doesn't happen very often these days, right? But the courts in the process have not changed their role. Because one reaction might have been, all right, so Congress can't supervise these delegations quite as carefully, maybe we, the court, should therefore be more active in supervising the limits of the power that Congress is delegating. In fact, the court has moved in the opposite direction.

So for a time, there was something in American constitutional law called the Non-delegation Doctrine. And the Non-delegation Doctrine was the idea that Congress could not delegate its power to one of the other branches, nor could it delegate one of the other branch's powers to another branch. In other words, that the legislative power has to be exercised by the legislature, executive power by the executive branch, judicial power by the courts.

It is pretty hard to reconcile the modern administrative state with the Non-delegation Doctrine. And indeed, one of the dramatic moments in American Constitution history is in 1937, when the Supreme Court not only turned its back on the Lochner Era, but when it also turns its back on the Non-delegation Doctrine. Right?

Today, there really is almost no Non-delegation Doctrine. Congress can delegate power to other branches as long as there is an intelligible principle binding on the delegation. And one of the most important modern non-delegation decisions was the Supreme Court's 1988 decision in a case called [*Mistretta*, ?] where the Supreme Court had basically delegated to this body called the US Sentencing Commission the power to make all of the rules for criminal sentences for federal prisoners-- what we might think of as a legislative power, right?

So I say all this because, when we think about the structure, at the same time you have the Supreme Court saying, Congress, you cannot supervise delegations [? through ?] a set of vetoes, you have the Supreme Court saying, Congress, you can delegate as much power as you want to, you have Congress saying, OK, sounds like fun, and you have the executive branch. And as I said, with the exception of Jimmy Carter, every president since this time period has claimed various species of delegated power that were novel in at least some respects.

All right. Are you guys with me so far? Making sense?

All right. So fast forward to President Trump, our dear friend. If nothing else, he is good for business.

Tough crowd. OK.

[LAUGHTER]

Legal business. Lots of business. Media business. Twitter, right? What would have happened to Twitter without President Trump?

Before we get to the NEA specifically, one of the hallmarks of the Trump administration has been taking advantage of the breadth of statutory delegations across a wide array of statutes to a degree that prior presidents had not.

So let's take one example from yesterday. There are actually two examples just from yesterday. I mean, this is what I'm talking about.

So example one from yesterday-- Ken Cuccinelli-- we're in Virginia. So I feel like I get to talk about Ken Cuccinelli, the former attorney general of Virginia.

So Ken Cuccinelli was somehow appointed as the acting director of the US Citizenship and Immigration Services Agency-- this is one of our immigration agencies-- even though he had never previously served in any position in the executive branch and the relevant statute, the Federal Vacancies Reform Act of 1998, kind of says that you have to have been serving in at least some position before you could be appointed as the acting director, as an acting officeholder.

And basically, what the Trump administration did was they created a brand new position that did not previously exist above the senior prior-existing officer in CIS. Right? So there was a deputy director-- there still is a deputy director named Mark Koumans.

And the administration says, aha, no problem, we will create a position called Principal Deputy Director. And lo and behold, who is going to be our principal deputy? Look, it's Ken Cuccinelli. Right? Because this position did not require senate confirmation, they could just put him in. And because principal deputy director is senior deputy director, Cuccinelli becomes the first

assistant to the actual director of the agency, who doesn't exist because he was fired.

Right? So by creatively interpret in the Federal Vacancies Reform Act, the Trump administration is able to install, for at least seven months and perhaps more, Ken Cuccinelli, who whatever you think of him, has no chance of being confirmed by the Senate, to run this very important immigration agency for seven months and perhaps more.

This is not the first time the Trump administration has relied on a rather aggressive interpretation of the Federal Agencies Reform Act. We had an acting attorney general for a few months, Matthew Whitaker, who was arguably serving in violation of the FARA. We had an acting secretary of veterans affairs, right? And in all of these contexts, what the administration is doing is they are taking advantage of the breadth of statutory delegation in the FARA in ways that none of its predecessors had.

Which leads to this wonderful back and forth where folks say, this is abusive. And the response from the president's supporters say, but it's legal. Right? And the folks say, well, legality isn't the only thing we should worry about. And the Trumpy's say, yes, it is. Right?

Not the only example-- also tariffs. You haven't heard of those?

AUDIENCE: Mm-hmm.

STEVE VLADECK: I live in Texas. Right? Suffice to say, the Texas economy was on the verge of being destroyed because Mexican tariffs would have really been rather bad for Texas.

Tariffs-- where does the president get the power to even threat-- well, threaten is fine, but if he actually carried through on this threat with Mexico-- to impose massive tariffs just on a whim? The answer is a statute called the International Emergency Economic Powers Act-- [? IEEPA. ?] You have to say it like that. [? IEEPA. ?]

[LAUGHTER]

Right? And IEEPA, like the National Emergencies Act, delegates broad power to the president when he determines that the circumstances warrant to take particular actions with regard to economic policies-- blocking assets, sanctions, and so on.

There is also something called Section 232 of the Trade Export Act of 1962-- I'm sure you guys had that one memorized-- which is the authority the president used to raise steel tariffs

on Canada. That statute says, when the President determines it is in the interest of, quote, "national security," unquote, he can take actions like raising tariffs on particular products. Right?

So across the board, we see context where this administration is taking advantage of Congress-- I don't want to say being lazy. I don't think that's fair, but of Congress basically delegating power to the president on the theory that predominated after World War II.

The theory being the president, not Congress, is in a better position to act first, right? The president, not Congress, is in a better position to be responsive. And then the key is Congress's ability to pull back, right?

And until recently, I think the principal check on these authorities had been politics, right-- had been the notion that the president's own party, whether this president, President Obama, and the other president-- would not abide such trampling on the legislative priorities; that even if the text of the statute might support some of these moves, the politics of redoing the statutes this way wouldn't.

One more example before we get to the NEA and the border wall-- the Insurrection Act. So this is actually one of the most important and scary examples of this trend. So the Insurrection Act goes all the way back to the founding. It dates to 1807. And the Insurrection Act is the statutory authority pursuant to which, in some kind of emergency, the president is allowed to use the military for ordinary law enforcement.

So there's a statute from after the Civil War called the Posse Comitatus Act that generally bars use in the US military for law enforcement. But the Insurrection Act is one of the most important exceptions. And so when the president determines that it is necessary to suppress insurrection, to repel invasion, or otherwise to execute the laws of the union, he is allowed to call out the military for law enforcement.

This used to happen fairly often. But as police forces became more competent-- well, that's loaded-- as police forces became more powerful, there became less of a need for military support for police. Right? The police were more increasingly able to handle local problems. We're in the middle right now of the longest period in American history without invocation of the Insurrection Act.

If you learned two things today, one is Garfield wasn't killed by Vito; two, is the last time a

president used the Insurrection Act was George HW Bush in May of 1992 in response to the Rodney King riots in Los Angeles. Right? It's been 27 years, which is pretty remarkable.

Why do I mention it? Well, because apparently the Trump administration has been considering using the Insurrection Act to help basically remove immigrants who are subject to removal on the theory that there are roughly 11 million immigrants the United States right now who are theoretically and legally subject to removal. The government, at least currently, doesn't have the resources to effect the removal of more than maybe 300,000 to 400,000 in any given year.

And so the Trump administration says, OK, fine, how are we going to find those resources-- the military. Can they do that? Well, the text of the Insurrection Act is remarkably broad. It says, as long as the president determines that it is necessary, as long as the president proclaims that existing law enforcement authorities are inadequate to the task at hand, the statute seems to authorize it.

So why hasn't every president done this? Again, politics. Right? After Hurricane Katrina, the Bush administration refused to invoke the Insurrection Act not because there wasn't a good case for it, but because there was such a strong concern that it would be seen as trampling on states' rights in an administration where that was actually a very big deal. It was politics, not law, that stopped it. And I think what we're seeing today is that the political constraints are functioning in a different way, if they're functioning at all.

All right. So all of that brings us to the border wall.

Let me start I think with what's hopefully a helpful geographic-- have you ever been to the US-Mexico border, anyone? Some of you. OK. Good.

How is it going to work to build the wall across the whole border? So there are large swaths of Texas where it's pretty inhospitable, where building a wall is not really either necessary or likely to succeed. That what we're actually talking to is not the entire US-Mexico border.

We're talking about pockets of it-- pockets where there are historical patterns of unlawful crossing or unauthorized cross; pockets where there are insufficient resources to track what's going on. And a lot of this is actually not in Texas. Even though the Texas-Mexico border is by far the longest, a lot of this is actually in Arizona and California.

All right. Why do I say all of this? Well, the wall I think has become, in some respects, a metaphor for a broader debate, except that some people actually, literally mean a wall. So the

president goes to Congress.

And he says basically, I want-- initially, he says \$25 billion. That comes down to \$5 billion. And basically, I want you to appropriate money to help me construct a wall. And Congress says, no.

After a whole lot of negotiating, Congress comes back and says, all right, we'll give you a little bit of money for the wall. But I think that the final offer was like \$1.6, maybe \$1.8 billion-- they have the math slightly off. [INAUDIBLE] [? evaluations-- ?] he doesn't know the exact amount of money Congress came back for in the--

All right. So after this complex, complicated budget negotiation, first, the government shuts down, right?

We already forget this part of the story, that, first, there's a government shutdown because the president refuses to sign and the Republicans in the Senate refuse to pass a spending bill without sufficient money for the border wall. Then after the shutdown, the president basically says, never mind, I don't need appropriated money. I can just declare a national emergency. And the National Review will get me to where I want to go.

So how does that work? So now we need to come back to the National Emergencies Act. So the way the National Emergencies Act was designed to work is it is not a substantive authority unto itself. The National Emergencies Act is like a key in a lock.

And the basic gist is there are-- the Brennan Center has a really good reporting on this written by Liza Goitein-- probably somewhere around 100 so-called framework statutes that don't generally apply, that aren't generally on. They're generally off. And they say, but in time of national emergency or in time of war-- and some say both in time of war or natural emergency-- the president can have the authority to do things he doesn't otherwise have.

So one of the most sort of classic examples is something called the Alien Enemies Act of 1798. That statute authorizes the detention and removal of any national of a country against which the United States has declared war. We don't really do that sort of thing anymore, right? But basically, the flip of the switch is a declaration of war. And once there is a declaration of war, the statute can be used.

All right. So here's one of my favorite trivia questions-- what's the last country against which

the US declared war?

AUDIENCE: Come on, folks.

AUDIENCE: Hungary.

AUDIENCE: Romania.

STEVE VLADECK: Romania. Did you guys do this last week?

AUDIENCE: Yeah.

STEVE VLADECK: Oh.

[LAUGHTER]

Nuts. I was going to say. That was too quick. Romania, right? Dracula. All right.

[LAUGHTER]

All right. I've been doing this for 15 years. I've never actually had a Romanian in the room when I did that. Hello.

[LAUGHTER]

Don't worry. We're at peace now unlike some countries that we're still at war with. OK. Are there any North Koreans?

AUDIENCE: No.

STEVE VLADECK: That would be awkward. OK.

So the Alien Enemies Act is one example, but there are about 100 of these. And the basic idea is Congress says, OK, once again, we can't act quickly. And so instead, we're going to pass these standby statutes that are just sitting in a room for when the emergency comes. And the trigger for these statutes is going to be some kind of proclamation by the president.

The National Emergencies Act is perhaps the foremost example of this, where Congress says, listen, all of the statutes that are already on the books that give the president special power to act in an emergency are now under the rubric of the NEA. And the way that the president

authorizes activation of the statutes is by following the procedure set out in the National Emergencies Act.

So this is the build up to present using the NEA. And he uses the NEA to get access to one very specific statute. It's so specific, it doesn't have a name. It just a number. It's 10 US Code Section 2808. This is the whole reason why this happened, right? A national emergency was not declared just for-- pardon my French-- shits and giggles, right?

It was declared so that he could unlock this one statute. So when folks online are like, oh, well, a Democratic president could declare a national emergency and take our guns or declare a national emergency and do climate change-- I don't even know what that means--

[CHUCKLING]

--that's not understanding how the NEA works, right? The NEA is just a key where, when you turn it, it activates statutes that already exist. And the statute that was activated that already exists is 10 USC Section 2808, which is a statute that deals with the entirely esoteric topic of military construction.

And the statute says something to the effect of, when the president declares a national emergency, he may repurpose funds that have already been appropriated for military construction for other projects that are necessary for the armed forces. Right? That's the basic gist-- that if the president doesn't get more money, he can just take money that has already been appropriated and say, I'm going to basically repurpose it to do something other than why it was appropriated.

OK? And the whole reason for doing it this way is, well, the military construction budget is actually quite hefty. Right? It's a couple dozen billion dollars-- that's real money.

Years ago, if I'd done this, I would've done a Dr. Evil thing. But I think Austin Powers has faded into the cultural-- this is the problem. When you teach, every year, your students are the same age and you're older.

[CHUCKLING]

And so your cultural references really sort of fade quickly.

Anyway, so the whole idea was the military construction statute would accomplish two things.

One, it would unlock a huge pile of money. And two, it seemed at least superficially substantively on point. Right? Military construction for use of the armed forces-- dude, we're building a wall to protect the country. What's not military about that? Never mind that, historically, the military plays no role in border protection or enforcement. But c'est la vie.

So all of this drama was to get to one very specific pile of money that the president couldn't otherwise touch. And it's a pile of money that was already tasked for other things. Right? It was a pile of money that was supposed to be for rebuilding various things like military bases, fixing up some hospitals, et cetera.

OK. The challenges follow. Right? So right off the bat, everyone says, I'm going to sue to challenge this. But it's kind of hard at first blush to challenge a national emergency. So let's start with the national emergency itself. Right?

The president declared a national emergency. The first reaction is, this is not an emergency. Right? Well, who decides that question?

So if you actually read the National Emergencies Act, it does not define "national emergency." And it does that on purpose. It does it on purpose because Congress didn't want to try to write down what a national emergency was because they were worried they would miss something.

This goes back to the great debate during the time of the ratification of the Constitution, where the anti-federalists say, how come you guys didn't write down any rights in your constitution? And the federalists said, because if we wrote down some, you'd think we meant to exclude the others. Right? Well, they lost that one.

Here, Congress says, we can't predict every situation that will be a national emergency. Right? So instead, we'll create a procedural statute. So how would a litigant-- let's assume you could find one with standing. Let's assume you could find someone who was directly injured by the national emergency-- maybe a land owner along the border whose land is going to be appropriated to build part of the wall.

What would you tell a court about why this isn't a national emergency? You could say, well, "emergency" has this dictionary definition and this doesn't meet it. But the statute seems to say, no, no, no, it's up to the president. Right? Back to the problem of delegation.

So after that, we have this issue that, if you're challenging the emergency itself, there's probably a lack of what courts call judicially discoverable and manageable standards. In

annoying federal courts doctrine, it's probably a political question. It's probably non-justiciable whether in emergency actually exists because Congress has not seen fit to try to create criteria. Right?

Congress says, it's an emergency if the president says it is. And I understand that that-- when I say this on Twitter, the lawyers on Twitter-- the (SARCASTICALLY) lawyers on Twitter-- all say, you don't know what you're talking about. Right? I'm like, well, I mean, my bio's in my profile. You know?

[CHUCKLING]

They say, this is not an emergency. And I say, well, but it is whatever you think it is. Right? The statute says what it says.

To back up a second, I can point to other national emergencies that have been declared under the NEA since 1976 that no one would think met the definition of a national emergency. Of the three dozen or so active national emergencies, a bunch of them have to do with cutting off financing for terrorist groups overseas.

That's a great thing, right? That's good. I'm not sure anyone would say, oh, my gosh, a national emergency that this drug money is going to terrorist groups in Yemen, right? I mean, you guys walk around every day--

So all these people are like, it's day seven of our national emergency. I'm like, well, it's day 3,916 of our national emergency with regard to the Sudan. Right? How are you feeling about that one?

This is where I get in trouble. Nobody likes me. Right?

[LAUGHTER]

OK. So the national emergency part is actually pretty hard to challenge. The more, I think, interesting the challenge is the specific unlocked authority-- is the 2808 question. Because 2808 actually says, here's why the president can use these military construction funds and here's what he can use it for.

And I think there's a more plausible argument, that using it to build a border wall to basically help US immigration policy-- something that is never previously the purview of the military-- is

actually beyond the limits of 2808. Right? That it actually does go past the 2808 delegates.

And one of the ways to illustrate this is, along the US-Mexico border, there's only one military installation.

AUDIENCE: Fort Bliss.

STEVE VLADECK: What was that?

AUDIENCE: Fort Bliss.

STEVE VLADECK: Bliss actually isn't right on the border. It's the Goldwater Air Force Range in Arizona. Right? And that's it.

So if the funds were being used just to build a wall across the southern edge of the Goldwater Range, then [INAUDIBLE] it would be fine. But it's not, right? So it seems like, if there's going to be litigation over this, that's where the fight's going to be.

Now, there have already been a bunch of suits. The House brought a lawsuit, but that was dismissed because the district court ruled that the House did not have standing as the House-- an interesting ruling about sort of congressional standing. The case I think is much more interesting is this case called Sierra Club v. Trump-- it's always the environmental groups. Right?

So Sierra Club actually has already prevailed, at least in small part. They got a partial preliminary injunction from a district court in California, but not on the 2808 issue. And part of why that's happened is because we haven't gotten to spending the money under 2808.

The way the Trump administration is doing the border wall, they're actually starting with money they already had. Right? And the 2808 money-- the money that they're getting only because of national emergency-- is the last thing they're using. So if you think about sort of a [? queue, ?] there's a ripeness problem. We haven't gotten to the heart of the challenge over the national emergency.

I say all this just to say that I think the litigation is ultimately not going to be that revealing with regard to current or future uses of the National Emergencies Act-- that even if we get all the way to the bottom and even if the president loses on using 2808 specifically for this project, that won't prevent him or future presidents from similarly declaring national emergencies in the

future in context in which there is a broad consensus [INAUDIBLE] in which there's even substantial dispute that circumstances warrant. Yeah, pal?

AUDIENCE:

Yeah. I was trying to interrupt you earlier just as an aside. Seven years before *Chadha*, I was a Senate staff member. And I wrote a speech arguing that legislative vetoes were unconstitutional that the court--

I'm sure they didn't have it, but the arguments were pretty much the same. But one key was Article 1 Section 7 says that "every resolution order or vote for which the concurrence of both houses would be necessary shall be submitted to the president [INAUDIBLE] passed over his veto," which I thought was fairly [INAUDIBLE].

But back to this, I've argued the president can't do what he wants to do with the wall for a different reason. And that is the fifth amendment says, "no person shall be deprived of life, liberty, or property without due process of law." The Supreme Court has said that "eminent domain authority shall not be inferred unless clearly expressed in the statute."

In the [INAUDIBLE] case in *Youngstown*, the court noted that what the president was trying to do had already been considered and turned down by Congress, and the President's emergency authority-- it's not an emergency. He asked Congress to give it to him and they rejected it.

And then he said, oh, it is an emergency, there's not time for Congress to act. But how is he going to get around the fact that almost all the land belongs to private citizens? And if they don't voluntarily give it to him, I don't see how he has authority to seize that land. The National Emergencies Act says nothing about seizing [INAUDIBLE].

STEVE VLADECK: Yeah, I agree. So just to back up a bit, I've been talking so far on the formal authority to do the thing, right? There's still the question, as there always is in this context, of whether, even if the government has the authority to act in the abstract, the action as applied violates the rights of particular individuals. I haven't gotten to that yet.

In the context of takings, I think Bob is right that there's going to be a real issue in cases where you have hostile landowners. That said, I'm not as convinced I think perhaps as you are that the current court would be quite so quick to say, this isn't for public. That the current court wouldn't be quite so quick to say, there isn't sufficiently expressed statutory approval and that this isn't for public use.

So I'm a little more circumspect about the prospects of a takings claim. But-- and this is the point I want to stress-- the constraint, again, is also political. Right? That part of the push back to the wall has been from conservatives in Texas. Right? That remarkably, there is actually very little support for the wall among conservatives not in Texas in general, because there is plenty of support in Texas in general, but along the border.

So Will Hurd is the congressman for this ginormous district in West Texas-- I think it's the 23rd-- that basically runs from just outside of El Paso halfway down to the Rio Grande Valley. He's the only Republican by the way in the House who represents a border district.

The other eight districts along the US-Mexico border are all Democrats. And Hurd is one of the only Republicans who repeatedly voted with the Democrats on the spending issues because his district is-- so again, Bob, the politics of I think are actually doing as much work as the law. Right? I'm sorry. I saw head over there.

AUDIENCE: Yeah. I had two questions. The first question is, in regards to the NEA and the definition of "emergencies", why can't a state get standing to file suit?

STEVE VLADECK: Right. I'm sorry. And the second question?

AUDIENCE: And the second question is, the 2808 litigation, what is the standing there? And let me just throw up a hypo. If you were a contractor and you could receive money from that build contract--

STEVE VLADECK: Yes. Oh, they would absolutely have standing.

AUDIENCE: All right. To challenge?

STEVE VLADECK: Yeah. So let me take those questions in turn. So for those of you who are less familiar with the US legal system, "standing" is this threshold question we have to satisfy in all litigation. Standing is basically, were you, the plaintiff, actually injured by the [INAUDIBLE] challenging, did the defendant caused it, and can the court actually provide the requested relief?

So courts are generally skeptical of what's called institutional standing. That's why Congress generally isn't allowed to sue anytime it disagrees with what the president is doing. It's why the House was held in part to not have standing to challenge the wall.

States are trickier. The Supreme Court has said that states generally can sue to protect the

rights and the interests of their citizens unless they're suing the federal government. And the reason for that is because states are generally *parens patriae*-- it's "father of the people."

I don't mean to be gendered. But the states are generally acting on their own citizen's behalves. But where they're suing the federal government, they're not. It's the federal government that's *parens patriae*. So states generally can't sue the federal government unless the state itself is injured.

Now, some of the states along the southern border are injured directly, because some of that land is owned by the states. And there's tax consequences. I mean, there's lots of stuff. Texas is not in a hurry to sue the federal government over the border wall-- again, politics. California is. And California is one of the plaintiffs in one of these cases.

So there's potential avenues for standing along the way. You mentioned contractors, right-- those who would have had projects, but had the money taken away by the repurposing. They'd have standing. Sierra Club, an environmental group where the wall would have a negative impact, they allege, on various environmental preserves along the border.

So the issue is not finding someone with standing, right? The issue is sort of the way the government's spending the money is a little bit of a moving target. Yeah?

AUDIENCE: So how would Chevron deference contribute to a court decision of implementation of [INAUDIBLE]?

STEVE VLADECK: So I don't think Chevron's going to have much to say here. So Chevron deference-- this is the idea that when Congress passes a statute giving power to an agency and something in the statute is ambiguous, that courts will defer to reasonable interpretations of the ambiguous text.

AUDIENCE: [? Would that be ?] necessary [INAUDIBLE]

STEVE VLADECK: But the problem is that 2808 right is not actually a Chevron-type delegation. So it's not delegating substantive authority to the Department of Defense. Right? So it's not like a statute says, hey, EPA, go regulate point-source emissions and you decide what that means.

So I don't think Chevron's an issue here. Now, there's a broader issue, which is the amount of deference that courts give to the executive branch. My friend Bobby is going to be here tomorrow, Bobby Chesney. Please harass him. Give him a lot of trouble. Tell him I sent you.

So Bobby has a really, really, I think, powerful and good article from the *Virginia Law Review* from 2009 called National Security Fact Deference. And his article is basically trying to explain all the different ways in which federal courts in national security cases struggle with the question of how much to accept the government's submissions at face value and to what extent they should second guess them.

I think what we're seeing is that, in some of these cases, there's less of that deference because of the politics, because courts are saying, this doesn't look like a traditional exercise of power. But that's [? within ?] the lower courts.

The same thing happened with the travel ban, where lower courts uniformly ruled against the executive branch on the ground that the sort of deference ordinarily [? on ?] the immigration context would go by the wayside given what the president had said. And the Supreme Court disagrees.

So there's also, I think, an important difference between how the lower courts are treating these cases and what the Supreme Court may ultimately do because of the current composition of the Supreme Court. Yes, ma'am?

AUDIENCE: I actually have two questions.

STEVE VLADECK: Please.

AUDIENCE: About the national emergency [INAUDIBLE] or lack of [INAUDIBLE], isn't it supposed to be under the approval [INAUDIBLE] for [? traitors ?] or war?

STEVE VLADECK: You could argue that Congress, in not defining a "national emergency," actually necessarily implied that it's supposed something that was unpredictable or some kind of military thing. That hasn't been how it's been understood even before President Trump. That is to say that a national emergency--

I like to explain it this way. That, basically, "national emergency" is almost poor terminology. That Congress could have called it a category B event, right? And a category B event, whatever that is, triggers all of these statutes over here. The assumption is that by using the word "emergency," it must be emergent.

And that hasn't been the practice. Right? Even before President Trump, there are examples of national emergencies that by no definition are emergent, that by no definition are sort of

beyond ordinary capacities of existing institutions. It's just the way Congress has chosen to structure the delegation of power.

AUDIENCE: And in that regards, coming back to the wall, how is that going to affect the private landowners?

STEVE VLADECK: Yes. So this was Bob's point, right?

AUDIENCE: Yeah. Is it going to be a requisition like in the wartime or expropriation through the [INAUDIBLE]?

STEVE VLADECK: So it's going to be the latter, right? So the theory is, if we ever get to a point-- and by the way, just to be clear, I don't think we're ever going to get there. I think this is not going to actually happen, which is another sort of comment on the current moment. There's a lot of-- how do I say-- sound and fury, not always substance. Always good to work in a Faulkner quote early in the morning.

All right. So if we actually got there, the way it would work is the government would buy the land. Right? I mean, they'd have to provide just compensation [INAUDIBLE] with the Takings Clause. But it's not enough to walk up to the landowner and say, here's a check for the market value of your house. It has to be for public use.

And so what Bob is suggesting is there's a long line of Supreme Court precedent that basically says, when that happens, you need express authorization from the legislature-- that we don't want the executive branch to say, hey, I just felt like taking your property today, and that you wouldn't find such express authorization in the existing statutes. I think that's true. I'm not sure that's going to matter if the litigation ever got that far.

AUDIENCE: Because the "emergency" part does not concur, in my opinion, with expropriation.

In my opinion, I would argue that it [? is ?] a national emergency. So you have to take extreme measures.

STEVE VLADECK: Well, imagine if there was a separate statute. Imagine if, instead of 2808, there were a statute that said, in a national emergency, the president is authorized to take private property with just compensation.

Right? That would be the kind of clear statement Bob is talking about. And then we'd be

fighting over whether you've satisfied the Takings Clause's requirement that the taking be for public use. Sorry. Yeah, another question?

AUDIENCE: Yeah. So would it work differently for the land [INAUDIBLE]? Could they somehow say, absolutely not, we're not selling it to you?

STEVE VLADECK: They could try. Actually, I haven't looked at how much reservation land abuts the border. I don't think it's a lot. But let's just say there are complications here, which is probably why this is never going to happen. The long and short is the president is going to build a five-mile stretch of border wall and be like, look, I built the wall, and claim victory.

AUDIENCE: [INAUDIBLE]

STEVE VLADECK: Exactly.

All right. So all this to say this is where we are, where you have not just in the wall context, but across again across a wide range of activities, the president saying, I can do all of these things because even though we might not agree that the statutory criteria are met, Congress in its wisdom has delegated that decision to me, not to you, and elections have consequences.

So the last thing I wanted to talk about before throwing it open to the remaining questions is, so how do we fix that? Because whatever you think of the current president, whatever you think of our current political situation, I hope there's generally consensus that this is not exactly wise that this structure where any president at any time can just say, I'm doing this, even though it doesn't look like why you want me to do this because the statute is poorly written. Yeah?

AUDIENCE: Another question. Given that it's the border, doesn't the international treaty say that borders are like five miles [INAUDIBLE] state? Can't they just use that from a treaty point of view?

STEVE VLADECK: So there are precepts of international law about the area around the border, which I learned last year is called the limit trough, right?

AUDIENCE: [INAUDIBLE]

STEVE VLADECK: Right. So we have a whole lot of conversation about the United States' complicated relationship with international law. Suffice it to say the US generally takes the position that it's not bound by many of those principles of customary international law.

I don't think there are specific treaties to which we're a party that bar us from taking action, even within the five-mile zone up to our border. And even if there were, I think the US would take the position that it has the authority to override those treaties.

I don't mean to go down the international law rabbit hole, but I think that's probably less fruitful as a source for constraint. And again, I don't want to sort of lose the thread-- my concern is less about the border wall and more about the structural problem of overdelegation.

And Bob and I are going to debate this afternoon whether we need a new AUMF-- a new authorization for the use of military force. You guys are like, wait, there's more of you? Blech. Don't worry. Bob will set me straight.

But so the AUMF debate overlaps with this, because one of the whole sort of complaints about the authorization for use of military force is that it's too open-ended, that Congress in September of 2001 gave the president the power to use force against groups he determines were responsible for the 9/11 attacks, and that that power basically allows president to say, oh, Iran is responsible for 9/11 or France is responsible for 9/11. It's the same problem. Right? It's the problem of overdelegation and then Congress's inability to claw back the delegation without a new statute. Yeah?

AUDIENCE: [INAUDIBLE] answer this if it takes us down into the rabbit hole. But is it a problem of overdelegation or is the overdelegation a response to the system of power and the ability for the US to conduct policy in a quick and decisive manner?

STEVE VLADECK: So this is the question, right? And I don't think this is a rabbit hole at all. I think this is the whole debate over how you fix it, right?

So then the question becomes, in a world with *Chadha*, in a world where the legislative veto is [INAUDIBLE], is the right answer for Congress to pass narrower delegations, to give less power on the front end to be able to move faster on its own when circumstances warrant?

And this is my sort of big setup-- or the answer sunsets where we actually keep all of the authorities as they are; where we still allow the president to go first, but where we pass far more aggressive sunsets where the authority the president has expires on its own barring some affirmative congressional re-authorization within a short period of time? And this to me, guys, is the easiest, obvious, cheapest, least politically controversial way out of this mess.

So let me sort of take a step back. Sunsets-- Congress of course has the ability when it

passed the statute to say, this authority will expire in x number of days, months, or years. We might actually fight a little bit this afternoon about whether that's true for use of force authorizations. But I at least think that's true for those as well.

And we've seen that before, even in the national security space. Have you guys done foreign intelligence surveillance yet?

AUDIENCE: Yeah.

STEVE VLADECK: All right. So FISA-- FISA is full of sunsets, especially the non-title 1 authorities, especially the authorities that go beyond just individual warrants based upon probable cause. Those authorities all sunset. The Business Records Provision 702-- they expire every three years. I think there's a sunset coming up later this year for some of the authorities. Right?

Those sunsets don't terminate the authorities. Congress's pattern historically since 9/11 has been to basically reauthorize-- sometimes with tweaks, sometimes not-- the same programs. But they require repeated, recurring, periodic legislative buy-in in ways where inertia is insufficient.

So for example, I think it was really powerful-- the Snowden disclosures, for better or for worse, had a pretty powerful impact on the re-authorization of Section 215 of the Patriot Act that it wouldn't have had if Congress hadn't had to reauthorize Section 215 of the Patriot Act. Right?

So we already had examples in the national security space through the surveillance wedge of sunsets. And my idea and my suggestion-- it's not only mine-- is we should incorporate sunsets into all of these authorities-- that AUMF's should sunset, that national emergencies should sunset, that international economic emergencies should sunset-- not because these things should expire automatically, but because Congress should have to be able to continually re-approve them.

So in the NEA context, imagine if the statute said that the president can declare a national emergency, but Congress must approve the emergency within 30 days of the beginning of its next meeting. Right? So allow for the fact that Congress might be out of town. But say, hey, Congress, when you're back in town, you've got 30 days. And at the end of those 30 days, if you haven't approved it, the emergency is over. That won't solve all the problem. Right?

So in the border wall context, President Trump could have been ready to go, declare the emergency, transfer all the money out of the Military Construction Fund, and then the emergency ends. But it might help in other contexts. Yeah?

AUDIENCE: Sorry. Just to follow up on that, it seems like a software fix rather than a hardware fix, right?

STEVE VLADECK: Indeed.

AUDIENCE: Has anyone challenged the sunset clause, any president? And is there a way you could challenge it? And again, if this going down the rabbit hole--

STEVE VLADECK: No, no, no. I'm trying to think. So President Nixon in his veto message of the War Powers Resolution did not expressly challenge the fact that the WPR would have expired on its own after 60 days. But he sort of leads in that direction-- that there's something weird about having the president's power expire. But that was predicated on the notion the president was exercising his inherent constitutional authority and that Congress could not set time limits on the president's inherent contention authority.

I think it's different when Congress is setting time limits on authority it has delegated. All right? That's to say that's not the argument Nixon was making. Right? Here, Congress could say, dear President, you can either have no authority if you veto this bill or you could have authority that will expire in 60 days if you sign this bill. And I think that's less constitutionally problematic from the Nixon perspective.

AUDIENCE: There's a lot of authority that's overlapping, right? So AUMF-- there's a lot of authority that the president has to make the same argument, right?

STEVE VLADECK: That's right. And this is why it's complicated in the AUMF context, which we'll talk about this afternoon. I'm not sure it's nearly as complicated in the NEA context. Right? Because in the NEA context, we're talking about framework statues that wouldn't exist and authorities that I think would be very hard to argue the president would have on his own but for Congress' delegation. Yeah?

AUDIENCE: So I understand the suggestion. But doesn't that suggestion also invite though another problem that we have at Congress, which is political brinkmanship? And so when you have a situation that is-- maybe it's still a national emergency by the nebulous definition, but kind of further from what we would think is an emergent evacuation, how that plays out?

STEVE VLADECK: Yeah. I think the lesson that hopefully we're learning from the recent moment is that we shouldn't rest our institutions on the idea that political checks will always function normally. And the brinkmanship problem I think is legitimate.

But if you look at the surveillance context, the brinkmanship actually pushes in the other direction, or at least it has thus far, in surveillance reform debates, where I think members of Congress who might have otherwise been more skeptical of re-authorization bills have been basically-- "coax" is too strong, but I think influenced into sort of the potential implications of terminating a program that they don't understand the consequences of terminating.

Right? So I actually think the politics, for better or for worse, lean inherently toward re-authorization. And that might be a problem unto itself, except compared to the status quo.

So think about the AUMF again. Assuming it would be constitutional to put time limits on the AUMF-- and I think we'll get into some of that this afternoon-- imagine if Congress in 2006 had had to revisit the AUMF, and again in 2011, and again in 2016.

I think we would have far more specificity about exactly who we're fighting. I think we would have more specificity about the objects. And I think there'd be less room for any president-- this president, previous presidents, and future presidents-- to take advantage of the vagueness of the statute in ways that we've seen.

The political brinkmanship I think would mean that the re-authorization bills will be deeply flawed, that they will be suboptimal in lots of respects. But, to me, that pales in comparison to the value of re-authorization-- that at least there will be new buy-in from this Congress.

The AUMF is a good example. We're down to I think 17% of the current Congress voted on the AUMF. Right? There are now soldiers in the US military who are old enough to die fighting for this country who weren't alive when the AUMF was enacted. Right?

So the idea behind sunsets is, yes, the politics will be screwed up-- they're always screwed up. Better that than just inertia. And I think the problem that has been especially clear the last two years, but I think was actually visible to lots of closer observers before that, is that inertia is a real weapon for the executive branch-- that presidents can use inertia to slowly accumulate power that I think if we actually had a national debate about, we'd be a little wary of giving to the executive branch. So we shouldn't be oblivious to the brinkmanship. I just think that that's a cost worth excepting. Yeah?

AUDIENCE: Just to add to that. I think it also adds accountability to the system, whereas currently you have a lot of representatives in the AUMF circumstance who said, I--

STEVE VLADECK: I didn't vote for it.

AUDIENCE: I didn't vote for it, but they're not willing to-- [INAUDIBLE]

STEVE VLADECK: That's exactly the point.

To go back to Chadha for a second, one of the points that Burger made in the majority opinion is that one of the virtues of Article 1 Section 7 is the accountability it promotes. Right? That for each action, you know that the House approved it, the Senate approved it, the president approved it or veto override.

And the AUMF is so emblematic of the broader national security space, where there is just so much inertia where members of Congress could say, I am opposed to this, but never have to vote on it, but never actually have to put their money where their mouth is. And maybe they're not opposed. Right? Maybe if push came to shove and there was a vote, they would actually support it. Fine. It's their prerogative, but that's the value to [? people. ?]

So we've seen one proposal of this already. So Senator Mike Lee introduced a bill called the Article One Act-- acronyms-- which would have basically interposed some kind of sunset requirement for national emergencies. But he dropped it pretty quickly.

So he did a big press event and then no follow up. And it seems to me that Congress [INAUDIBLE] not just about the National Emergencies Act, but about national security delegations in general is why we don't sunset all of them. And the sunsets could be generous, right? I mean, for the AUMF's, five years. And I still think we'd be in a better place than we are today. Yeah?

AUDIENCE: Will the sunset construct be [? breached ?] [INAUDIBLE] invocation of the emergency or would it be a provision allowing for the president to declare the emergency?

STEVE VLADECK: So you could write the bill in different ways. If I were in charge-- well, we'd all be screwed. But if I were in charge, I would say, whenever the president declares a new national emergency reauthorizes an existing national emergency, Congress has-- I would say 60 days, because I think 30 is unnecessarily short. But basically, within 60 days, Congress has to pass a resolution and the president has to sign it approving the emergency or else it will expire.

Yeah?

AUDIENCE: Politically, given that both parties now seeing the benefits of this, are any of the software fixes actually realistic? Because they could always envision where they will be the president without this. And they can then do what they want. So I worry that [INAUDIBLE] and where we should change it, the parties would politically not be willing to do it [INAUDIBLE].

STEVE VLADECK: So I daresay it's worse than that, because I think there is also quiet acceptance. The same people who are criticizing the incumbent president for doing this are actually quietly happy that this presence is claiming that power. Right? And so there's also hypocrisy. Hypocrisy, who knew?

Yes, the politics are bad. I think we are seeing, in as stark a form as we've seen certainly since I've been old enough to notice these things, is sort of this thesis that's popular among contemporary political scientists that we're increasingly characterized by the separation of parties, not the separation of powers.

We could talk about some of the reasons for that. And I actually would, if we had time, try and convince you that partisan gerrymandering has a lot to do with why that's happened-- that Congress is polarized because primary elections have become more important than general elections and that you win primaries by running to the base, not to the middle.

But to me, the way to fix it unfortunately is a president who's willing to lead on the subject-- a president who's willing to actually make it an important part of his or her domestic agenda to restore the balance of power between the branches and then forces members of his or her own party in the Congress to get on board. Because at that moment, it would be very hard for the opposition party to oppose.

So imagine a hypothetical scenario where some Democratic candidate somehow wins the presidency in 2020. So it's 2021. And you've got, let's say, a Democratic president, Democratic House, Republican Senate, which I think is not beyond the realm of possibility.

If you had a president who said, I want to champion all of these bills that will actually in my mind restore a healthy balance of power between Congress and the executive branch, I think the Democrats in the House would have to go along and that the Republicans in the Senate would look really bad if they opposed it. Right? But it's going to take a president. Congress is not going to be able to do it itself because of the things that you suggest.

And so I don't want to say we need another Jimmy Carter, but we need a president who actually thinks it is an important part of their agenda to restore legislative constitutional power.

And I don't see virtually any of the 417 people running for the Democratic nomination who have so far made that a big thing because it won't be popular in the primaries. you. Can't say that in the primaries. But maybe when it comes time for the general, we'll see that. Yeah?

AUDIENCE: And you might have mentioned this. Is there anybody that makes that argument that sunset provisions are actually bad because if you do need some type of extraordinary use of legislation, then if there's no framework in place, then [INAUDIBLE]?

STEVE VLADECK: Yeah.

So leaving aside the congressional debate, I think there are three principal objections to sunsets. One is the brinkmanship problem. Right? One is the sort of handicapping problem-- that on day n plus 1, you could have a real issue.

And Bobby, who will be here tomorrow, also thinks that they're ineffective, not just because of the politics, but that basically, what is to stop the president from declaring a new emergency on day n plus 1 and starting the clock over again? To me, those are mostly drafting problems, right? That is to say that I think you can actually account for most of that by writing the statutes in careful ways.

So for example, if you sunset an AUMF, no one's arguing that on day n plus 1, the president loses his Article 2 power to respond to attacks. Right? No one's arguing that on day n plus 1, the president can't use other statutory authorities that are existing.

The drafting is hard. I think part of the problem with the Mike Lee proposal is that it's really superficial and you actually have to think through a whole bunch of scenarios in ways that I don't think his staff has yet. But I do think you can, not solve, but mitigate these concerns by drafting the statutes in a way that make it clear, not just what happens on day n, but what happened on day n plus 1. Yeah?

AUDIENCE: In the case of a tariff, you mentioned IEEPA. [INAUDIBLE] in the directory of IEEPA. And I'm not a lawyer. I'm just basically talking from the perspective of teaching and researching [INAUDIBLE].

There was a moment when there was something called the Berman Amendment that said, yes, there is an emergency, you are using the IEEPA, but there are certain principles that we hold very important. And there is a conflict with first amendment issues and things like that. Therefore, delegations that are about [INAUDIBLE] of information cannot be subject of the triangulation of transactions with people living abroad under IEEPA.

I don't know if there is a way to do that. But it is clear that tariffs could be-- somebody could imply that republics are based on trade or soci-- but you know this. I'm not going to go through this in your way.

STEVE VLADECK: No. Yeah. There is--

AUDIENCE: But there may be a way to [INAUDIBLE] of American economic contacts with the outside world-- I don't know-- protected, insulated from the--

STEVE VLADECK: I think I saw somewhere that there was a member of Congress who was proposing, before the president backed down because of this wonderful deal that no one has seen--

[LAUGHTER]

A member of Congress was proposing legislation that would amend IEEPA to expressly preclude the use of the emergency power for tariffs basically to take away from the IEEPA emergency authority tariffs specifically, sort of like the seizure issue in Youngstown.

Guys, my reaction to that is, sure, there are one-off examples that I suspect we could get behind for particular authorities that ought not to be available even when other things are true. But I don't think that solves the structural problem. because. The Mexican tariffs were going to be run through IEEPA, but the Canadian tariffs were run through a different statute. Right? The steel tariffs were run through the Trade Export Act, which has this crazy open-ended delegation.

So I'm not averse to sort of case-by-case amendments to these statutes to make sure that the authorities are less open-ended once the emergency is declared. But I still think there's the problem of things Congress can't anticipate, right? It's tariffs today. It was vacancies yesterday. It'll be space tomorrow. The Space Force-- which will go through that the Moon is indeed part of Mars.

Right? So I say all this is to say, if we're going use the software/hardware metaphor, those are very specific lines of fixing the code, whereas I want to rewrite the base software.

AUDIENCE: [INAUDIBLE]

STEVE VLADECK: Yeah, [? it did. ?]

AUDIENCE: I'd be interested in knowing whether other countries represented have similar legislation emergency powers and whether you'd face some of the same problems, such as Australia or Canada? Anybody want to comment on that?

AUDIENCE: Well, in Canada, we have a couple of different pieces of legislation. We have one called a War Measures Act, which was used in the 1970s when we had some internal terrorism going on in Quebec. But most recently, we had a part of our constitution that is called the "peace, order, and good government" provision.

And it allows for the federal government to enact different kinds of legislation to override things that it believes is in national interest. And most recently, they enacted legislation for climate change. And some of the provinces are actually suing the federal government over it. And it's kind of going through the courts of appeal right now.

STEVE VLADECK: We've seen the future, because that's US in 2021 or 2025.

My gut-- and I'm not a comparativist. So this is just rank amateur speculation-- is that there are some structural differences when you have parliamentary systems.

To me, one of the [? seminal ?] virtues of parliamentary systems is that you tend to have less drift of power from the legislature to the executive because they're so intertwined in ways that they're not in the US system-- maybe not formally, but at least practically. Right? And part of the issue here is that we have sort of hermetic seals that parliamentary systems don't. But I don't know if that's reflected in the Canadian experience.

AUDIENCE: I think there's also a lot less antagonism and partisanship--

STEVE VLADECK: In Canada? No.

[LAUGHTER]

AUDIENCE: It's somewhat easier to-- people are less opposed to the federal government passing climate

change and taxation legislation under the rubric of "peace, order, and good government."
There's just not any strong antagonism.

STEVE VLADECK: To me, one of the ironies is I had long thought that one of the most powerfully compelling principles of the modern Republican Party had been limited federal government, right? I don't always agree with it, but I understood it.

And one of the things that I've been totally screwed up about American politics in the last two and a half years is that, all of a sudden, we're for huge government if it's doing certain things, but not other things, right? I don't know, Dave, how we walk back from that.

Any more q-- I think we're almost out of time. More questions? Yeah?

AUDIENCE: We've got 10 minutes.

STEVE VLADECK: Oh, 10 minutes.

AUDIENCE: How about Australia? Anybody--

AUDIENCE: Yeah, I'm from Australia.

STEVE VLADECK: Please.

AUDIENCE: So I guess--

STEVE VLADECK: Is *Secret City* right?

AUDIENCE: *Secret City*? [INAUDIBLE]

AUDIENCE: Not likely.

[LAUGHTER]

It's nothing like it.

AUDIENCE: I haven't seen that. But I'd like to watch it.

AUDIENCE: So for us, I guess because we're a parliamentary system, there are some differences. So things like declarations of war and things sits [INAUDIBLE] with the executive, nothing really to do with the parliament. I think as well from a political view, there's lots of bipartisanship on those issues in Australia. So essentially, on all things national security, there is very little

difference between both parties.

We do have some kind of emergency [INAUDIBLE] powers, but they're very, very limited. And they really relate to able the ability to call out the military, for example, for domestic [INAUDIBLE]. Yeah. Just one--

STEVE VLADECK: How often are those used?

AUDIENCE: They only recently amended. And [INAUDIBLE] unless-- yeah, so it was probably the last time. So rarely used. And on thing we'd say though is that the border is a very big issue in Australia. For those of you who have never seen [INAUDIBLE] immigration laws.

And it's being characterized more and more as being an issue of national security. And the military has been much more involved along the border, stopping people and boats coming from the north as well. So yeah. But that's generally received bipartisan support.

STEVE VLADECK: There was a time that was true here as well, right? There was a time where national security was not always a partisan thing in the US. I don't want to draw a rose [INAUDIBLE]. Partisan [? thought ?] some of it. But it never was like, if you're a Republican, you believe x about [INAUDIBLE] if you're a Democrat, you believe y. That I think is a newer phenomenon in American politics.

AUDIENCE: Steve, I think just in the Australian experience, what you said before about-- our executive is essentially part of our legislature. Our cabinet sits in the parliament. So when we have power struggles, they are not really between-- like, you guys have the Congress and the executive.

We've had some pretty stark divides between what's considered a senate power and then what's considered a lower-house power, if you like. We have a lot of disputes about what's a state power and what's a federal power. But yeah, there doesn't seem to be this conflict between the executive and Congress quite the same way you guys have it. It's a little bit more streamlined.

STEVE VLADECK: And what role do the courts play? Are they aggressive in resolving those disputes or generally deferential?

AUDIENCE: [INAUDIBLE]

AUDIENCE: Yeah. [INAUDIBLE] case, which actually goes to our high [INAUDIBLE] Supreme Court. But

there's generally quite a bit of deference to the executive in those times.

AUDIENCE: I would say that's not as much the case in Canada. The courts are quite interventionist. They will do whatever they believe is right.

STEVE VLADECK: I think the Canadian courts are probably up there with the Israeli courts in sort of, we do what we want when we want, and if the executive said it's bad, what do they know?

I make no bones about what I think about our current president. All you have to do is look at my Twitter feed and you'll know-- you probably know already. But I do think that there is a very-- I won't say healthy, but educational service that the sort of approach of this administration ought to have with regard to exposing and fault lines that are not new, that I think have been there for decades.

Bobby makes fun of me because, my whole career, I've been writing about obscure topics in American national security law-- articles that nobody reads. And all of a sudden, they matter. That wasn't my plan.

And the fault lines I think are not about Trump, right? The fault lines are about this much longer, deeper structural sort of nonpartisan drift of power from the legislature to the executive, which I think is especially problematic in a presidentialist democracy because of the structural separation between the branches that you don't see in parliamentary systems.

And I wish that we could sort of extricate ourselves from the politics of Trump to have a conversation about the problems of the drift-- problems that lead Republicans during the Obama administration to scream bloody murder about various things that President Obama did and that I'm sure will lead future opposition to whoever is president next to do the same thing. That's the conversation I think we ought to be having.

Whatever we think of sunsets, I think there are ways to close some of these gaps to clean up some of this mess. I just wish we would focus more on those. Yes?

AUDIENCE: Those aren't permanent though, right? So you could go back. You could fix--

STEVE VLADECK: You could undo sunsets.

AUDIENCE: The next president to come in comes in and says, all right, we're going back to where we were [INAUDIBLE] Congress. So what are the systematic changes that you could envision, even if

that would be hard to imagine that you'd ever see pass, where you would change the actual dynamic [INAUDIBLE]?

STEVE VLADECK: Yeah. So Bob and Dave know this well about me. I am first and foremost a judicial maximalist. It's a very strange time to be a liberal-progressive in this country and a judicial maximalist. But that's what I am.

And I actually think that the biggest structural reform I would like to see is less deference from the courts. Right?

There so many contexts in which the US courts in the last 20 years have shown less deference to the federal government than they used to-- legislation, right? The Commerce Clause-- if you're not an American lawyer, the amount of ink that's been spilled over the scope of Congress's power to regulate interstate commerce.

I don't know that I agree with the court's answer to what interstate commerce is, but I do like the court taking up the mantle into their [INAUDIBLE] to decide that. I would like to see the court take the same approach to the rest of the federal government.

To me, the real problem with the travel ban case isn't the result. It's the reasoning. Right? The real issue in the census case the Supreme Court's going to decide the next couple of weeks is there is pretty powerful evidence that the government is lying through its teeth about why it did what it did. To me, that should matter. Right?

So to me, the structural reform here is a generation of judges who are taught not to fear the executive branch, who are taught to use their independent judgment whether I agree with it or not to review everything the executive branch and Congress-- what every government actor is doing.

I'm not especially optimistic that that's going to happen, but it's what I'd like to see if I had my druthers. To me, the courts are in sort of the second-best position after the president to really create pressure on restoring these institutional dynamics. And Congress is the worst, right? The president can go first. The courts I think are the second-best. But the one place where this is never going to happen is Congress because all the incentives are wrong.

AUDIENCE: So you don't see a constitutional failure [INAUDIBLE]?

STEVE VLADECK: My colleague at UT is Sandy Levinson. If you guys don't know Sandy Levinson, Sandy has

basically made a whole career out of arguing that the Constitution sucks.

[LAUGHTER]

He writes better titles. But his basic argument is that we revere a broken constitution. Right?

For Sandy, the last couple years have been amazing. Right? Like the electoral college-- I've been telling you guys about this for years. Right? I don't think the Constitution is broken-- or at least I don't think it's more broken than it was two years ago. I think the Constitution is-- well, I was about to quote *Hamilton*.

The Constitution is a mess, but it always has been. And we have evolved structural responses to make up for the ways in which it's a mess. My concern is that some of those I think really sophisticated structure relationships are decaying largely because politics have become more important than institutions. Right?

There's an old line about a first-term Democratic congressman who shows up in Washington. And he finds a senior member of his caucus, says, where is the Republicans, I want to see the enemy. And his senior colleagues says, the Republicans aren't the enemy. They're the opposition. The Senate, that's the enemy.

That's not true anymore, right? And so I don't think the Constitution is broken any more than it has been forever. I think the accommodations we have made to account for its deficiencies are weakening. And I'm interested in how we can bolster them. Yeah?

AUDIENCE: I think that Congress isn't interested in standing up for their own power.

STEVE VLADECK: Because it's never--

AUDIENCE: It's almost like what they need to do to get reelected is totally separate from actually exercising their legislative power.

STEVE VLADECK: That's where we are. I think we're at a point where it is almost never in the interest-- it's in the opposition's interests, right? So whoever is not in charge of the presidency, it is in their interest to scream bloody murder about the separation of powers. But unless you have one party with veto-proof super-majorities of both houses, you're not going to get any legislation through. That's just going to be them shouting at the moon.

AUDIENCE: Do you think term limits would help with that?

STEVE VLADECK: No-- sorry, that was too quick.

[LAUGHTER]

Term limits have lots of pros and lots of cons. But to tie a couple threads together, what I really think would help is more aggressive judicial constraints on partisan gerrymandering.

If you guys follow the US Supreme Court, I think the most important decision the court is going to hand down this term are in two cases called [INAUDIBLE] and *Benisek v. Lamone* about partisan gerrymandering-- about the power of state legislatures to draw congressional lines based solely on partisan considerations to maximize the power of one party and minimize the power--

I live in Austin, Texas. Austin is the 11th largest city in the United States. The county Austin is in, in the 2018 Senate election, voted for Beto O'Rourke, the Democratic candidate, 75 to 25. Right? So our county is 3-to-1 Democrat. There are six congressional district that cut through different parts of Austin, a 75-25 jurisdiction. And of those six congressional districts, one returned a Democrat because the Texas legislature is very good at disenfranchising Texas Democrats.

To tie together judicial maximalism and more institutional responsibility, is send more moderates to Congress. And the way you send more moderates to Congress is you make general elections more competitive. And the way you make general elections more competitive as you constrain the ability of state legislatures to gerrymander. That won't fix the Senate, because you can't gerrymander the Senate. But back to the Constitution.

I'm not one of those who thinks the Senate is unconstitutional-- unlike some of my colleagues. I know. It's a weird argument, but it's there.

AUDIENCE: [INAUDIBLE].

STEVE VLADECK: It's out there.

AUDIENCE: Steve, thanks very much.

STEVE VLADECK: Yeah. Thanks, everybody.

[APPLAUSE]