EXAMINING POTENTIAL REFORMS OF EMERGENCY POWERS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

TUESDAY, MAY 17, 2022

EXAMINING POTENTIAL REFORMS OF EMERGENCY POWERS

Tuesday, May 17, 2022

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 9:33 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

Members present: Representatives Cohen, Ross, Johnson of Georgia, Jackson Lee, Jordan, Johnson of Louisiana, McClintock, Roy, and Fischbach.

Staff present: Aaron Hiller, Chief Counsel and Deputy Staff Director; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian and Senior Counsel; Gabriel Barnett, Staff Assistant; Merrick Nelson, Digital Director; James Park, Chief Counsel for Constitution; Agbeko Petty, Counsel for Constitution; Will Emmons, Professional Staff Member/Legislative Aide for Constitution; Ella Yates, Minority Member Services Director; James Lesinski, Minority Senior Counsel; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. The Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Rights will come to order. Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time.

I welcome everyone to today's hearing on examining potential reforms of emergency powers, a very serious topic which we have explored in the past and will explore again.

We have established an email address and distribution list dedicated to circulating exhibits and other written materials and motions the Members might use today. Send them to the email address, if you would like to do so, that we have previously shared, and they will be distributed.

Finally, all Members and Witnesses should mute their microphones when you are not speaking. This will help prevent feedback, other technical issues, and you saying things you don't want to have heard. You may unmute yourself at any time when you seek recognition.

I now recognize myself for an opening statement. It was fitting that our first hearing under my Chairmanship of this Subcommittee which was in February of 2019, was on the National Emergencies Act of 1976 and its implications for one of the core tenets of the Constitution's design, namely a governmental structure defined by checks and balances, and the separation of power, nothing more fundamental in our system.

The specific impetus for that previous hearing was then President Trump's attempt to invoke emergency powers to divert billions of dollars in military construction funds to build a border wall. We heard a number of broader and bipartisan concerns about the National Emergencies Act and Congress' delegation of emergency authority to the Executive.

The National Emergencies Act was enacted in 1976 to constrain the use of Presidential Emergency authorities. It does not give the President any particular powers, but it sets forth the process he has to follow if he declares an emergency in the process that we in Congress have to follow if we want the emergency to end, the access out of procedural framework only, and does not define what is an emergency.

Congress passed the National Emergencies Act during a period of post-Watergate reforms after it became increasing concerned that Presidential Emergency powers were becoming unwieldy and overextended. Before 1976, no statutory procedures existed for the Presidential Declaration of National Emergency and Congress had no defined supervisory role in the checks and balances portion.

It was the response and abuses of the Nixon era that the Senate created the 1973 Special Committee on the Termination of the National Emergency, renamed, excused me, the Special Committee on National Emergencies and Delegated Emergency Powers in 1974 which was Co-Chaired by the Honorable Senators Frank Church and Charles Mathias. The Special Committee issued its final report in 1976 emphasizing that emergency laws and procedures in the United States have been neglected for too long and that Congress must pass the National Emergencies Act to end the potentially dangerous situations. It was against this backdrop that Congress passed that Act in 1976. That was 48 years ago.

Since that time, the National Emergencies Act's shortcomings have come into view. For instance, one of the concerns we heard at our 2019 hearing about the limitations of the Act included the fact that there is little in the Act that would prevent Presidents from doing emergencies in perpetuity. The only mechanism that Congress has for ending an emergency without the support of the President is through a joint resolution of Congress which requires the President's signature and is subject to a veto.

The Act also does not require that any statutory powers invoked by a President relate to the nature of the emergency. In other words, the President could exercise numerous powers upon issuing an emergency declaration even if those powers have nothing to do with the declared emergency.

Exacerbating these concerns is the fact that as many scholars and commentators point out, Congress has almost lost track of how many underlying laws exist that grant the President emergency

authorities or whether these grants of emergency authority remain warranted.

Our Witnesses will describe what some of those laws for us, many of which have never been used. Nonetheless, they remain on the books and as Justice Robert Jackson put it in a famous dissent about a different claim of emergency authority, they "lie about like a loaded weapon."

In the three years since our previous hearing, Members on both sides of the aisle and in both houses, has introduced legislation to address the potential for the President to address these weapons. Broadly speaking, these measures would amend the National Emergencies Act to place more effective guardrails on a President's ability to invoke emergency powers and would reassert Congress' rightful place to check on what would otherwise be almost unfettered executive authority.

For example, title 5, subtitle C of the Protecting our Democracies Act, would amend the National Emergencies Act to among other things, empower Congress to proactively approve a Presidentially-declared National Emergency. Requiring a National Emergency declaration to expire after 20 legislative days absent congressional assent. It would also require that any emergency powers invoked by the President pursuant to a national emergency or relate to the nature of it may be used only to address that emergency.

Other proposals of note include the Article 1 Act, legislation introduced by Senators Mike Lee and Representative Chip Roy, a Member of our Subcommittee, that would also amend the National Emergencies Act to place similar congressional guardrails with the President's exercise of emergency authority.

While the House Judiciary Committee no longer has legislative jurisdiction over the National Emergencies Act, it makes no sense to me whatsoever, but several things around here don't. It was this Committee that helped in drafting the act. I believe the Judiciary Committee has a continuing obligation to ensure that the Act's purpose in seeking to restore proper congressional check on the Executive Branch is being met.

The American people deserve our continued vigilance on this matter. They deserve to know that a President cannot rewrite the laws to avoid obscure loopholes in an effort to abuse power or even to exercise it unnecessarily.

I look forward to the hearing from our Witnesses today and bring a range of perspectives about the issues. I hope we can have a productive and fruitful discussion about whether we, as Congress, can do more to constrain these types of authorities so they are used only in true emergencies and not as end to run around the Constitution.

I thank Mr. McCleary for reinvigorating me on this subject and a group that he is Chairing and Ms. Goitein for returning to the country and continuing your pursuit of the truth.

I know recognize the Ranking Member for his opening statement, Mr. Johnson of Louisiana for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. As noted, we actually have bipartisan agreement on the importance of this issue and those are rare agreements these days, so really grateful for this hearing.

Here is the Republican summary view. The National Emergencies Act is the principal framework, of course, through which the President exercise emergency authority. As noted, passed by Congress in 1976, the NEA was intended to rein in the President's use of emergency authority through various procedural requirements. Here is the thing that we all know, and I suspect there will be broad agreement here today on this point that the law has shortcomings, let's put it that way.

As we all know, the President can only act in our system, in our constitutional government, he can only Act with the authority vested in him by the Constitution or specifically by Congress. The problem here is that Congress has been proven quite adept at delegating authority to the President over the years. When Congress last accounted for emergency authorities delegated to the President in 1973, it found that more than 470 of such delegations have been given.

In a report documenting these authorities, the Senate's Special Committee on the Termination of National Emergency remarked that Congress had "conferred enough authority to rule the country without reference to normal constitutional process." It is kind of an ominous summary there.

Today, there are approximately 115–140 such delegations in effect, although as the Chair said, "it is difficult to count them sometimes and it depends upon the source that you consult." Regardless of which number is correct, the Presidents have proven to be proficient at declaring emergencies. There are currently more than 30 national emergencies in effect right now as we speak with the oldest dating back to President Jimmy Carter.

National emergencies are commonly renewed by the President and Congress rarely passes the joint resolution necessary to terminate them. So, although the NEA was intended to end perpetual States of Emergency, it has actually resulted in Presidents freely renewing emergencies sometimes for decades. Of course, that seems to defy the common sense and the common definition of emergency, right?

The NEA has proven to be an ineffective check on the President and Congress has surrendered its authority to the Executive Branch for too long. We can't even say it was a usurpation of authority because Congress willingly gave it up.

Article 1 of the Constitution vests all legislative authority in the Congress, and we are obliged to consider how to use that authority to more effectively control Presidents' use of emergency declarations. The way that political issues are framed today is existential threats, incentivizes the President to stretch the bounds of their emergency authority to accomplish policy goals, and sometimes partisan goals that cannot pass the Congress. This is no way for our government to function. In a moment when so many of our institutions are being imperiled and the people are losing faith in them, I think this is something meaningful that we could work on together and try to fix. The devil is in the details, of course. That is why we are all here today.

So, I look forward to hearing from our Witnesses and I yield back.

Mr. COHEN. Thank you, Mr. Johnson. Mr. Nadler is not going to be with us right now and he wants his statement entered in the report which he has given us and without objection it will be done. I understand that Mr. Jordan does not have a statement, so at that point we will proceed go to our Witnesses.

[The information follows:]

MR. NADLER FOR THE RECORD

Statement of Chairman Jerrold Nadler

Hearing on: "Examining Potential Reforms of Emergency Powers"

Since 1976, when Congress passed the National Emergencies Act, U.S. Presidents have declared the existence of 75 national emergencies, justifying their potential exercise of emergency powers. Of those 75 declarations, more than 40 remain in effect, with the oldest dating back to the 1970s. This means that for nearly five decades, this country has technically been in some form of a state of emergency. That is to say, some Americans have lived their entire lives under emergency rule.

This is deeply problematic, given the numerous powers a president can exercise upon issuing an emergency declaration. Experts have noted that at least 123 distinct statutory provisions become available to the president when invoking the National Emergencies Act. These statutory provisions delegate a broad range of authority to the executive branch, including the ability to test biological and chemical agents on humans, to suspend statutory wage-rate requirements for public contracts, or to take over communications networks.

Even more problematic is that the president need not show any relationship between the declared emergency and the statutory provision being invoked. Instead, the president is essentially given carte blanche freedom to act once an emergency is declared.

As we will hear from our witnesses today, the danger of unfettered executive power triggered by an emergency declaration has been a longstanding problem across administrations of both parties.

Indeed, Congress enacted the National Emergencies Act to curtail certain abuses of the emergency authorities that had come before. The Act provides a general framework through which the president can declare national emergencies and—most importantly—through which Congress can review and terminate them.

At the time the law was enacted, it allowed Congress to terminate any emergency by a majority vote in both Houses. But in 1983, in INS v. Chadha, the Supreme Court held that Congress could not veto actions taken by the executive branch through majority votes in the House and Senate alone. Instead, the Court held that if Congress wanted to override the president's actions, it had to pass a new law, which required either the president's signature or a veto override.

Consequently, in 1985, Congress amended the National Emergencies Act to be consistent with that ruling. Unfortunately, in doing so, Congress lost a substantial amount of its constitutional power to constrain the president, making it effectively

impossible for Congress to revoke the power that the president assumes upon declaring a national emergency.

The bottom line now is that if the president declares an emergency, and we in Congress do not like it, either we must convince the president to sign a joint resolution to terminate his or her own emergency declaration—an unlikely occurrence—or we need a veto-proof majority in Congress, which is very difficult to muster. While, in principle, it should not require a supermajority of Congress to stop the president from abusing power that Congress has delegated, the Court has forced our hand.

We may agree that the president should be allowed some types of discretion during true emergencies, but an emergency cannot continue in perpetuity. So, to shift the burden of inertia, we must set a time limit for emergencies—a reasonable proposal might require that they automatically expire after 20 days unless Congress ratifies the emergency declaration by law.

This type of sunset provision would restore the authority and the responsibility to change the law to where it belongs—in Congress. A similar provision was included in the Protecting Our Democracy Act, which passed the House last year, and I hope the Senate will join us in this important legislation.

Our nation's founders left it up to all of us—including those of us in Congress—to act as guardians against assault on our constitutional order. That means we must reform the National Emergencies Act to ensure that future abuse will not occur.

Otherwise, as Senators Church and Mathias warned almost 50 years ago, 'the unmistakable drift toward [a] one-[person] government will continue.'

I recognize that we will not solve all these issues today, but I am eager to continue this important dialogue. I thank the witnesses for their participation, I look forward to their testimony, and I yield back the balance of my time.

We welcome our Witnesses and thank them for participating in today's hearing. I will now introduce each of the Witnesses and after each introduction will recognize that Witness for his or her oral testimony. Each of your written statements are entered in the record entirety and you have five minutes, and you know the five-minute rule. The green lights, red, green go; red, you are over; and yellow, your last minute.

Before proceeding with testimony, I would like to remind all our Witnesses that you are under oath to tell the truth. We don't make you stand up and swear to anybody or anything. We just want you to know that if you don't tell the truth, you are going to be taken to the slammer.

Our first Witness is Elizabeth Goitein. Ms. Goitein co-directs the Brennan Center for Justice's Liberty & National Security Program and is a Senior Practitioner Fellow at the University of Chicago's Center for Effective Government. She is a nationally recognized expert on Presidential Emergency Powers, government surveillance, and government secrecy. I think she cares about this as much as I care about the Memphis Grizzlies, which is a lot.

She testified before this Subcommittee in February of 2019 about the National Emergencies Act. Prior to joining the Brennan Center, she served as counsel to Senator Feingold, Chair of the Constitution Subcommittee of the Senate Judiciary Committee and as trial attorney in the Federal Programs Branch of the Civil Division of the Department of Justice.

She received her law degree from Yale. A law clerk to the Honorable Michael Daly Hawkins to the U.S. Court of Appeals for the Ninth Circuit.

Welcome back, and you are recognized for five minutes.

STATEMENT OF ELIZABETH GOITEIN

Ms. GOITEIN. Good morning, Chair Cohen, Ranking Member Johnson, and Members of the Committee. Thank you for this opportunity to testify.

The legal framework for emergency powers in this country is in urgent need of reform, grants the President sweeping powers, some of which seem like the stuff of autocratic regimes with few safeguards against abuse. Fortunately, Congress has a ready way to build a meaningful check into the system.

Let me back up and explain what emergency powers are and how they work. Emergency powers have existed in countries around the world for hundreds of years. The theory behind them is simple. Because emergencies are by definition unforeseen and unforeseeable, the powers conferred on the government by existing laws might not be sufficient to address them. Amending the law to provide greater powers might take too long and might do damage to principles that are held sacrosanct in ordinary times.

Emergency powers thus authorize a limited departure from the legal norm. Their purpose is to give the President a temporary boost in power until the emergency passes or until there is time to change the law through the normal political process. Most countries have emergency powers written into their constitutions. Our Constitution is an outlier. It does not give the President any explicit emergency powers. So, Presidents have, for the most part, re-

lied on Congress to provide them. There are exceptions that I hope we will have time later in the hearing to talk about, Presidential claims of inherent emergency powers.

In any event, for the past century, we have had a system in place where the President can declare a national emergency and that declaration triggers special powers contained in a whole range of laws, all which say something like in a national emergency, the President can do X.

For several decades though, there is no overarching statute governing the system. Presidents didn't have to disclose what powers they were invoking. They didn't have to report to Congress and there was no limit on how long emergency declarations could last.

Congress passed the National Emergencies Act in 1976 to rein in Presidential power. It attempted to do this in three main ways.

First, it provided that emergency declarations would end after a year unless the President renewed them.

Second, it allowed Congress at any time to terminate an emergency declaration using a legislative veto, a law that would go into effect without the President's signature.

Third, it required Congress to meet every six months while an emergency was in effect to consider a vote on termination.

By any measure, the National Emergencies Act has failed to achieve its purpose. Expiration of emergency declarations after one year which was supposed to be the default, has become the rare exception. We actually have 41 national emergency declarations in place today and most of them have been in place for over a decade.

In 1983, the Supreme Court held that legislative vetoes are unconstitutional. So, today, Congress effectively needs a two-thirds super majority to end the emergency declaration over the President's likely veto. Finally, for more than 40 years, Congress completely ignored the requirement to periodically review existing emergencies.

Why should this worry us? Because an emergency declaration unlocks powers contained in more than 120 statutory provisions and some of those carry enormous potential for abuse. For instance, there is a law that allows the President to take over or shut down radio or wire communications facilities. It was last invoked during World War II, when wire communications meant telephone calls and telegrams and most Americans didn't own a telephone. Today, it could arguably be used to assert control over U.S.-based internet traffic.

Other laws would allow the President to freeze Americans' assets with no judicial process, to coordinate and control domestic transportation, and even to suspend the prohibition on government testing of chemical and biological agents on unwitting human subjects.

Even how potent these authorities are, it is remarkable that there hasn't been more abuse. We have been lucky. It would be irresponsible to continue relying on luck and presidential self-restraint. Congress should pass legislation to restore its role as a meaningful check on these powers.

There are several bills pending before Congress right now broadly supported by Democrats and Republicans that would require Presidential Emergency Declarations to terminate after 30 days unless approved by Congress using expedited procedures that

would prevent obstructionism. This simple, common-sense measure would give Presidents the powers they need when they most need them, flexibility in the immediate aftermath of a crisis while still allowing Congress to step in and serve as a backstop against Executive abuse and overreach.

Thank you and I look forward to your questions.

[The statement of Ms. Goitein follows:]

STATEMENT OF

ELIZABETH GOITEIN
CO-DIRECTOR, LIBERTY AND NATIONAL SECURITY PROGRAM
BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION

HEARING ON

EXAMINING POTENTIAL REFORMS OF EMERGENCY POWERS

MAY 17, 2022

Introduction

Chairman Cohen, Ranking Member Johnson, and members of the subcommittee, thank you for this opportunity to testify on behalf of the Brennan Center for Justice at New York University School of Law.[1] The Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. I co-direct the Center's Liberty and National Security Program, which works to advance effective national security policies that respect constitutional values and the rule of law.

In December 2018, the Brennan Center completed a two-year intensive research project on the legal framework for national emergencies, which I oversaw. This work was a natural outgrowth of the program's longtime focus on executive power in the area of national security.[2] We began our study of emergency powers by researching the history of the National Emergencies Act of 1976 (NEA). We then catalogued all the statutory powers that become available to the president when a national emergency is declared, and for each such power, we determined when and under what circumstances it had been invoked. We published this compendium online[3] along with a list of national emergency declarations issued since the National Emergencies Act went into effect.[4]

We followed up with a deep dive into one of the most potent authorities that becomes available during a declared national emergency: the International Emergency Economic Powers Act (IEEPA).[5] After extensive consultation with stakeholders, including a group of experienced former sanctions officials, we developed a proposal for legislative reform of IEEPA. We set forth this proposal—along with our research into IEEPA's history and operation—in our June 2021 report, *Checking the President's Sanctions Powers.*[6]

At the same time, we expanded our research focus to encompass non-statutory sources of emergency authority, examining the little-known phenomenon of "presidential emergency action documents," or PEADs.[7] The public record on these documents is scant, and the Brennan Center is working to supplement it through Freedom of Information Act requests. The available

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[1] This testimony is submitted on behalf of a Center affiliated with New York University School of Law but does not purport to represent the school's institutional views on this topic. More information about the Brennan Center's work can be found at http://www.brennancenter.org.

[2] *See, e.g.*, Michael German and Sara Robinson, *Wrong Priorities on Fighting Terrorism*, Brennan Center for Justice, 2018; Faiza Patel and Meghan Koushik, *Countering Violent Extremism*, Brennan Center for Justice, 2017; Elizabeth Goitein, *The New Era of Secret Law*, Brennan Center for Justice, 2016; Michael German, *Strengthening Intelligence Oversight,* Brennan Center for Justice, 2015; Elizabeth Goitein and Faiza Patel, *What Went Wrong with the FISA Court*, Brennan Center for Justice, 2015.

[3] "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated March 4, 2022, https://www.brennancenter.org/analysis/emergency-powers.

[4] "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 9, 2022, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.

[5] 50 U.S.C. §§ 1701 *et seq.*

[6] Andrew Boyle, *Checking the President's Sanctions Powers*, Brennan Center for Justice, June 10, 2021, https://www.brennancenter.org/media/7754/download.

[7] *See* Elizabeth Goitein and Andrew Boyle, "Trump Has Emergency Powers We Aren't Allowed to Know About," *New York Times*, April 10, 2020, https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html.

information, however, gives ample reason for concern about these shadowy claims to emergency power.[8]

Based on this research and on events of the past few years, I believe the legal framework that governs presidential emergency powers is in urgent need of reform.

The powers triggered by a national emergency declaration include authorities that are highly susceptible to abuse and could be misused to undermine our democracy. These powers must be subject to meaningful checks against abuse and overreach. In its current form, the NEA makes it far too easy for presidents to declare national emergencies and keep them in place indefinitely—and far too difficult for Congress to terminate them. Congress should amend the NEA to provide that presidential emergency declarations will terminate after 30 days (or a similarly short period) unless approved by Congress, and to require congressional approval for any subsequent renewals of the declaration. There are several bills pending in Congress that would implement this basic reform.

Congress should address IEEPA separately, as IEEPA sanctions raise concerns that are unlikely to be solved by a congressional approval requirement alone. The Brennan Center has proposed amending IEEPA to include due process protections for Americans caught up in sanctions regimes; broaden the exception for the provision of humanitarian aid; and require increased transparency in various aspects of the law's operation. IEEPA also should include a congressional approval requirement—one that would allow Congress, if necessary, to vote on sanctions regimes as a package rather than individually.

Finally, Congress must have visibility into how the executive branch interprets and proposes to implement its emergency authorities. Secret executive claims to emergency powers, unchecked by any other branch of government, are anathema to the Constitution's separation of powers and carry grave risks for our democracy. Congress accordingly should require the president to disclose PEADs, and any legal analysis underpinning them, to the relevant oversight committees.

I. Emergency Powers in the U.S.: What they Are—and Aren't

Emergency powers have existed in countries around the world for hundreds of years. They are based on a simple premise: The laws that hold sway in ordinary times might not be sufficient to respond to an unforeseen crisis, and amending the law to provide greater powers might take too long or do damage to principles held sacrosanct in ordinary times. Emergency powers thus give the government—usually, the head of state—a temporary boost in power until the crisis passes or there is time to change the law through normal legislative processes.[9]

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[8] *See* "Presidential Emergency Action Documents," Brennan Center for Justice, last updated November 22, 2021, https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents.
[9] *See generally* John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2 (2004): 210; Jules Lobel, "Emergency Power and the Decline of Liberalism," *Yale Law Journal* 98 (1989): 1385.

Unlike the modern constitutions of most countries,[10] the U.S. Constitution includes no separate regime for emergencies. It does include a handful of specific crisis-response provisions, but these powers are given to Congress, not to the president. Most notably, Congress may suspend the writ of *habeas corpus* "when in Cases of Rebellion or Invasion the public Safety may require it,"[11] and Congress has the power "to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."[12]

Although Article II confers no explicit emergency powers, there are implied powers accompanying some of its express provisions. Most notably, the Commander-in-Chief power entails the authority to defend the United States against sudden attack, even without prior congressional authorization,[13] and to manage the conduct of war. The Supreme Court has also asserted (somewhat controversially) that the president is the "sole organ of the federal government in the field of international relations,"[14] although the scope of this exclusive power in the international-relations field remains unclear.

Broader claims that the president has inherent constitutional powers to do whatever he considers necessary in an emergency have been soundly rejected by the Supreme Court. The government advanced a version of this theory to justify President Truman's seizure of U.S. steel mills during the Korean War. The Supreme Court invalidated the president's action, and Justice Jackson, in his famous concurrence, observed: "[T]he Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants."[15]

Accordingly, since the founding of the nation, Congress has been the primary source of the president's emergency powers. It has periodically legislated standby authorities that the president may activate when certain types of emergencies occur.[16] These are akin to an advance medical directive; they represent Congress's best guess as to what authorities a president might need in a crisis that is unfolding too quickly for Congress to act in the moment. As such, they can be quite broad in the actions that they allow and in the discretion that they grant.

Several laws give the president or other executive branch officials the power to issue emergency declarations in specified situations, which in turn unlock resources and authorities as provided in the law. Notable examples include the Public Health Service Act[17] and the Stafford Act.[18] In addition to these statutes, each of which constitutes a self-contained grant of emergency authority, the National Emergencies Act (NEA) allows the president to declare a national

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[10] A review of current constitutions reveals that at least 172 countries' constitutions have provisions for emergency rule. *See Constitute*, s.v. "emergency," accessed May 11, 2022, https://www.constituteproject.org/constitutions?lang=en&q=emergency&status=in_force&status=is_draft.
[11] U.S. Const. art. 1, § 9, cl. 2.
[12] U.S. Const. art. 1, § 8, cl. 15.
[13] *See* Louis Fisher, *Presidential War Power*, 2nd rev. ed. (Lawrence: University Press of Kansas, 2004), 8-10.
[14] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).
[15] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) (emphasis in original).
[16] *See* Harold C. Relyea, *National Emergency Powers*, report no. 98-505 (Washington, D.C.: Congressional Research Service, 2007), 5, https://fas.org/sgp/crs/natsec/98-505.pdf.
[17] Pub. L. 78-410 (1944) (codified at 42 U.S.C. ch. 6A §§ 201 *et seq.*).
[18] Pub. L. 100-707 (1988) (codified at 42 U.S.C. ch. 68 §§ 5121 *et seq.*).

emergency, which then unlocks more than 120 statutory authorities scattered throughout the U.S. Code. The NEA is discussed in detail in Part II of this testimony.

Finally, many laws that are available without an emergency declaration are properly viewed as emergency powers, because they confer extraordinary authorities that are clearly intended for use in extraordinary situations. A prime example of this type of "pseudo-emergency power" is the Insurrection Act,[19] one portion of which allows the president to deploy military forces domestically to suppress insurrections, domestic violence, and any "unlawful combination" or "conspiracy" that "opposes or obstructs" the execution of the law.[20] Similarly, multiple statutes allow the president to take certain actions—or set aside otherwise applicable limits on presidential action—when necessary for "national security."[21]

Critically, none of these powers allows the president to make law in his own right—i.e., to create the alternative set of rules that will govern his actions. Similarly, while some laws specify certain statutory provisions that the president may suspend in an emergency, none allows him to choose for himself which laws he may disregard. Under the statutory emergency powers regime, the president is strictly limited to the powers that Congress has granted to him in advance. The will of Congress thus remains the touchstone during emergencies as in other times. This scheme preserves the constitutional separation of powers, in contrast to some other countries whose constitutions allow the head of state to dissolve the legislature or take over its functions during times of emergency.[22]

II. The Origin and Purpose of the National Emergencies Act

Although statutory emergency powers have existed since the country's founding, the process by which presidents avail themselves of such powers has evolved over time. The current system for national emergencies—in which the president declares a national emergency, and the declaration unlocks statutory powers that would otherwise lie dormant—dates back to President Woodrow Wilson.[23] It developed organically, and for several decades there was no single law that governed the process. Presidents did not have to identify what powers they would invoke or keep Congress informed of their actions, and states of emergency could last indefinitely.

In the 1970s, several scandals involving executive branch overreach—including Watergate, the bombing of Cambodia, and domestic spying by the CIA—prompted Congress to take a hard look at executive power, and to enact several laws aimed at reasserting Congress's

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[19] For information about the Insurrection Act and its invocations throughout U.S. history, *see* Joseph Nunn, "The Insurrection Act Explained," Brennan Center for Justice, April 21, 2022, https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained; Joseph Nunn and Elizabeth Goitein, "Guide to Invocations of the Insurrection Act," Brennan Center for Justice, April 25, 2022, https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act.

[20] 10 U.S.C. §253 (2018).

[21] Section 232 of the Trade Expansion Act of 1962, for instance, allows the President to impose restrictions on certain imports when the Department of Commerce determines that the product "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. §1862.

[22] *See, e.g.*, Constitution of the Republic of Ecuador, 2015, ch. 3, § 1, art. 148.

[23] *See* Relyea, *National Emergency Powers*, 7.

role as a coequal branch of government and a check on executive authority.[24] It was in this context that a special Senate committee was formed to examine presidential use of emergency powers.

The immediate impetus for the committee's formation was Republican Senator Charles Mathias's discovery that an emergency declaration issued in 1950, at the start of the Korean War, was still in place and was being used to prosecute the war in Vietnam. On closer examination, the committee learned that four clearly outdated states of emergency were still in effect, giving the president access to literally hundreds of statutory emergency powers. These included powers "to seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens."[25]

The committee's work culminated in the introduction and passage of the National Emergencies Act of 1976.[26] The clear purpose of the law, evident in every facet of the legislative history, was to place limits on presidential use of emergency powers. As summarized by the committee in urging passage of the Act:

> While much work remains, none of it is more important than passage of the National Emergencies Act. Right now, hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process. Revelations of how power has been abused by high government officials must give rise to concern about the potential exercise, unchecked by the Congress or the American people, of this extraordinary power. The National Emergencies Act would end this threat and insure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review.[27]

The law employed several mechanisms to this end. It required the president to publish declarations of national emergency in the Federal Register;[28] to specify the powers he intended to invoke;[29] and to report to Congress every six months on expenditures related to emergency powers.[30] It provided that states of emergency would terminate after a year unless renewed by the president.[31] Most important, it *allowed* Congress to terminate states of emergency at any time through a concurrent resolution (a so-called "legislative veto" that would take effect without the

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[24] *See generally* Thomas E. Cronin, "A Resurgent Congress and the Imperial Presidency," *Political Science Quarterly* 95, no. 2 (1980): 209-37.
[25] S. Comm. On Government Operations and the Spec. Comm. On National Emergencies and Delegated Emergency Powers, The National Emergencies Act (Pub. L. 94-412), Source Book: Legislative History, Text, and Other Documents, at 20 (1976) (hereinafter "Spec. Comm. On National Emergencies Source Book").
[26] National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).
[27] Spec. Comm. On National Emergencies Source Book at 50.
[28] National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621).
[29] *Id.* § 301 (codified at 50 U.S.C. § 1631).
[30] *Id.* § 401(c) (codified at 50 U.S.C. § 1641(c)).
[31] *Id.* § 202(d) (codified at 50 U.S.C. § 1622(d)).

president's signature),[32] and it *required* Congress to meet every six months while an emergency declaration was in effect to "consider a vote" on whether to end the emergency.[33]

As enacted, the law did not include a definition of "national emergency." Critically, however, this omission was not intended as a grant of unlimited discretion. Under an earlier draft of the legislation, the president was authorized to declare a national emergency "[i]n the event the President finds that a proclamation of a national emergency is essential to the preservation, protection and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States."[34] One committee report noted that "[t]he definition of an emergency has been deliberately cast in broad terms that makes it clear that a proclamation of a state of national emergency requires a grave national crisis."[35]

The Senate Committee on Government Operations ultimately removed this language, not because it was too limiting, but because the committee believed it to be too broad. As stated in the committee's report:

> [F]ollowing consultations with several constitutional law experts, the committee concluded that section 201(a) is overly broad, and might be construed to delegate additional authority to the President with respect to declarations of national emergency. In the judgment of the committee, the language of this provision was unclear and ambiguous and might have been construed to confer upon the President statutory authority to declare national emergencies, other than that which he now has through various statutory delegations.
>
> The Committee amendment clarifies and narrows this language. The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.[36]

The committee's solution ultimately proved ineffective, as the majority of the statutes in place today that confer power on the president during "national emergencies" do not include definitions of the term or any criteria that must be met beyond the issuance of the declaration. It is nonetheless significant that Congress believed that even a definition limiting national emergencies to grave national crises would be "overly broad." The notion that Congress intended the National Emergencies Act as an affirmative delegation of unlimited discretion to the president is contradicted by this and every other aspect of the legislative history.

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[32] *Id.* § 202 (codified as amended at 50 U.S.C. § 1622).
[33] *Id.* § 202(b) (codified at 50 U.S.C. § 1622(b)).
[34] *See, e.g.*, S. 977, 94th Cong. § 201(a) (1975).
[35] Spec. Comm. On National Emergencies Source Book at 96.
[36] S. Comm. On Gov. Operations, Report to Accompany H.R. 3884, S. Rep. No. 94-1168, at 3 (1976) (reprinted in Spec. Comm. On National Emergencies Source Book at 292).

III. National Emergencies from 1979 to the Present

The National Emergencies Act has not served as the strong check on executive action that Congress intended. The requirements that the president publish a declaration of national emergency in the Federal Register, identify publicly the powers he intends to use, and report to Congress on emergency-related expenditures have provided a modicum of transparency (although expenditure reports from the past fifteen years are not readily available to the public). Other key provisions, however, have proven toothless.

As noted, the decision not to define "national emergency," although intended to ensure the Act did not result in an expansion presidential authority, in practice meant there were no clearly articulated limits on the exercise of the president's discretion. In addition, renewal of emergencies after one year, intended to be the exception, has become the default. Most of the emergencies declared since the National Emergencies Act was passed are still in effect. The average length of emergencies has been close to a decade, with 29 emergencies lasting even longer. The longest-running state of emergency was issued by President Jimmy Carter in 1979 in response to the Iranian hostage crisis and remains in place today.[37]

Perhaps most significantly, Congress has not exercised its intended role as a check on presidential power. In 1983, the Supreme Court ruled that concurrent resolutions are unconstitutional.[38] Congress's solution was to substitute a joint resolution as the mechanism for terminating emergencies.[39] Like any other legislation, a joint resolution must be signed into law by the president. If the president vetoes the resolution, Congress can override the veto only with a two-thirds vote by both houses. This change greatly diluted the role of Congress as envisioned in the original Act.

Moreover, until recently, Congress demonstrated little interest in exercising the powers it gave itself. The Act requires Congress to meet every six months while an emergency is in place to consider a vote on whether to end the emergency. States of emergency have been in place throughout the 44 years the law has been in effect, which means Congress should have met almost 90 times to review existing states of emergency. Before 2019, however, only one resolution to end a state of emergency had ever been introduced, and the emergency declaration at issue was revoked before Congress could vote on it.[40]

After President Trump declared a national emergency in February 2019 to secure funding for constructing a wall along the southern border, Congress twice voted to terminate the

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[37] *See* "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 9, 2022, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.
[38] *See* INS v. Chadha, 462 U.S. 919, 954-55 (1983).
[39] *See* 50 U.S.C. § 1622(a)(1).
[40] *See* Tamara Keith, "If Trump Declares an Emergency to Build the Wall, Congress Can Block Him," *NPR*, February 11, 2019, https://www.npr.org/2019/02/11/693128901/if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him.

declaration.[41] President Trump vetoed the resolution both times,[42] however, and Congress was unable to muster the two-thirds majority necessary to override the veto.[43]

National emergencies are thus easy to declare and hard to stop—and they grant access to a rich well of powers, most of which become available regardless of whether they are relevant to the emergency at hand. Given this state of affairs, one might expect presidents to declare emergencies at every turn and to exploit all of the powers available to them. Yet this has not been the case. To the contrary, presidents have generally exercised considerable self-restraint in their use of statutory emergency powers, and there have been few clear misuses of the authority to declare national emergencies.

It might seem odd to describe presidential use of emergency powers as restrained, given that 75 states of national emergency have been declared in a 44-year period, 41 of which are in effect today. Sixty-eight of these declarations, however, were issued for the sole or primary purpose of imposing economic sanctions on foreign actors under the International Emergency Economic Powers Act (IEEPA) and related sanctions laws.[44] These declarations must be considered separately.

IEEPA is, in many ways, *sui generis*. Congress enacted it in 1977 to limit the powers conferred by the 1917 Trading With the Enemy Act (TWEA). It was Congress's sense that the TWEA, which gave presidents broad authority to "investigate, regulate . . . prevent or prohibit . . . transactions" in times of war or declared emergency,[45] had been improperly used to regulate domestic economic activity during peacetime. IEEPA thus limited the use of TWEA to wartime, and created a new framework for peacetime emergencies.[46] Under that framework, presidents could declare a national emergency based on an "unusual and extraordinary threat" to the U.S. national security, foreign policy, or economy "which has its source in whole or substantial part outside the United States."[47] The president could then authorize a range of economic actions to address the foreign threat.

Despite being tied to the mechanism of national emergency declarations, and despite the requirement of an "unusual and extraordinary threat," IEEPA has been used almost from the

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[41] H.J. Res. 46, 116th Cong. (Mar. 2019); S.J. Res. 54, 116th Cong. (Sep. 2019).
[42] Donald Trump, "Veto Message to the House of Representatives for H.J. Res. 46," March 15, 2019, https://trumpwhitehouse.archives.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/; Donald Trump, "S.J. Res. 54 Veto Message," October 15, 2019, https://trumpwhitehouse.archives.gov/presidential-actions/s-j-res-54-veto-message/.
[43] H.J. Res. 46, 116th Cong. (override failed in House, Mar. 26, 2019); S.J. Res. 54, 116th Cong. (override failed in Senate, Oct. 17, 2019).
[44] The numbers in this paragraph are derived from review of the emergency proclamations as compiled by the Brennan Center and comprehensively listed at "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 9, 2022, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.
[45] Trading with the Enemy Act of 1917, ch. 106 § 5(b)(1), 40 Stat. 415 (1917) (codified as amended at 50 U.S.C. § 4305(b)(1)).
[46] *See* Laura K. Donohue, "Constitutional and Legal Challenges to the Anti-Terrorist Financing Regime," *Wake Forest Law Review* 43 (2008): 643, 647-48.
[47] International Emergency Economic Powers Act, Pub. L. 95-223, title II, § 202, 91 Stat. 1626 (1977) (codified at 50 U.S.C. 1701(b)).

outset as a standard tool of foreign policy. Presidents issue declarations under IEEPA in situations where imposing sanctions on foreign actors would advance U.S. interests, regardless of whether the threat to those interests is truly "extraordinary."[48] IEEPA declarations create sanctions regimes that often become—and are intended to become—semi-permanent in nature. IEEPA thus underlies current U.S. economic policies toward governments or factions in Iran, Sudan, the Balkans, Zimbabwe, Iraq, Syria, Belarus, the Democratic Republic of the Congo, the Central African Republic, Burundi, Lebanon, North Korea, Venezuela, Somalia, Libya, Yemen, and Ukraine.[49]

This routinization of IEEPA use is problematic in many respects. Among other things, it cheapens the currency of national emergencies. When President Obama declared a national emergency to impose sanctions on Venezuela in 2015, finding that "the situation in Venezuela . . . constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States,"[50] Venezuelan president Nicolás Maduro's strong reaction prompted unusual public scrutiny of the declaration. The White House hastened to reassure the public that there was, in fact, no threat to U.S. national security, despite the president's words to the contrary. "[T]he United States does not believe that Venezuela poses some threat to our national security," said Deputy National Security Adviser Ben Rhodes. "We, frankly, just have a framework for how we formalize these executive orders."[51] State Department spokesperson Jen Psaki echoed his remarks: "This is how we describe the process of naming sanctions, and there are 20 to 30 other sanctions programs we have."[52]

Nonetheless, Congress has for decades acquiesced in, and arguably ratified, the use of IEEPA as a substitute for ordinary sanctions legislation. Indeed, there is some evidence that Congress, in passing IEEPA, expected that it would be used to fill gaps in legislative regimes. Presidents had previously invoked a provision of the TWEA to impose controls over certain types of exports when export-control legislation—the Export Administration Act—had lapsed. Congress imported the relevant language from the TWEA into IEEPA, and the legislative history shows that Congress anticipated it could be used in the same way if the Export Administration Act were to lapse again in the future.[53] (That is, in fact, exactly what happened in 1983.[54])

If IEEPA declarations are set aside, the picture looks very different. National emergency declarations not relying on IEEPA have been few and far between. A complete list of such declarations includes:

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[48] *See* Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven: Yale University Press, 1990), 47.
[49] *See* "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 9, 2022, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.
[50] Exec. Order No. 13692, 80 Fed. Reg. 127467 (Mar. 8, 2015).
[51] Gregory Korte, "White House: States of emergency are just formalities," *USA Today*, April 9, 2015, https://www.usatoday.com/story/news/politics/2015/04/09/pro-forma-states-of-national-emergency/25479553/.
[52] *Ibid.*
[53] *See* Joel B. Harris and Jeffrey P. Bialos, "The Strange New World of United States Export Controls Under the International Emergency Powers Act," *Vanderbilt Journal of Transnational Law* 18 (1985): 78-80, 78 n. 16.
[54] Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983).

- Executive Order 12722 (1990) – issued in response to the Iraqi invasion of Kuwait. Although the emergency initially was declared for the purpose of imposing sanctions under IEEPA, President George H.W. Bush subsequently relied on it to bolster military strength and to engage in military construction during the Gulf War.

- Proclamation 6491 (1992)[55] – issued in response to Hurricanes Andrew and Iniki. The declaration was used to suspend minimum wage requirements with respect to reconstruction efforts in areas devastated by the hurricanes.

- Proclamation 6867 (1996) – issued in response to Cuban attacks on U.S. civilian aircraft. The declaration was used to impose a naval blockade on Cuba.

- Proclamation 7463 (2001) – issued in response to the attacks of 9/11. The declaration was used primarily to make changes in the size and composition of the military forces, including calling reservists to active duty and implementing stop-loss policies.

- Proclamation 7924 (2006) – issued in response to Hurricane Katrina. The declaration was used to suspend minimum wage requirements with respect to reconstruction efforts in areas devastated by the hurricane.

- Proclamation 8443 (2009) – issued in response to the swine flu epidemic. The declaration was used to waive certain legal requirements in order to facilitate the provision of public health services.

- Proclamation 9844 (2019) – issued in response to unlawful immigration at the southern border of the United States. The declaration was used to reallocate funding from military construction projects to enable construction of a border wall.

- Proclamation 9994 (2020) – issued in response to the COVID-19 pandemic. The declaration was used primarily to increase flexibility in the provision of health care services, fund National Guard deployments relating to the Covid response, and pause payments on student loans in light of the economic hardship resulting from the pandemic.

- Proclamation 10371 (2022) – issued in response to Russia's invasion of Ukraine. The declaration is being used to block Russian-affiliated vessels from entering United States ports of entry.

With the exception of Proclamation 9844 (the border wall declaration), which is discussed further below, all of these declarations were triggered by sudden, unexpected events. Most of these occurrences directly and significantly affected Americans' health or safety, and all but Proclamation 9844 at least arguably necessitated an immediate response (regardless of whether one believes the president's response, in each case, was the correct one).

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[55] Although the proclamation stated that the hurricanes constituted a "national emergency" and invoked emergency powers, it did not formally declare an emergency under the National Emergencies Act. Accordingly, this proclamation is not included in the Brennan Center's list of national emergency declarations. It is referenced in this testimony to present a complete picture of how emergency powers have been used.

This is not to say that no misuses have occurred. It is questionable, for instance, whether Iraq's invasion of Kuwait constituted an emergency for the United States that justified invoking emergency military powers. And while Cuba's attack on American aircraft and the attacks of 9/11 constituted real emergencies, it is worrisome that those states of emergency remain in place today. Emergencies, of course, can result in long-term or permanent changes in external conditions necessitating new or different legal authorities. The solution is for Congress to enact the necessary changes in the law—not to permit indefinite emergency rule by the president. The Cuba and 9/11 emergencies have become, in effect, "permanent emergencies," which is one of the phenomena the National Emergencies Act was designed to prevent.[56]

Among other dangers, "permanent emergencies" increase the likelihood that the declaration will be used for purposes unrelated to the original triggering emergency. The 9/11 state of emergency already has been pressed into service to deal with problems having nothing to do with 9/11. President George W. Bush relied on the 9/11 declaration to call up reservists and implement stop-loss in the Iraq War.[57] In 2017, President Trump relied on the 9/11 declaration to invoke emergency powers to fill a chronic shortage in Air Force pilots.[58]

Still, what is most notable about the record of presidential use of emergency powers (outside the unique context of IEEPA[59]) is what has *not* happened. Despite the lack of strong limits in National Emergencies Act, presidents generally have not declared national emergencies simply to grant themselves additional powers when convenient. In most cases, they have not renewed emergency declarations indefinitely, but revoked them or allowed them to expire when the threat had passed. And while nothing in the National Emergencies Act would prevent presidents from using emergency declarations to access dozens of special powers unrelated to the emergency at hand, presidents have not exploited that license. The Brennan Center's research

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[56] *See, e.g.*, Spec. Comm. on National Emergencies and Delegated Emergency Powers, Interim Report, S. Rep. No. 93-1170, at 1 (reprinted in Spec. Comm. on National Emergencies Source Book at 19 ("A majority of Americans alive today have lived their entire lives under emergency rule.")); 120 Cong. Rec. S15784-86 (daily ed. Aug. 22, 1974) (statement of Sen. Church) (reprinted in Spec. Comm. on National Emergencies Source Book at 73) ("[F]ew, if any, foresaw that the temporary states of emergency declared in 1933, 1939, 1941, 1950, 1970, and 1971, would become what are now regarded collectively as virtually permanent states of emergency . . . .").

[57] *See* Proclamation No. 7463, 66 Fed. Reg. 48197 (Sept. 14, 2001) (declaring 9/11 state of emergency and activating 10 U.S.C. § 12302, authorizing the call-up of reservists and thus triggering stop-loss authority under 10 U.S.C. § 12305); Doe v. Rumsfeld, 435 F.3d 980, 984-985 (9th Cir. 2006) (citing 9/11 declaration as the source of authority for the exercise of these authorities in Iraq).

[58] *See* Exec. Order No. 13814, 82 Fed. Reg. 49271 (Oct. 20, 2017); Jeff Daniels, "Trump executive order lets Air Force recall up to 1,000 retired pilots for active duty," *CNBC*, October 21, 2017, https://www.cnbc.com/2017/10/21/trump-executive-order-lets-air-force-recall-up-to-1000-retired-pilots.html.

[59] Even with respect to IEEPA, presidents have shown some restraint. As discussed below (*see infra* Part V.B), IEEPA is written broadly enough to allow the imposition of punishing economic consequences on American citizens/residents and organizations. With the disturbing exception of executive branch actions in the aftermath of 9/11, however, s*ee* Boyle, *Checking the President's Sanctions Power*, 12-14, IEEPA generally has been used to target foreign actors, including foreign governments, officials, factions, and suspected narcotics traffickers and terrorist groups.

indicates that nearly 70% of the powers available to the president when he invokes a national emergency have never been invoked.[60]

IV. President Trump's Border Wall Declaration: An Unprecedented Abuse

Against this backdrop, President Trump's emergency declaration in 2019 was an unprecedented abuse of emergency powers for at least two reasons.

The first reason is the absence of conditions that meet any common-sense definition of an emergency. Congress did not include a definition of "national emergency" in the National Emergencies Act. However, the word "emergency" is not meaningless. A quick sampling of prominent English-language dictionaries reveals some common elements. Merriam-Webster, for instance, defines "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action"[61]; the Oxford-English dictionary similarly defines it as "[a] serious, unexpected, and often dangerous situation requiring immediate action."[62]

A basic element of an emergency, in other words, is that the circumstances in question must be unexpected—and must presumably represent a change for the worse. In that respect, an "emergency" is fundamentally different than a "problem." Unless it has unexpectedly gotten worse, a problem that has existed for years or decades cannot accurately be described as an "emergency," no matter how serious that problem might be.

It is possible to view illegal immigration at the southern border as a significant problem and still acknowledge the simple reality that in February 2019, it had not taken an unexpected turn for the worse. Official government data leave no doubt on that point. At the time, illegal border crossings had been steadily declining since reaching a high of 1.64 million in 2000. In 2017, they reached their lowest point (303,916) in 40 years; they remained close to that historic low (396,579), and well within the fluctuation range for the past several years, in 2018.[63] The only change in circumstances the president was able to identify in his proclamation was a significant increase in families seeking asylum at the border.[64] This change, however, was not evidence of "unlawful migration"—the crisis identified in the proclamation—as these families were seeking admission to the United States through lawful means.

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[60] *See* Elizabeth Goitein, "Trump's Hidden Powers," Brennan Center for Justice, December 5, 2018, https://www.brennancenter.org/blog/trump-hidden-powers; *see also* "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated March 4, 2022, https://www.brennancenter.org/analysis/emergency-powers.

[61] *Merriam-Webster*, s.v. "emergency," accessed May 11, 2022, https://www.merriam-webster.com/dictionary/emergency?src=search-dict-hed.

[62] *English Oxford Living Dictionaries*, s.v. "emergency," accessed May 11, 2022, https://en.oxforddictionaries.com/definition/emergency.

[63] *See* Lori Robertson, "Illegal Immigration Statistics," FactCheck.Org, last updated June 7, 2019, https://www.factcheck.org/2018/06/illegal-immigration-statistics/; U.S. Border Patrol, "Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year," accessed May 11, 2022, https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf.

[64] *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (February 15, 2019).

Moreover, it was clear from President Trump's own words and actions that the situation at the southern border did not require "immediate action." For the first two years of his administration, it apparently did not occur to the president to consider illegal border crossings a national emergency. He first dangled the idea that he might declare a national emergency in early January 2019.[65] Yet he waited a full six weeks before declaring the emergency. When he announced the declaration, he explicitly stated that quick action was not a necessity in this case, just a personal preference: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster."[66]

Even if illegal border crossings had spiked to an all-time high, President Trump's declaration would have been an abuse of authority. That's because President Trump sought funding from Congress to build a wall along the southern border, and Congress expressly refused to provide it. Indeed, Congress voted repeatedly not to give the president the authority and funds that he requested.[67] The president was thus invoking emergency powers to thwart the express will of Congress. President Trump did not try to hide this fact; in the weeks leading up to the declaration, he repeatedly stated that he would use emergency powers only if Congress refused to give him what he wanted.[68]

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[65] *See* Jane C. Timm, "Fact check: What's a 'national emergency' and can Trump declare one to get his wall?", *NBC News,* January 4, 2019, https://www.nbcnews.com/politics/donald-trump/fact-check-what-s-national-emergency-can-trump-declare-one-n954966.

[66] White House, "Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border," February 15, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/.

[67] Over the course of nearly a year of negotiations, Congress repeatedly declined to allocate $5.7 billion for the border wall, and never got a bill to the President with more than $1.6 billion. *See, e.g.* Department of Defense Appropriations Act, H.R. 695, 115th Cong. (2017) (failed in conference after an amendment adding $5.7 billion in border wall funding passed the House); End the Shutdown and Secure the Border Act, S.Amdt. 5 to Supplemental Appropriations Act, H.R. 268, 115th Cong. (2019).

[68] On January 10, President Trump stated his preference for "do[ing] the deal through Congress," but he added that if the deal did not "work out," he would "almost . . . definitely" declare a national emergency. White House, "Remarks by President Trump Before Marine One Departure," January 10, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-30/. Asked about his threshold for declaring an emergency, President Trump responded, "My threshold will be if I can't make a deal with people that are unreasonable." George Sargent, "Trump: I Have the 'Absolute Right' to Declare a National Emergency if Democrats Defy Me," *Washington Post*, January 9, 2018, https://www.washingtonpost.com/opinions/2019/01/09/trump-i-have-absolute-right-declare-national-emergency-if-democrats-defy-me/?utm_term=.124f57619b33. On February 1, Trump reiterated that he was planning to wait until February 15, the date on which a temporary appropriations measure would lapse, before issuing an emergency declaration. "Excerpts from Trump's Interview with the New York Times," *New York Times*, February 1, 2019, https://www.nytimes.com/2019/02/01/us/politics/trump-interview-transcripts.html; see also "Transcript: President Trump on 'Face the Nation,' February 3, 2019," *CBS News,* February 3, 2019, https://www.cbsnews.com/news/transcript-president-trump-on-face-the-nation-february-3-2019/ (President Trump describing emergency declaration as an "alternative" to the process that Congress was engaged in to avert another shutdown, which was to end on February 15). He predicted that "we will be looking at a national emergency, because I don't think anything is going to happen [in Congress]. I think the Democrats don't want border security." White House, "Remarks by President Trump in Meeting on Human Trafficking on the Southern Border," February 1, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-human-trafficking-southern-border/.

Although President Trump was the first president to declare a non-existent emergency to evade Congress's express will,[69] he was not the first to use emergency powers to bypass Congress. Recent research by the Brennan Center uncovered an incident in which President Obama used emergency powers, albeit on a much smaller scale, to expand an overseas naval facility after Congress appropriated funds for the project but simultaneously withheld authorization. President Obama did not concoct a new national emergency for this purpose but relied on the 9/11 emergency proclamation.[70]

The use of emergency powers as an end-run around Congress is an abuse of these powers for many reasons. First, as discussed in Parts I and II, emergency powers were never intended to allow the president to bypass Congress or to cut Congress out of its constitutional policymaking role. Emergency declarations merely allow the president to rely on a different set of statutes—ones that Congress has passed in advance, on the assumption that true emergencies would unfold too quickly for Congress to respond in the moment.

If, on the other hand, Congress has time to respond, there is no justification for bypassing the ordinary legislative process. (In the case of the border wall declaration, the president purposefully and explicitly gave Congress time to act.) And if Congress's response is to vote against the very action that the president seeks to take, that expression of Congress's will should

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[69] President Reagan issued a national emergency declaration in 1983, which he used to continue certain export controls under IEEPA after a statute authorizing such controls had lapsed. *See* Exec. Order No. 12444, 48 Fed. Reg. 48215 (October 14, 1983). As noted above, however, the legislative history of IEEPA indicates Congress's awareness that presidents would be able to use IEEPA for that very purpose. Importantly, that was not a case in which Congress voted to deny the president authority or funding for the very action he then took.

[70] More specifically, President Obama in 2011 requested $45.2 million to expand a Navy facility in Bahrain. After Senators raised explicit concerns about that investment, the National Defense Authorization Act for Fiscal Year 2012 zeroed out its authorization. *See* Department of Defense Authorization for Appropriations for Fiscal Year 2012 and the Future Years Defense Program, Hearings Before the S. Comm. on Armed Services, 112th Cong. 70, 91, 101 (2011) (questions of Sen. Ayotte and Manchin); Military Construction and Veterans Affairs, and Related Agencies Appropriations for Fiscal Year 2012, Hearings Before a Subcomm. of the S. Comm. on Appropriations, 112th Cong. 121-2 (2011) (question of Sen. Johnson); H. Rept. 112-329, 112th Cong. (2011); Pub. L. 112-81, § 4601 (2011). Appropriations language was less clear, but it appears that the full $45.2 million was appropriated. *See* Department of Defense, Submission of Budget for Fiscal Year 2013, C-1 at 154, https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2013/fy2013_c1.pdf. Lawmakers cautioned President Obama against moving forward without authorization, however, and signaled that such authorization would not be forthcoming. *See* Department of Defense Authorization for Appropriations for Fiscal Year 2013 and the Future Years Defense Program, Hearing Before the S. Comm. on Armed Services, 112th Cong. 62 (2012) (statement of Sen. McCaskill). At that point, instead of reiterating his request for authorization, President Obama invoked 10 U.S.C. § 2808 and began to award contracts for development. Michael J. Vassalotti and Brendan W. McGarry, *Military Construction Funding in the Event of a National Emergency* (Washington, D.C.: Congressional Research Service, 2019), 3, https://sgp.fas.org/crs/natsec/IN11017.pdf.

This incident was a misuse of emergency powers, given that Congress had withheld authorization for the project. It was nonetheless distinguishable from President Trump's border wall funding grab in several respects. First, the border wall was not, properly understood, a "military construction project," as the Navy facility was. 10 U.S.C. § 2808. Second, the money bound up in Trump's emergency proclamation was two orders of magnitude larger, and the border wall itself was a matter of intense public controversy, making the will of Congress—as representatives of the American people—all the more important. Finally, as noted above, President Obama did not fabricate a non-existent emergency to make emergency powers available. The naval base presumably operated in service of post-9/11 overseas military operations, and President Obama relied on the 9/11 emergency declaration. That declaration was unquestionably appropriate, although it is problematic that Presidents Bush, Obama, and Trump relied on it—and President Biden relies on it today—long after the immediate crisis passed.

control. Relying on emergency powers to move forward in such a case is like a doctor relying on advance medical directive to withhold life-sustaining treatment when the patient is conscious and clearly asking to be saved.[71]

The abuse was particularly egregious in the case of the border wall declaration because the Constitution unambiguously prohibits spending that Congress has not approved. Article I states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[72] The president thus invoked emergency powers, not just to get around the will of Congress in general, but to evade an express limitation in the Constitution.

Even this clear abuse, however, proved extremely difficult to stem. Several lawsuits were brought. Some plaintiffs struggled to establish standing.[73] Judges who sided with the plaintiffs stayed their own rulings (or had the rulings stayed by appellate courts) pending appeal.[74] Overall, courts were unwilling to look behind the designation of a "national emergency," focusing instead on the applicability of the particular emergency power the president invoked—10 U.S.C. § 2808, which authorizes emergency reallocation of funding only for "military construction" projects—and on a provision of the 2019 Consolidated Appropriations Act that expressly forbade changes in the funding of projects unless the changes were approved in an appropriations act.[75] And the Biden administration has asked the Supreme Court to vacate rulings against the Trump administration, now that President Biden has terminated the emergency declaration and stopped construction of the border wall.[76]

Congress, too, was unable to assert its will. For the first time since the enactment of the NEA, Congress voted on a resolution to terminate a national emergency declaration.[77] The resolution passed both chambers, with twelve Republican senators crossing party lines to vote for it.[78] President Trump vetoed the resolution, however, and Congress was unable to muster the two-thirds supermajority necessary to override his veto.[79] Six months later, the process repeated itself; a majority of Congress rejected the emergency declaration, yet it stayed in place.[80]

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[71] *See* Elizabeth Goitein, "Trump Is Destroying His Own Case for a National Emergency," *The Atlantic*, January 28, 2019, https://www.theatlantic.com/ideas/archive/2019/01/trump-has-no-case-national-emergency/581356/.
[72] U.S. Const. art. I, § 9, cl. 7.
[73] *See, e.g.,* U.S. House of Representatives v. Mnuchin, 379 F.Supp. 3d 8 (D.D.C. 2019).
[74] *See, e.g.,* Sierra Club v. Trump, No. 19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. 2019), *injunction stayed*, Trump v. Sierra Club, 140 S. Ct. 1 (2019); California v. Trump, 407 F.Supp. 3d 869 (N.D. Cal. 2019) (court stayed own injunction); El Paso County v. Trump, 408 F.Supp. 3d 840 (W.D. Texas 2019), *injunction stayed*, El Paso County v. Trump, No. 19-51144 (5th Cir. Jan. 8, 2020).
[75] *See* Pub. L. No. 116-6, div. D, § 739.
[76] *See* Petitioners' Motion to Vacate and Remand, Biden v. Sierra Club, S. Ct. No. 20-138 (2021), *granted*, 592 U.S. ____ (Jul. 2, 2021).
[77] *See supra* n. 41.
[78] *See* John Haltiwanger, "The 12 Senate Republicans who defied Trump and voted to terminate the border wall national emergency," *Business Insider*, March 14, 2019, https://www.businessinsider.com/12-gop-senators-voted-against-trumps-border-wall-national-emergency-2019-3.
[79] *See supra* nn. 42-3.
[80] *See supra* nn. 41-3.

V. How—and Why—Congress Must Act

President Trump's border wall declaration created a dangerous precedent. It signaled that presidents can declare emergencies to address *any* problem they consider to be serious, however longstanding, and that they can use those emergency declarations to give themselves powers Congress has expressly withheld. This could permanently upset the balance of power between the president and Congress. It could also undermine one of the basic principles of democracy: that the policies pursued by our government are those approved by a majority of Congress, not those that Congress cannot muster a supermajority to reject.

Moreover, the next time a president decides to declare an emergency for the sake of political convenience, he could invoke powers far more potent than the one President Trump invoked in 2019. The Brennan Center has catalogued 123 statutory provisions that become available to presidents when they declare a national emergency. Ninety-six of these require nothing more than the president's signature. Twelve contain a *de minimis* restriction, such as a requirement than an agency head certify the necessity of the measure (something the president could simply order the agency head to do). Only fifteen of these powers contain a more substantive restriction, such as a requirement that the emergency have certain specified effects.[81]

While many of the authorities provided in these 123 provisions are measured and sensible, some seem like the stuff of authoritarian regimes. For example, merely by signing a declaration of national emergency, the president may take over or shut down radio stations;[82] if the president goes further and declares a "threat of war," he may take over or shut down facilities for wire communication—a provision that arguably could allow him to assert control over U.S.-based Internet traffic.[83] Other powers would allow the president or members of his administration to freeze Americans' assets and bank accounts (IEEPA),[84] to exercise broad and unspecified powers over domestic transportation,[85] to detail members of the U.S. armed forces to any country,[86] to prohibit or limit the export of any agricultural commodity[87]—even to suspend the prohibition on government testing of chemical or biological agents on unwitting human subjects.[88]

Indeed, emergency powers could be deployed to undermine democracy itself. According to recent news stories, allies of former President Trump advocated that he invoke a range of emergency powers to overturn the results of the 2020 presidential election. They urged the president to declare a national emergency and invoke IEEPA in order to seize voting machines;

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[81] *See* Goitein, "Trump's Hidden Powers," Brennan Center for Justice; "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated March 4, 2022, https://www.brennancenter.org/analysis/emergency-powers.
[82] *See* 47 U.S.C. § 606(c).
[83] *See* 47 U.S.C. § 606(d); *see also* Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *The Atlantic,* January/February 2019, https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.
[84] *See* 50 U.S.C. §§ 1701 *et seq*.
[85] *See* 49 U.S.C. § 114(g).
[86] *See* 10 U.S.C. § 712(a)(3).
[87] *See* 7 U.S.C. § 5712(c).
[88] *See* 50 U.S.C. § 1515.

to invoke the Insurrection Act; and to declare martial law.[89] For reasons the Brennan Center has laid out, none of these suggestions would have provided a legal basis for overturning the election results.[90] Had President Trump nonetheless implemented these measures, they undoubtedly would have disrupted the transition of power even further, and created even greater chaos and (potentially) violence, than the insurrection of January 6. Moreover, while there are no emergency powers that allow a president to change the outcome of an election, some of the authorities that become available in a declared national emergency could be used to undermine the fairness of the election itself—e.g., by creating conditions that make it harder for people to vote.[91]

It is incumbent on Congress to fix this state of affairs. There are bills pending before Congress, as well as other public reform proposals, that would preserve the president's flexibility in times of crisis while mitigating against the risk of abuse and preventing "permanent emergencies."

A. National Emergencies Act Reform

Following President Trump's border wall declaration, several lawmakers introduced bills to amend the National Emergencies Act. Most of them contained the same central reform: a presidentially declared national emergency would automatically terminate after 30 days (or a similarly short period) unless Congress voted to approve the declaration. Expedited procedures would enable Congress to move quickly; they would also allow any member to force a vote and would prohibit filibusters in the Senate. This would ensure that the emergency declaration would not expire through obstructionism or inertia, and that the outcome would reflect the will of a majority of Congress. If Congress approved the declaration, it could stay in place for up to a year; if the president wished to renew it, each yearly renewal would again require Congress's approval.

This approach, versions of which are used by many other countries,[92] is more consistent with the core purpose of emergency powers. It would give the president ready access to

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[89] *See* Betsy Woodruff Swan, "Read the never-issued Trump order that would have seized voting machines," *Politico*, January 21, 2022, https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572; Tina Nguyen, "MAGA leaders call for the troops to keep Trump in office," *Politico*, December 18, 2020, https://www.politico.com/news/2020/12/18/trump-insurrection-act-presidency-447986; Luke Broadwater, "Fearing a Trump Repeat, Jan. 6 Panel Considers Changes to Insurrection Act," *New York Times*, April 19, 2022, https://www.nytimes.com/2022/04/19/us/politics/trump-jan-6-insurrection-act.html; Jamie Gangel, Jeremy Herb, and Elizabeth Stuart, "Mark Meadows' 2,319 text messages reveal Trump's inner circle communications before and after January 6," *CNN*, April 25, 2022, https://www.cnn.com/2022/04/25/politics/mark-meadows-texts-2319/index.html.

[90] *See* Joseph Nunn and Andrew Boyle, "There Are No Extraordinary Powers a President Can Use to Reverse an Election," Brennan Center for Justice, March 3, 2021, https://www.brennancenter.org/our-work/analysis-opinion/there-are-no-extraordinary-powers-president-can-use-reverse-election.

[91] *See* Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *The Atlantic,* 46-47, January/February 2019, https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.

[92] *See, e.g.*, Spanish Constitution, § 116, https://www.constituteproject.org/constitution/Spain_2011?lang=en; Constitution of the Fifth Republic (France) art. 36, https://www.constituteproject.org/constitution/France_2008?lang=en; Constitution of Greece art. 48, https://www.constituteproject.org/constitution/Greece_2008?lang=en.

enhanced authorities when he needs them most—i.e., when the emergency is in progress and Congress has not had time to address it. Once Congress has had time to act, however—and history shows that Congress can act quite swiftly in the face of true emergencies[93]—it should be Congress's decision as to whether emergency authorities are a good fit for the crisis at hand. Critically, that would remove the perverse incentive that exists when the government actor who declares the emergency is the same one who receives additional powers.

A bill featuring this reform, the ARTICLE ONE Act, was reported out of the Senate Homeland Security and Government Affairs Committee in 2019.[94] It received broad bipartisan support: The bill was introduced by Senator Mike Lee (R-Utah) and cosponsored by 18 Republican Senators, yet every Democrat on the committee voted for it, and several Democrats signed a bipartisan letter to Senate party leaders urging them to bring the bill to the floor.[95] Subsequently, versions of the ARTICLE ONE Act were incorporated into two major Democratic reform packages—the Protecting Our Democracy Act (PODA), which was passed by the House in December 2021,[96] and the Congressional Power of the Purse Act (CPPA)[97]—and a bipartisan bill to reform national security powers, titled the National Security Powers Act (NSPA) in the Senate[98] and the National Security Reforms and Accountability Act (NSRAA) in the House.[99] All told, 31 sitting Democratic senators and 20 sitting Republican senators have sponsored or cosponsored NEA reform legislation that includes this core change.

Although the congressional approval requirement remains the heart of the reform, PODA, the CPPA, and the NSPA/NSRAA added various provisions to further safeguard against abuse. One such provision is a ban on "permanent emergencies" that would prohibit emergency declarations from continuing for more than five years. At the five-year mark, it cannot fairly be said that the circumstances necessitating action are unexpected or extraordinary; they have effectively become a "new normal," and should be addressed through non-emergency measures. There is some risk that this approach could lead Congress to enact permanent expansions of presidential power where temporary ones would suffice. That concern, in my view, is better addressed by including sunsets in the relevant legislation, rather than allowing supposedly temporary powers to effectively become permanent through routine renewals of emergency declarations.

Another provision would place two key limits on which statutory authorities a president may invoke during a declared national emergency. First, it would specify that the authorities invoked must relate to the nature of, and may be used only to address, that emergency. There is

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[93] For instance, within weeks of the attacks of 9/11, Congress passed the USA PATRIOT Act, sweeping legislation that ran 342 pages and made changes to more than 15 different laws. Lisa Finnegan Abdolian and Harold Takooshian, "The USA PATRIOT Act: Civil Liberties, the Media, and Public Opinion," *Fordham Urban Law Journal* 30:4 (2003): 1429.
[94] S. Rep. No. 116-159, 116th Cong. (Nov. 2019).
[95] *See* "Bipartisan Letter Urges Leadership to Have Full Senate Consider ARTICLE ONE Act," Office of Sen. Mike Lee, October 18, 2019, https://www.lee.senate.gov/2019/10/bipartisan-letter-urges-leadership-to-have-full-senate-consider-article-one-act.
[96] H.R. 5314, 117th Cong. (December 9, 2021).
[97] H.R. 6628, 116th Cong. (2020); S. 3889, 116th Cong. (2020).
[98] S. 2391, 117th Cong. (2021).
[99] H.R. 5410, 117th Cong. (2021).

no reason why an emergency declaration should give the president access to dozens of powers that are facially irrelevant to the emergency at hand. This state of affairs presents an irresistible temptation to keep emergency declarations in effect as long as possible, as they may be used to address other problems—emergencies or otherwise—that might come up in the future. Second, the added provision would make very clear that emergency powers cannot be used to circumvent Congress. Specifically, it would prohibit the use of emergency powers to take a specific action if Congress, following the events giving rise to the emergency declaration, has withheld authorization or funding for that action.

Finally, each of the bills, to varying degrees, enhances transparency regarding how presidents use the emergency powers Congress has granted them. Currently, the president is required to report to Congress only on emergency-related expenditures, and there is no requirement to make those reports public. All of the NEA reform bills cited above would require the president to detail, not only the expenses incurred, but the activities and programs implemented, and the NSPA and NSRAA would require the president to make those reports public (although classified indexes could be submitted where necessary).

Any of these bills would represent a significant improvement over the status quo. Each would honor the original intent behind the Act by allowing Congress to serve as a meaningful check on the executive branch. And one of them, PODA, has gone through committee markup and passed the House, making it ripe for enactment either as a stand-alone bill or an amendment to other legislation.

B. IEEPA Reform

As noted above, Congress generally has acquiesced in presidents' use of IEEPA to impose economic sanctions in a wide range of circumstances, including situations that pose no imminent threat to U.S. security. Currently, there are 37 sanctions regimes that rely on IEEPA and that most lawmakers consider uncontroversial.[100] Reflecting that fact, many of the NEA reform bills discussed above include a carveout for national emergency declarations that invoke only IEEPA. In other words, under these bills, IEEPA invocations would not be subject to the requirement of congressional approval within 30 days of the declaration and yearly thereafter.

It would be a mistake, however, to leave IEEPA as-is. IEEPA provides some of the most potent authorities the president possesses in a national emergency. On its face, the law can be used to freeze the U.S.-based assets of nearly anyone, and to prevent people and entities under U.S. jurisdiction from engaging in any financial transactions with that person, as long as the president deems the action necessary to address a foreign threat.[101] Although IEEPA has largely been used to impose economic sanctions on hostile foreign actors, such as the government of Iran or international terrorist groups, nothing in the statute limits its application to such entities. President Trump, for instance, used IEEPA to impose sanctions on International Criminal Court

[100] *See* "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 9, 2022, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.
[101] *See* 50 U.S.C. §§ 1701-02.

staff in response to the Court's investigations of alleged war crimes committed by U.S. and allied personnel.[102]

Indeed, the law can be—and has been—used to target American citizens inside the United States and deny them access to their own property, with nothing resembling due process. After 9/11, for instance, several Muslim American charities and individuals were sanctioned based on suspicions that their activities benefited terrorist groups overseas. The targets were provided no notice of the reason for their designation, let alone the evidence on which the government relied, and were not afforded a hearing with the government. Several charities were forced to shut down without the government ever having to prove its case in court. As for the individuals, they endured several months in a terrifying limbo, unable to pay their bills or hold a job without the government's permission, before the government dropped the sanctions for lack of evidence.[103]

In addition, some sanctions regimes have had devastating impacts on innocent civilian populations overseas. IEEPA contains a humanitarian exemption, but it is relatively narrow, permitting only donations of certain types of goods. Moreover, the law allows presidents to waive the exemption, and they routinely do so. The executive branch has effectively replaced the statute's humanitarian exemption with regime-specific "general licenses" (i.e., licenses available without an individual application) that allow certain transactions for humanitarian purposes. These licenses, however, have proven insufficient. Fearing the dire financial consequences of being found in violation of sanctions, companies and financial institutions invariably "overcomply" and avoid even those transactions that are licensed.[104] There is mounting evidence that U.S. sanctions have significantly exacerbated humanitarian crises in Venezuela,[105] Afghanistan,[106] Iran,[107] and North Korea.[108]

Finally, IEEPA sanctions are marred by a lack of transparency in licensing, leading to the appearance (and perhaps the reality) of corruption. Individuals or companies may apply to the Treasury Department for "specific licenses" enabling them to conduct transactions that would otherwise be barred by sanctions. Such licenses can be highly lucrative and provide a competitive advantage to recipients. Yet there are no regulatory standards for issuing them, and recipients are not publicly identified. Investigative reporting in recent years has uncovered multiple instances of licenses being granted to well-connected applicants, including campaign donors, after members of Congress or high-level executive officials intervened on their behalf.[109]

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[102] Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).
[103] *See* Boyle, *Checking the President's Sanctions Power*, 12-14; Jake Tapper, "A Post-9/11 American Nightmare," *Salon*, September 5, 2002, https://www.salon.com/2002/09/05/jama/.
[104] *See* Boyle, *Checking the President's Sanctions Powers*, 16.
[105] *See, e.g.,* "New Report Documents How U.S. Sanctions Have Directly Aggravated Venezuela's Economic Crisis," Washington Office on Latin America, October 29, 2020, https://www.wola.org/2020/10/new-report-us-sanctions-aggravated-venezuelas-economic-crisis/.
[106] *See, e.g.,* Ellen Ioanes, "US policy is fueling Afghanistan's humanitarian crisis," *Vox*, January 22, 2022, https://www.vox.com/2022/1/22/22896235/afghanistan-poverty-famine-winter-humanitarian-crisis-sanctions.
[107] *See, e.g.,* "The humanitarian impact of US sanctions on Iran," Atlantic Council, October 29, 2019, https://www.atlanticcouncil.org/event/the-humanitarian-impact-of-us-sanctions-on-iran/.
[108] *See, e.g.,* Jessica J. Lee, "It's Time to Reexamine US Sanctions on North Korea," *The Diplomat*, March 9, 2021, https://thediplomat.com/2021/03/its-time-to-reexamine-us-sanctions-on-north-korea/.
[109] *See* Boyle, *Checking the President's Sanctions Power*, 16-17.

Congress should undertake reform of IEEPA that addresses the unique considerations it presents. The Brennan Center recommended several changes to the law in its 2021 report, *Checking the President's Sanctions Powers*. Most notably, IEEPA should be amended to build in due process protections, including meaningful notice and judicial review, for Americans who find themselves in sanctions' crosshairs. The law's humanitarian exception should be broadened and the waiver provision narrowed. The Treasury Department should be required to articulate standards for the issuance of specific licenses and make its licensing decisions available to Congress for review. And the role of Congress as a check on executive overreach should be strengthened. If Congress assesses that yearly approval of each individual sanctions regime would be overly burdensome, it should create an alternative approval process in which lawmakers vote on sanctions as a package, and any member may offer an amendment to strip out an individual sanctions regime.[110]

C. Disclosure of Presidential Emergency Action Documents

As noted in Part I of this testimony, the Constitution gives the president no explicit emergency powers. Nonetheless, modern presidents have increasingly claimed that the Constitution provides them with broad inherent powers to act during emergencies in ways that Congress need not authorize and cannot restrict. These radical claims, often set forth in Department of Justice memoranda that are not shared with Congress or the public,[111] find little support in constitutional history[112] and have largely escaped testing in the courts. Yet they may well be at the center of a category of emergency planning tools known as "presidential emergency action documents," or PEADs.

PEADs are executive orders, proclamations, and messages to Congress that are prepared in anticipation of a range of emergency scenarios, ready to sign and put into effect the moment one of those scenarios comes to pass. Created during the Eisenhower administration as part of continuity-of-government plans in the event of a nuclear attack,[113] PEADs have since been expanded for use in other emergency situations where the normal operation of government is impaired.[114] As one recent government document describes them, they are designed "to implement extraordinary presidential authority in response to extraordinary situations."[115]

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[110] *See* Boyle, *Checking the President's Sanctions Power*, 20-24.
[111] For example, the so-called "torture memos" issued by the Department of Justice's Office of Legal Counsel, which opined that the statutory prohibition on torture could not constrain the president's Article II commander-in-chief powers, were closely held even within the executive branch and became public only when one of the memos was leaked to the press. *See* Katherine Hawkins, "The Lies Hidden Inside the Torture Report," *Politico*, January 28, 2015, https://www.politico.com/magazine/story/2015/01/torture-report-lies-114693/.
[112] *See* Saikrishna Prakash, "The Imbecilic Executive," *Virginia Law Review* 99, no. 7 (Nov. 2013): 1361-1433; *but cf.* Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).
[113] *See* Matthew L. Conaty, *The Atomic Midwife: The Eisenhower Administration's Continuity-of-Government Plans and the Legacy of "Constitutional Dictatorship,"* 62 Rutgers L. Rev. 627 (2010).
[114] *See* Federal Emergency Management Agency, "Manual 5400.2," effective February 29, 2000, 111; *see also* "Presidential Emergency Action Documents," Brennan Center for Justice, last updated November 22, 2021, https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents.
[115] Stephen G. Burns, "Update of Presidential Emergency Action Documents," Nuclear Regulatory Commission, July 23, 2004, https://www.governmentattic.org/18docs/NRCupdtPEADS_2004.pdf.

PEADs may be the best-kept secret in Washington; none has ever been publicly released or even leaked. Indeed, it appears that they are not even subject to congressional oversight. Although the executive branch is required by law to report even the most sensitive covert military and intelligence operations to at least some members of Congress,[116] there is no such disclosure requirement for PEADs, and no evidence that the documents have ever been shared with relevant congressional committees.

Although PEADs themselves remain hidden from the public eye, various government records have become available over the years that discuss them. Through these records, we know that there were PEADs during the early decades of the Cold War designed to authorize the roundup and detention of "dangerous persons" within the United States; suspend the writ of *habeas corpus* by presidential order; provide for various forms of martial law; issue a general warrant permitting search and seizure of persons and property; establish military areas such as those created during World War II; restrict Americans' ability to travel overseas; and authorize censorship of news reports.[117] By contrast, there is almost no public information about the contents of modern PEADs. We do know, however, that there were 56 PEADs in effect as of 2017, and that the Trump administration was engaged in a processing of reviewing them.[118]

Advance planning for emergencies is prudent, and there is nothing inherently problematic about drafting orders and directives in advance of foreseeable crises. But emergencies cannot justify unconstitutional measures, and *planning* to violate the Constitution or ignore statutory limitations is a grotesque abuse of power. Moreover, Congress, as an equal partner in matters of national security, has both the prerogative and the obligation to conduct oversight of the executive branch's emergency planning[119] —in part to ensure that the executive branch does not stray beyond the law.

In 2020, Senator Ed Markey (D-Mass.) introduced a bill titled "Restraint of Executive in Governing Nation (REIGN) Act" that would require the president to disclose PEADs to the relevant oversight committees in Congress.[120] Versions of the bill were subsequently

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[116] *See* National Security Act, Pub. L. 102-88, title VI, § 603(a)(2), 105 Stat. 442 (1947) (codified at 50 U.S.C. § 3093).
[117] *See* Elizabeth Goitein and Andrew Boyle, "Trump Has Emergency Powers We Aren't Allowed to Know About," *New York Times*, April 10, 2020, https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html; "Presidential Emergency Action Documents," Brennan Center for Justice, last updated November 22, 2021, https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents.
[118] *See* Commerce, Justice, Science and Related Agencies Appropriations for 2018, Hearing Before a Subcomm. Of the H. Comm. on Appropriations, 115th Cong. 625 (2017) (Department of Justice Justification of the Budget Estimates).
[119] *See generally* Vicki Divoll, "The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive," *Harvard Journal of Law and Public Policy* 34 (2011): 493. Although the Constitution assigns the president the role of Commander in Chief, *see* U.S. Const. art. 2, § 2, cl. 1, it grants Congress several equally significant powers in the areas of military, national security, and foreign affairs. *See, e.g.,* U.S. Const. art. 1, § 8, cls. 1 (power to "provide for the common Defence"), 11 (power to declare war), 12 (power to raise armies), 13 (power to "maintain a Navy"), 14 (power to regulate the armed forces), 15 (power to "call[] forth the Militia"); art. 2, § 2, cl. 2 (requiring Senate advice and consent for treaties and certain presidential appointments).
[120] S. 4279, 116th Cong. (2020).

incorporated into PODA and the NSRAA. This is an extremely modest and tailored solution. Neither the REIGN Act nor PODA requires any disclosure to the public, and while the NSRAA mandates a declassification review, the executive branch retains the authority to decide what information, if any, to declassify. The legislation merely gives Congress the ability to serve its constitutionally-assigned oversight function. Lawmakers also should insist that the president share with Congress any legal analyses underpinning the PEADs. Among other reasons, Congress needs this information so it may correct, through legislation, any executive branch misinterpretations of statutory law.

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Congress has enacted a range of extraordinary authorities designed to enhance the president's powers in cases of sudden, unexpected crises. The greater the powers, however, the greater the need for robust oversight and safeguards against abuse. Congress enacted the National Emergencies Act and IEEPA to put such checks in place, but they have failed to serve that function. Moreover, presidents increasingly lay claim—in secret—to inherent constitutional powers that threaten to render statutory limitations moot.

It is time for Congress to revisit the legal framework governing presidential emergency powers, with an eye toward restoring its own role as a check against executive overreach. My testimony today has described some common-sense reforms that would provide the president with the flexibility he needs in a crisis, while simultaneously ensuring that these extraordinary powers cannot be used to subvert democracy and guarding against the corrosive phenomenon of "permanent emergencies."

Thank you again for this opportunity to testify.

Mr. COHEN. Thank you very much. Our next Witness is Mr. Soren Dayton. Mr. Dayton is a policy advocate with Protect Democracy. He previously worked at Hill & Knowlton Strategies. He has also worked on the late Senator John McCain's campaign for President and the campaigns for a variety of Republican candidates among others. He is on the Board of Advisors of Tech Congress and was a Penn Kemble Fellow with National Endowment for Democracy.

He has an A.B. from the University of Chicago, and you are recognized for five minutes, sir.

STATEMENT OF SOREN DAYTON

Mr. DAYTON. Thank you, Chair Cohen and Ranking Member Johnson for inviting me to discuss national emergency powers and opportunities for reform. I am here on behalf of Protect Democracy which works to strengthen our democratic institutions and separation of powers.

Emergencies present a critical issue of checks and balances. In the constitutional balance of powers, Congress has the power to make laws and appropriate funds. The President has the power to implement laws and spend the money that Congress directs.

In situations of national emergency, Congress rightly gives the President and the Executive Branch fairly broad leeway because of the need to quickly and to make specific decisions. That doesn't mean Congress wants to give the President unlimited power. Members of Congress, you still want a say and you have an important role in reviewing, supporting, or curtailing a President's execution of delegated powers.

Congress found a solution 50 years ago in the National Emergencies Act. The NEA gave the President broad flexibility in an emergency but required clear reporting to Congress and empowered Congress to call a halt through a legislative veto. Any Member of the House or the Senate could ask for a vote to block a President's action via a current resolution. That system was applied not just to national emergencies, but also to war powers and arms sales. That system broke in 1983. Supreme Court decision, *INS* v. *Chadha*, struck down the legislative veto that Congress had relied on putting a stop to emergencies when it felt the President had gone too far. Without that check, the delegation of emergency powers was transformed into something far broader than ever intended. It now requires a veto-proof majority in both chambers to override Presidential action under emergency powers.

Indeed, since Chadha, there have been virtually no checks on the President's national emergency powers. Typically, Members of both parties complain about perceived abuses of Executive powers by the President of a different party and more recently, this has come to the fore with emergency powers, yet increased polarization and congressional gridlock have left those actions substantially unchallenged.

Fortunately, there is a solution to restore proper balance of emergency powers. The key reforms are straight forward. The President must give a clear declaration of emergency including which delegated authorities he plans to invoke. The authorities in the declaration would sunset automatically after a short period of time

and expedited procedures must be put in place to allow Congress to extend or terminate those authorities in a timely manner. Such reforms would closely model the intent of the 1976 National Emergencies Act.

For many years, these important reforms lay out of reach, yet fortunately, Congress now seems ready to assert its rightful role regarding emergency declaration. Legislation encompassing these key changes now has broad bicameral and bipartisan support.

My written testimony provides greater detail on the context for national emergency reforms and recent legislative efforts, but I will recap some of the recent milestones here.

Last December, the House passed a strong reform of the National Emergency System as part of the Protecting Our Democracy Act. That legislative proposal built on the work in a previous Congress including a Republican proposal in the Senate that was marked up in Committee in 2019. The House companion to that legislation was led by Mr. Roy on this Subcommittee. In the Senate, over 30 Democrats have cosponsored bills that include national emergency reform. 20 Senate Republicans have either cosponsored similar legislation or voted for it in Committee. It is clear that there is strong bipartisan consensus on this important issue. We have the momentum to reclaim congressional authority in national emergencies. It is time to get it done.

Thank you, Chair Cohen, Ranking Member Johnson for calling this hearing. I urge you all and Members here to translate that support into legislative action and pass national emergency reform this year. Thank you. I look forward to questions.

[The statement of Mr. Dayton follows:]

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Judiciary Committee

"Examining Potential Reforms of Emergency Powers"

Testimony of Soren Dayton
Policy Advocate, Protect Democracy

May 17, 2022

Thank you Chairman Cohen and Ranking Member Johnson for inviting me to discuss national emergency powers and opportunities for reform.

In the constitutional balance of powers, Congress has the power to make laws and appropriate funds. The president has the power to implement laws and spend money. During national emergencies, Congress rightly gives the president and the executive branch broad leeway because of the need to act quickly or to make specific decisions. But that doesn't mean Congress wants to give the president unlimited power; it still wants a say and to be able to step in if it thinks the president is acting improperly.

Nearly fifty years ago, by passing the National Emergencies Act of 1976 (NEA), Congress created a framework for giving the president the ability to operate flexibly in certain situations through broad delegations, clear reporting to Congress, and the use of a legislative veto for Congress to intervene and stop actions. Any member of Congress could ask either the House or the Senate to vote to block the president's action via a concurrent resolution. This system was applied to national emergencies, war powers, and arms sales.

However, the Supreme Court's 1983 decision in *INS v. Chadha*[1] removed that tool when it determined that Congress could not use a so-called "legislative veto" on decisions made pursuant to powers Congress had delegated to the executive. This meant that Congress's built-in check on national emergency powers was no longer viable and transformed its delegation of emergency powers into something far broader than intended.

Indeed, since *Chadha*, there have been virtually no checks on the president's national emergency powers. Fortunately, there are simple reforms that Congress can institute to ensure a proper balance of power between Congress and the president on national emergencies — and to restore Congress's original intent when it developed a fail-safe to address executive overreach.

[1] 462 U.S. 919 (1983).

Typically, members of both parties complain about perceived abuse of executive powers by the president of a different party, and more recently with emergency powers.

Fortunately, there are proposed reforms to bring the emergency powers back into balance. The core structure of the reform is straightforward: the president gives clear declarations of the use of delegated authorities, the authorities sunset automatically, and expedited procedures give Congress the ability to extend those authorities in a timely manner.

These reforms have broad bicameral and bipartisan support, and would restore the kind of necessary checks that Congress originally enacted in its original 1976 bill.

Congress has done more to address the problems with the NEA in the last three years than it has in the 39 years since *Chadha* was decided—and it has done so on a bipartisan and bicameral basis. In addition, reforming the NEA can serve as a model in Congress's broader effort to rebalance the powers of the legislative and executive branches.[2]

The Structure and Context of the National Emergencies Act of 1976

When Congress passed the NEA, it explicitly delegated powers to the president while also preserving Congress's ready ability to terminate a particular action at any time. The president would declare an emergency and state which authorities he proposed to use. At the same time, this declaration would unlock expedited procedures that would allow any member of the House or Senate to bring a concurrent resolution to the floor to terminate the emergency.

The NEA was part of a broader pattern during the 1970s of Congress asserting its right to a legislative veto and its powers vis a vis the executive branch. Like the NEA, the War Powers Resolution of 1973 and the Arms Export Control Act of 1976 all used a legislative veto using a concurrent resolution. And in all cases, the statutes provided expedited procedures so that any member of the House or the Senate could force a vote on the executive branch actions with the real possibility of terminating the action.

By the mid-1970s, there were well-established frameworks to enable the executive branch to make flexible decisions, ensure that Congress was informed, and empower Congress to disagree with certain actions. The NEA, along with statutes regarding war powers and arms sales, employed just one of several different forms of legislative veto. These bills were the strongest, requiring concurrent action by both chambers of Congress. There were also single-chamber vetoes and even veto actions taken by the chairs and ranking members of committees.

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[2] Mort Halperin & Soren Dayton, *Can Congress Reclaim Authority It Has Handed Over to the President? It's Trying.*, Wash. Post (Aug. 20, 2020), https://tinyurl.com/2p88uabr.

The *Chadha* case actually emerged from an exercise of a single-chamber veto, in the Immigration and Nationality Act (INA).[3] Under the INA, certain adjudicatory decisions taken by the executive branch, in this case a decision to suspend a deportation proceeding, were reported to Congress. If either chamber did not pass a resolution rejecting that decision by the completion of that Congress, the executive branch's decision would take effect.

The Congressional Budget and Impoundment Control Act of 1974 empowered Congress to block executive branch attempts to reprogram or impound funds.[4] The act gave Congress several ways to do this, including passing a bill to rescind certain budget authority or adopting a single-house resolution (of the kind later deemed unconstitutional in *Chadha*) blocking a proposed deferral of budget authority.[5]

The basic framework for all of these systems was that some part of the executive branch would notify Congress about a desire to take an action. In cases of urgent situations—for example national emergencies, war powers, and potentially emergency arms sales—the executive branch could act with some authorities before Congress acted. All of these systems fell with *Chadha*.

How the Executive Branch Gained Power After *Chadha*

The 1983 *Chadha* decision destabilized that framework by essentially ending the so-called legislative veto. The decision made clear that for Congress to overrule executive branch action, it would require "bicameralism and presentment." That is, *both* houses must pass something and the president must sign it (or have a veto overridden).

In the wake of *Chadha*, Congress adjusted certain statutes to account for the ruling and the result was to significantly shift power to the executive.

Under the statutes where Congress required a concurrent resolution—namely for the NEA, War Powers Resolution, and Arms Export Control Act—Congress modified the statute to require a joint resolution. The difference, of course, is that the president would have to sign a joint resolution of termination of his action or his veto would need to be overruled. The threshold for Congress exerting its will over a president who disagreed went from a simple majority to a two-thirds supermajority in both chambers, effectively neutering Congress's ability to push-back against executive action.

Some informal checks on executive overreach still remained. After *Chadha*, some agencies voluntarily adopted policies or even regulations to follow the previous procedures if they didn't require a full body of Congress to act, merely a full committee or the chair or ranking member of

[3] Immigr. & Nat'y Act § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).
[4] Cong. Budget & Impoundment Control Act of 1974 §§ 1012-13, 31 U.S.C. §§ 1402-03 (1974).
[5] *Id.* § 1012(b), 2 U.S.C. § 683(b); *id.* § 1013(b), 31 U.S.C. § 1403(b) (1974).

a committee. For example, a 2021 Congressional Research Service report on Department of Defense (DOD) transfer and reprogramming authorities noted:

> While DOD regulation requires congressional prior approval of certain reprogramming actions, the department does not view the requirement as legally binding. The ability of Congress to create legally binding prior approval requirements on reprogramming actions may be limited by the 1983 U.S. Supreme Court case *Immigration and Naturalization Service (INS) v. Chadha*.[6]

DOD simply decided to comply with the old system. However, the report notes that Congress had a stake in the relationship:

> Some observers may view approval requirements as practically binding, however, because the annual appropriations process provides a means for Congress to impose sanctions on violations of comity and trust.[7]

Because Congress continued to pass both appropriations bills and the annual National Defense Authorization Act, Congress maintained a degree of control by other means. Regular congressional action gave Congress the power to enforce its prerogatives because the executive branch needed things from Congress, in this case money and statutory changes to the Department of Defense.

Civil society also has stepped in to address perceived overreach by the executive branch regarding emergency powers. For instance, my organization, Protect Democracy, litigated against the national emergency on the southern border on behalf of El Paso County and the Border Network for Human Rights. We prevailed in the Western District of Texas in El Paso. The American Civil Liberties Union also sued and prevailed at the district court level. However, lawsuits brought by third parties are a poor way to protect Congress's prerogatives.

Fortunately, in the last three years, Congress has started seriously to wrestle with the imbalance of power between Congress and the executive branch created by the *Chadha* decision and its aftermath. Congress has made particular progress on the national emergency front.

Reforms to the National Emergency Structure and Beyond

[6] Brendan McGarry, Cong. Rsch. Serv., IF11243, *Defense Primer: DOD Transfer and Reprogramming Authorities* 2 (2021), https://sgp.fas.org/crs/natsec/IF11243.pdf.
[7] *Id.* (emphasis omitted).

The basic structure of a comprehensive post-*Chadha* reform was clear relatively soon after the 1983 decision. The core components were a "sunset" of authorities matched with expedited procedures that would allow Congress to move quickly to ratify or reject presidential action. In 1984, then-Sen. Joe Biden wrote in the Syracuse Law Review that one key response to *Chadha* should be the increased use of a "sunset" mechanism that allows some powers automatically to lapse after a specified period of time:

> I believe that the American Bar Association was correct in telling the Senate Judiciary Committee that sunset legislation "is an idea whose time has come, gone, and [in light of the *Chadha* decision] returned."[8]

Sen. Biden actually proposed a reform that sunset certain authorities in S.2384, the Arms Export Reform Act of 1986.[9] Sen. Chuck Grassley was an original cosponsor.

And months after the *Chadha* decision, then First Circuit Judge Stephen Breyer suggested a "special fast track for special confirmatory laws"—in other words, creating expedited procedures to approve or confirm executive branch actions.[10] Perhaps the most detailed proposal was from John Hart Ely, a professor of constitutional law at Harvard. In his 1993 book *War and Responsibility*, Ely laid out detailed procedures for the legislative and executive branches around war powers.[11] Proposed reforms to the NEA are a somewhat stripped down version of what Ely proposes, as emergencies don't implicate the kinds of Article II powers that war powers do.

In the end, the core structure of these proposed reforms are built on these two insights. When there is a clear delegation of authority to the executive branch and a clear action taken by the executive branch to activate those delegated powers, the following conditions should apply:

1. Automatic sunset of those broad delegations;
2. Congressional action to confirm or renew the use of the delegated powers in a specific case for a specific period of time with expedited procedures in each chamber to ensure that Congress acts to explicitly affirm or reject the use of delegated powers prior to the sunset; and
3. Reporting and factual declarations about the justification for and use of the powers.

That is, the core of any reform is the "sunset" that then-Sen. Biden proposed alongside the "fast track … confirmatory law" that Breyer proposed—with some reporting added so that Congress

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[8] Sen. Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 Syracuse L. Rev. 685, 690-91 (1984), https://tinyurl.com/2p879wj2.
[9] Arms Export Reform Act of 1986, S. 2834, 99th Cong. (1986), https://tinyurl.com/4xbnb7py.
[10] Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785, 793 (1984), https://tinyurl.com/2p93vdva.
[11] John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1993).

can have the appropriate information to act quickly on underlying executive action and follow its implementation.

This is a relatively straightforward change from the pre-*Chadha* system. Congress must specify a period of time after which the authorities will sunset. The NEA already had expedited procedures for terminating national emergencies, so they can simply be adopted for a joint resolution that would affirm rather than terminate.

There has been enormous bipartisan and bicameral work, and growing consensus, on this issue:

- In February 2019, this subcommittee held a hearing on this subject and showed the urgent need for reforms.[12]
- A number of bills offering relatively similar fixes to the national emergency situation were introduced, including the bipartisan Guarding Congressional Authority Act (H.R.1410),[13] the Limiting Emergency Powers Act (H.R.1720), and a bicameral bill, the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act (ARTICLE ONE) Act (H.R.1755 and S.764). The ARTICLE ONE Act became the basis for subsequent legislating. It did the following:
    - Automatically sunsetted a national emergency declaration after 30 days. It also sunsetted national emergencies after one year.
    - Required a "joint resolution of approval" to extend the emergencies after the sunset.
    - Added some reporting requirements about authorities, monies spent, and similar issues.
- In July 2019, the Senate Homeland Security and Governmental Affairs Committee (HSGAC) held a markup on the ARTICLE ONE Act and reported it out of committee on an 11-2 vote, with all of the Democrats voting in favor.[14] The most important substantive change was removing international economic emergencies under the International Economic Emergency Powers Act (IEEPA) from the reform. This is primarily because many of our international sanctions, such as those now being imposed nearly daily on Russia, are issued under IEEPA.
- In October 2019, 15 Senators, comprising 9 Republicans and 6 Democrats, asked leadership for floor time to move forward on this legislation.[15]

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[12] *The National Emergencies Act of 1976: Hearing Before the Subcomm. on the Const., Civ. Rts., and Civ. Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019), https://tinyurl.com/3v927mwx.
[13] Guarding Cong. Authority Act, H.R. 1410, 116th Cong. (2019), https://tinyurl.com/2p8aw3md.
[14] S. Rep. No. 116-159, at 5-6 (2019), https://tinyurl.com/2ec9fbcb.
[15] Press Release, Sen. Mike Lee, Bipartisan Letter Urges Leadership to Have Full Senate Consider ARTICLE ONE Act (Oct. 18, 2019), https://tinyurl.com/ye2a4esn.

- In early 2020, House and Senate Democratic members of the Budget and Appropriations Committees introduced the Congressional Power of the Purse Act (CPPA).[16] This legislation included the NEA reforms that had been approved by HSGAC the preceding year with some small technical improvements and the addition of House expedited procedures. (The CPPA was also included as Title V of the Protecting Our Democracy Act.[17])
- The HSGAC bill was offered as an amendment to the 2020 National Defense Authorization Act in the Senate with bipartisan support, including from Sens. Portman, Peters, Leahy, Lee, Udall, Toomey, Cornyn, and Johnson.[18] It did not receive a vote.
- In 2021, the ARTICLE ONE Act was included in an omnibus national security reform package called the National Security Reforms and Accountability Act (H.R.5410)[19] in the House, led by Chairman McGovern and Rep. Peter Meijer. In the Senate, Sens. Murphy and Lee introduced a nearly identical version of that bill as the National Security Powers Act (S.2391).[20]
- The Protecting Our Democracy Act was re-introduced in October 2021[21] and passed the House in December 2021 with the support of all of the Democrats on the Judiciary Committee. Every single Democrat on this subcommittee voted for it. A bipartisan amendment offered by Reps. McGovern, Meijer, and DeFazio was adopted to bring the national emergency provisions of the Protecting Our Democracy Act and the National Security Reforms and Accountability Act into closer alignment.

At this point, every House Democrat has voted for national emergency reform. A number of House Republicans have introduced bills on this issue, including Mr. Roy on this subcommittee.

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[16] Cong. Power of the Purse Act, H.R. 6628, 116th Cong. (2020), https://tinyurl.com/52me9ptm; *see* Staff of H. Comm. on the Budget, 116th Cong., *Section-by-Section Analysis: Congressional Power of the purse Act* (2020), https://tinyurl.com/4ja2zmz8 (noting that CPPA § 301 "provides that, with the exception of emergencies under the International Emergency Economic Powers Act (IEEPA), an emergency declared by the President shall automatically cease after 30 days unless Congress expressly approves the declaration. This will require both Houses affirmatively to approve of an emergency, flipping the current default that resulted from the Supreme Court's decision in *INS v. Chadha* in which both Houses must affirmatively disapprove of an emergency with sufficient votes to override a veto. This section also provides that individual statutory emergency authorities associated with a non-IEEPA emergency declaration shall cease unless approved by Congress during the 30-day period, even if Congress approves the underlying declaration.").

[17] Protecting Our Democracy Act, H.R. 8363, 116th Cong., tit. V (2019), https://tinyurl.com/ykvkr58f.

[18] S. Amdt. 2477 to S. Amdt. 2301 to Nat'l Def. Authorization Act for Fiscal Year 2021, S. 4049, 116th Cong. (2020), https://tinyurl.com/2p842ksf.

[19] Press Release, Rep. Jim McGovern, McGovern, Meijer Lead Introduction of Sweeping New Legislation to Reassert Congressional Power Over National Security (Sept. 30, 2021), https://tinyurl.com/54z5zpyj (noting that "[t]heir bipartisan bill aims to recalibrate the balance of power between the president and congress by reclaiming congressional oversight of arms sales, emergency declarations, and the use of military force").

[20] Press Release, Sen. Chris Murphy, Murphy, Lee, Sanders Introduce Sweeping, Bipartisan Legislation to Overhaul Congress's Role in National Security (July 20, 2021), https://tinyurl.com/mw3y9xtt.

[21] Press Release, Rep. Adam Schiff, House Democrats Introduce the Protecting Our Democracy Act to Restore, Strengthen, and Protect Our Democracy (Sept. 21, 2021), https://tinyurl.com/2p8f5d5x (noting that NEA reform text in bill "[i]mposes a limit on Presidential declarations of emergencies and any powers triggered by such declarations unless extended by a vote of the Congress").

Over twenty Senate Republicans have either cosponsored it or voted for it in committee. And over thirty Democratic Senators have cosponsored bills that included national emergency reform.

It's clear that there is a strong bipartisan consensus on this important issue. Thank you Chairman Cohen and Ranking Member Johnson for calling this hearing and I urge you and all members to work to translate that support into legislative action and pass national emergency reform this year.

Mr. COHEN. Thank you, Mr. Dayton. Our next Witness is Mr. GianCarlo Canaparo, Senior Legal Fellow at the Heritage Foundation, the Edwin Meese III Center for Legal and Judicial Studies. He researches, writes, speaks, testifies on regulatory policy, criminal justice policy, the Federal courts, and constitutional law.

His works have appeared in the *Harvard Journal of Law and Public Policy*, the *Notre Dame Law Review*, the *Administrative Law Review*, and *Georgetown Law and Public Policy*.

Prior to joining the Heritage Foundation, he was in private practice and served as a law clerk for two years for a Federal District Court judge. He received his law degree from Georgetown and was editor of the *Law Journal* there. He has a Master's degree in economics from UC–Davis.

Is Canaparo right or Canaparo?

Mr. CANAPARO. Canaparo.

Mr. COHEN. Canaparo. You are recognized for five minutes.

STATEMENT OF GIANCARLO CANAPARO

Mr. CANAPARO. Thank you. Good morning, Chair Cohen, Ranking Member Johnson, and distinguished Members of the Committee.

The question facing the Committee today is how can Congress regain control over the Executive Branch's emergency powers? Over the years, Congress has gifted the President vast emergency powers that are at his command as soon as he issues the magic words national emergency. He can redirect money, seize assets, and suspend laws.

Like two opposing pendulums, Members of both political parties swing from celebrating this situation to opposing it and back again. Those with a longer view see the need to resolve this. They likewise appreciate that any limits that Congress imposes on the President's emergency powers are a double-edge sword. It will constrain a President of one party today and a President of another party tomorrow. The status quo is also a double-edged sword granting the President of one party today tremendous power and the President of another party tomorrow tremendous power. The status quo suffers from the added side effects of being constitutionally suspect and ripe for abuse. Any set of rules is going to hurt one party and help the other, depending on who the President is. Wise leaders accept this and strive to create stability over time. The unwise, on the other hand, try to exploit the present broken system for short term political gain.

For those who are curious about repairing the present system, I offer a few solutions. I approach this starting from the Constitution's text and logic. The Constitution by design includes no emergency powers clause. The Framers, as Justice Robert Jackson once observed, knew what emergencies were, knew the pressures they engender for authoritative action, and knew, too, how they afford a pretext for usurpation.

Still, many parts of the Constitution do anticipate emergencies: The Army clause, the Treaty clause, the Guarantee clause, and of course, the Extraordinary Occasions clause. The themes that runs through them all is that Congress, not the President, is supposed to take the lead. This makes good sense because if the President gets extra powers whenever he decides there is an emergency, you

might reasonably worry that he will go find some useful emergencies. The potential for abuse is there. Congress, unfortunately, has created it. Congress can fix it.

As I set out in more detail in my written testimony, I offer a few solutions. My solutions are substantive, not procedural for a couple of reasons. As my co-Witness here mentioned, the procedural limitations are effectively cut off by the Supreme Court's decision in *INS* v. *Chadha*. Procedural solutions were always going to be second best solutions anyway. They don't realign us with the underlying constitutional logic and as long as that partisan pendulum continues to swing, Congress is likely to exercise oversight functions of Presidential emergency poweronly when it is controlled by the opposite party.

So, instead, Congress should impose substantive limitations on the President's emergency powers. To put it simply, to paraphrase my mother, you brought these powers into the world, and you can take them out again. How do you establish a framework to do that?

The Constitution provides a guide. It anticipates that Congress will take the lead in addressing emergencies. So, generally, Congress should do so. Now, that is not to say that Congress should give the President no emergency powers. Congress should give him such powers only when it is convinced that it is incapable of reacting with necessary speed.

Now, I think this will be a high bar because in the past when this country has faced serious crises, whether it was the attack on Pearl Harbor or 9/11, Congress has reacted with tremendous speed. With that in mind, your first step should be to reevaluate all those laws that give the President emergency powers and eliminate all but those you believe require a speedier reaction than Congress can deliver.

The second solution is to impose a time limit on all emergencies, not longer than two years. Two years, because the Constitution's Army clause says that Congress must renew the Army's funding every two years without exception. It doesn't matter if the country is invaded by a hostile force, the Army's funding will run out without Congress' action. If the response to an invasion ends after two years without congressional action, then no other emergency needs last longer.

A third solution is to give the President temporary emergency powers on a case-by-case basis at his request. Rather than create a vast array of powers that the President can activate whenever he sees fit, make him come hat in hand, so to speak, to you to ask for specific powers narrowly tailored to the crisis.

Again, I provide more detail in my written statement, but in the meantime, I welcome your questions and I will stop there.

[The statement of Mr. Canaparo follows:]

"Examining Potential Reforms of Emergency Powers"

Testimony Before
House Committee on the Judiciary

Subcommittee on the
Constitution, Civil Rights, and Civil Liberties

Chairman Stephen I. Cohen

United States House of Representatives

5/17/22

GianCarlo Canaparo
Senior Legal Fellow
Meese Center for Legal and Judicial Studies
The Heritage Foundation

Chairman Cohen, Ranking Member Johnson, and distinguished Members of the Committee:

Thank you for giving me the opportunity to appear before you today.

My name is GianCarlo Canaparo. I am a Senior Legal Fellow in the Meese Center for Legal & Judicial Studies at the Heritage Foundation.[1] I am a scholar of constitutional and administrative law. One of my main areas of study is the separation of powers, and today's topic goes right to the heart of that issue.

The question facing the committee today is: how can Congress regain control over the executive branch's expansive emergency powers? This is a profoundly important question, and there is agreement among scholars on both sides of the political aisle that it needs to be addressed. I agree, for example, with the conclusion of the liberal Brennan Center's *A Guide to Emergency Powers and Their Use* that many of the laws that give emergency powers to the executive branch "appear to be unnecessary and/or outdated" and "subject to abuse."[2] I likewise share the concerns of the bipartisan Special Committee on the Termination of the National Emergency that emergency powers are a threat to liberty and that Congress ought to vigorously monitor and check them.[3] And I agree with Senator Mike Lee who has said that rule by executive emergency order "runs directly counter to the vision of our Founders and undermines the safeguards protecting our freedom."[4]

My testimony today aims to provide you with the constitutional provisions and logic that should guide you as you work towards reining in executive emergency power. To that end, I will provide an overview of the relevant constitutional provisions, discuss past efforts to rein in executive emergency powers, explain the state of judicial precedents on the topic and how they limit the options available to you, and offer several potential solutions for you to consider. Finally, I'll address several recent bills on this topic.

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[2] *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE, Dec. 5, 2018 (updated Mar. 4, 2022), https://www.brennancenter.org/media/4976/download (hereinafter *Guide to Emergency Powers*).
[3] REPORT OF THE SPECIAL COMMITTEE ON THE TERMINATION OF THE NATIONAL EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. Rep. No. 93-549, 93d Cong. (1973) (hereinafter REPORT OF THE SPECIAL COMMITTEE).
[4] Press Release: *Sen. Lee Introduces ARTICLE ONE Act to Reclaim Congressional Power*, Feb. 4, 2021, https://www.lee.senate.gov/2021/2/sen-lee-introduces-article-one-act-to-reclaim-congressional-power.

I. OVERVIEW & HISTORY

The Constitution includes no emergency powers clause. This is by design. The Framers, as Justice Robert Jackson once observed, "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."[5] Except for the Suspension Clause, which permits Congress to suspend the writ of habeas corpus during rebellion or invasion when public safety requires it, no other provision of the Constitution provides extraordinary powers or procedures during emergencies.[6] Quite the contrary, many parts of the Constitution expressly contemplate emergencies and yet require the government to address them through the same procedures that it uses for normal business. Consider the following:

1. Even if a foreign army is rampaging across the country, Congress must re-appropriate money for the Army every two years.[7]
2. Before Congress passed a succession law, if both the president and vice-president had died, the executive branch would have been leaderless.[8]
3. Even if the country is at war, the President cannot conclude a peace treaty unless two-thirds of the Senate approve.[9]
4. If there are vacancies in high-level executive positions, no matter how important, they must be approved by the Senate, and even if the Senate is in recess, a temporary appointment will expire if not approved during the Senate's next session.[10]
5. If there is "domestic violence" within a state, the federal government may intervene only if the state asks for Congress's help or, if Congress "cannot be convened," for the President's help.[11]
6. Finally, even if the country is at war, soldiers may be quartered in homes only in a manner that Congress proscribes by law.[12]

There is a theme here, and it is that even during emergencies, the federal government is supposed to react through its normal procedures. What is more, *Congress*—not the president—is supposed to take the lead. This presumption is made manifestly clear by the Extraordinary Occasions Clause, which provides that when the country is faced with "extraordinary Occasions," the President may call special sessions of Congress.[13] Extraordinary occasions, per Justice Joseph Story's influential *Commentaries On the Constitution of the United States*, include the need "to repel foreign aggressions, depredations, and direct hostilities; to provide adequate means to mitigate, or overcome unexpected calamities; to suppress insurrections; and to provide for innumerable other important exigencies, arising out of the intercourse and revolutions among nations."[14] Precisely the sort of things we think of today when we imagine emergencies.

These various constitutional clauses show how the country is supposed to deal with emergencies: Congress takes the lead, and if it is out of session, then the president calls it back so that it may do so. This makes good sense because the if the president gets extra powers when there is an emergency, one might reasonably

[5] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).
[6] U.S. CONST., Art. 1, § 9, cl. 2.
[7] U.S. CONST., Art. I, § 8, cl. 12.
[8] U.S. CONST., Art. II, § 1, cl. 6.
[9] U.S. CONST., Art. II, § 2, cl. 2.
[10] U.S. CONST., Art. II, § 2, cl. 3.
[11] U.S. CONST., Art. IV, §4.
[12] U.S. CONST., Amend. III.
[13] U.S. CONST., Art. II, § 3.
[14] 3 JOSEPH STORY, COMMENTARIES 575–76.

worry that the president will go find some useful emergencies.[15] This is especially true when Congress is unwilling to give him what he wants through the normal channels.[16] It was for this reason that Justice Jackson said that "emergency powers are consistent with a free government only when their control is lodged elsewhere than in the Executive who exercises them."[17]

Nowadays, however, the country does not deal with emergencies as the Constitution says it should. Over the years, Congress has delegated vast authority to the president to determine when emergencies exist and to react as he sees fit, even if it allows him to ignore other laws or redirect money that Congress has appropriated for other purposes.[18] When the Special Committee on the Termination of the National Emergency issued its report in 1973, it counted 470 provisions of federal law that give the president emergency powers when a national emergency is declared.[19] The Brennan Center's survey counts 136 such provisions today.[20] Regardless what the correct number is, it is safe to say that declaring a national emergency gives the president a vast array of powers that he does not otherwise have. One such law gives the president the power to freeze foreign assets,[21] many others allow him to spend money that Congress has not appropriated for his purposes,[22] and still others allow him to suspend other laws for as long as he sustains his emergency declaration.[23]

In 1976, following the Special Committee's report, Congress passed the National Emergencies Act (NEA) to try to rein in the president's runaway emergency powers.[24] That law imposed *procedural* limitations on the president's use of emergency powers conferred by other statutes. Critically, it eliminated few grants of substantive power. As originally passed, the NEA allowed the president to declare a national emergency—

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[15] Youngstown Sheet, 343 U.S. at 650 (Jackson, J., concurring) ("We may also suspect that [the Framers] suspected that emergency powers would tend to kindle emergencies.").

[16] For instance, Senate Majority Leader Chuck Schumer has expressly urged the President to declare a national emergency with respect to climate change so that he can achieve policy results that Congress is not willing to give him. Ben German, *Schumer Suggests Biden Could Use Emergency Powers for Climate Policy*, AXIOS, Jan. 26, 2021, https://www.axios.com/2021/01/26/biden-schumer-climate-change-emergency (quoting Schumer as saying "Then [the president] can do many, many things under the emergency powers of the president . . . that he could do without legislation."). And before him, President Trump used emergency powers to redirect funds apportioned elsewhere for the construction of a border wall even though Congress disapproved. Alex Leary & Kristina Peterson, *Trump Vetoes Congressional Disapproval of Emergency Declaration*, WALL ST. J., Mar. 15, 2019, https://www.wsj.com/articles/trump-to-discuss-border-policy-as-he-prepares-first-veto-11552672395.

[17] Youngstown Sheet, 343 U.S. at 652 (Jackson, J., concurring).

[18] *See, e.g.*, *Guide to Emergency Powers*, *supra* note 2 (collecting statutes authorizing emergency actions); REPORT OF THE SPECIAL COMMITTEE, *supra* note 2 at III ("This vast range of powers, taken together, confer enough authority [on the president] to rule the country without reference to normal constitutional processes."); Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835 (2006) ("[T]he United States has tended to normalize its emergencies. As a result, normal governance is at least in part always emergency governance, even when a crisis is not looming."); Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE, Dec. 8, 2017, https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency ("[I]f the last four decades are any indication, some emergencies are here to stay.").

[19] SPECIAL REPORT OF THE COMMITTEE, *supra* note 2 at III.

[20] *Guide to Emergency Powers*, *supra* note 2 at 2.

[21] International Emergency Economic Powers Act, Tit. II of Pub. L. 95-223, 91 Stat. 1626 (codified as amended at 50 U.S.C. § 1701 *et seq.*).

[22] *See, e.g.*, Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 100–707, 102 Stat. 4689, (codified at 42 U.S.C. § 5121 *et seq.*); Public Health Services Act, Pub. L. 78-410, 58 Stat. 682 (codified at 42 U.S.C. ch. 6A § 201 *et seq.*); *see also* Justin Bogie, *Congress Must Stop the Abuse of Disaster and Emergency Spending*, HERITAGE FOUNDATION BACKGROUNDER No. 3380, Feb. 4, 2019, https://www.heritage.org/budget-and-spending/report/congress-must-stop-the-abuse-disaster-and-emergency-spending (explaining how emergency declarations allow the president to undermine the Budget Control Act by funneling vast sums of money through the act's emergency loophole).

[23] *See, e.g.*, 7 U.S.C. § 4208 (suspending farmland protection laws during an emergency); 33 U.S.C. § 1902(b)(3)(F) (suspending laws regulating waste disposal at sea near land); 50 U.S.C. § 1515 (suspending laws regulating chemical and biological weapons including a law prohibiting their testing on civilian populations).

[24] National Emergencies Act, Pub. L. No. 94-412, § 201(a), 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1621, 1622).

it did not define that term—and thus activate any of the many secondary laws that give him emergency power. It required, however, that he comply with certain procedural requirements like naming the laws that he intends to invoke and publishing the declaration in the Federal Register. Congressional oversight came in two parts of the act: one that allowed Congress to end an emergency declaration by concurrent resolution (a legislative veto), and another that required each house of Congress to meet and vote on those concurrent resolutions six months after the emergency declaration. The Supreme Court later held that legislative vetoes were unconstitutional,[25] and in response, Congress amended the NEA to replace concurrent resolutions with joint resolutions that could be vetoed by the president. This severely constrained Congress's ability to procedurally restrain executive emergency powers. Thus, Congress today finds itself in almost the same position it was in before that law's passage. Presidents continue to have vast emergency powers that allow them to circumvent Congress unless Congress has a veto-proof majority.

Like two opposing pendulums, members of both political parties swing from celebrating this situation to complaining bitterly about it.[26] Those with a longer view, however, who realize that we need rules of governance that each party can live with whether in or out of power, see the need to resolve this. They likewise appreciate that any limits that Congress imposes on the president's emergency powers will be a double-edged sword. It will constrain a president of one party today, and a president of the other tomorrow. But the status quo is also a double-edged sword, granting tremendous power to one president today and another tomorrow. The status quo, however, suffers from the added side effects of being constitutionally suspect and ripe for abuse. Any set of rules will hurt one party and help the other depending on who the president is, but wise leaders accept this and strive to create stability over time. The unwise, on the other hand, try to exploit the present broken system for short-term political gain. For those who are serious about repairing the current system, I offer a few solutions.

II. SOLUTIONS

The effect of the Supreme Court's decision in *INS v. Chadha* is to preclude Congress from imposing meaningful procedural restrictions on the president's emergency powers.[27] That's not a serious problem, however, because procedural restrictions are second-best solutions to this issue; substantive restrictions are better. There are three reasons for this. First, procedural limitations on the use of delegated emergency power do not address the underlying constitutional directive that Congress—not the president—should retain primary responsibility for reacting to emergencies. Second, because of the pendulum dynamic where the president's party likes his emergency declarations and the party out of power does not, Congress is likely to exercise procedural oversight only when it is controlled by the opposite party. That only reinforces the partisan nature and perception of emergency declarations. And third, Congress is very rarely successful at binding future Congresses to carry out oversight functions when emergencies are concerned.[28]

On this last point, recall that the NEA requires Congress to meet and vote on a joint resolution approving or disapproving of a president's emergency declaration every six months. Congress has only ever done that once—when it disapproved of President Trump's emergency declaration to redirect money for a border wall.[29] Until then, Congress ignored its own law.

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[25] INS v. Chadha, 462 U.S. 919 (1983).
[26] *See* sources cited *supra* note 16.
[27] 462 U.S. 919.
[28] *See generally* Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2166-67 (2005); *see also* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 648 (2006) ("Where emergencies provoke panic, unleash socially harmful motivations, and encourage legislators to defer to executive power, earlier framework legislation is most likely to be circumvented or repealed outright.").
[29] *See* Leary & Peterson, *supra* note 16.

Therefore, rather than try to impose procedural restrictions, Congress should instead impose substantive limitations on the president's emergency powers. All emergency powers are delegated to the president by Congress.[30] What *INS v. Chadha* held was that once Congress has delegated those powers, they belong to the executive, and the legislature cannot veto his use of them unless the constitutional requirements of bicameralism and presentment are satisfied.[31] But Congress still has complete control over whether the president has any emergency power at all and, if so, how much and for how long.

The question then is: how should Congress go about setting substantive guardrails around the president's emergency powers?

Thankfully the Constitution provides several useful reference points. Recall that even in the most extreme emergencies such as invasion, domestic violence, or other "extraordinary Occasions,"[32] the Constitution anticipates that *Congress* will take the lead in responding, even if it is adjourned.[33] In only one case—domestic violence in a state—does the Constitution anticipate a presidential response, and then only if Congress "cannot be convened."[34] This is not to say that Congress should give the president *no* emergency powers, but that Congress should give the president emergency powers only when Congress is convinced that it is incapable of reacting with the necessary speed. This will be a high bar because when the country has faced true emergencies in the past—events that are not just "emergencies" in the minds of partisans, but events that everyone agrees are true crises—Congress has reacted with great speed. For example, Congress declared war on Japan the day after the attack on Pearl Harbor[35] and authorized military force against al Qaeda only 14 days after 9/11.[36] In most situations, Congress can react quickly and does not need to give the president emergency powers. Thus, Congress' first step should be to reevaluate all the situations in which it gives the president emergency power and eliminate all but those that Congress believes require a speedier response than it can deliver. In all other situations, Congress should retain for itself the power to declare emergencies and tailor the response and the president's powers accordingly.

This first solution touches on an issue that is often front-and-center in political fights over emergency powers: whether there really is an emergency. Often when a president uses emergency power, his critics will say that he is abusing it because there is no real emergency. Some commentators, therefore, suggest that Congress should define the term "emergency" so that courts could review the president's declarations.[37] This approach, however, will not solve the problem for three reasons. First, the courts are very reluctant to second-guess a president's determination that there is an emergency.[38] Courts are not experts in foreign

[30] There is a scholarly debate about whether the president has any inherent emergency powers, but that's beyond the scope of this testimony. Here, I'm focused only on those secondary emergency statutes that give the president powers after he declares a national emergency.
[31] 462 U.S. 919.
[32] U.S. CONST., Art. II, § 3.
[33] *Id.*
[34] U.S. CONST., Art. IV, §4.
[35] S. J. Res. 116, 77th Cong., Pub. L. No. 328, ch. 561 (1941).
[36] S. J. Res. 23, 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 (2001).
[37] *See* Jess Bravin, *Can Trump Build A Wall Under A National Emergency?*, WALL. ST. J., Jan. 10, 2019, https://www.wsj.com/articles/when-is-it-legal-to-declare-a-national-emergency-11546943401 (quoting sources).
[38] *See, e.g.*, Martin v. Mott, 25 U.S. 19 (1827) (Story, J.) ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object."); United States v. Amirnazmi, 645 F.3d 564, 579 (3d Cir. 2011) ("Mindful of the heightened deference

policy, terrorist threats, infectious diseases, or the risks posed by other extraordinary occasions, and they are, by design, slow and thoughtful institutions ill-suited to quick action. Courts also know that no two emergencies are alike and that any ruling on an emergency today, threatens to reduce the president's flexibility to address a novel emergency tomorrow. A statutory definition of "emergency" will not change any of these facts, and so courts are likely to remain unwilling to second-guess an emergency declaration.

Second, any definition of "emergency" is likely to employ broad terms to preserve a flexible response to crises. Consequently, even if the courts considered a challenge to an emergency declaration, they would still likely end up deferring to the executive. For example, if Congress used Merriam-Webster's definitions—"an unforeseen combination of circumstances or the resulting state that calls for immediate action" or "an urgent need for assistance or relief"[39]—courts would have to fix definitions to the vague conditions "calls for immediate action" or "urgent need." For all the same reasons that they refuse to second guess the president's determination that a particular situation is an emergency, they would remain unwilling to second guess his determination that either of those two conditions are satisfied.

Third, defining "emergency" does not cure the underlying problem that the executive branch should not have the power to both invoke and then wield emergency powers.[40] All it does is attempt to drag the judiciary into the political morass surrounding presidential emergency declarations. The correct approach is not to drag the judiciary into this mess, but to keep these determinations in Congress where they belong.

One might respond, at this point, to say that if Congress retained the power to decide whether something was an emergency, we would have fewer emergency declarations because both parties would have to agree to some extent that an emergency exists. That's exactly right and exactly the point. Presidents have invoked—and are implored to invoke[41]—emergency powers when reasonable people on both sides of the aisle disagree about whether something is an emergency. If Congress keeps for itself the ability to declare most emergencies, we are less likely to have fake partisan emergencies. That, in turn, preserves the rule of law, which is diminished when vast emergency powers are abused for partisan purposes.

The second solution is to impose a time limit on all emergencies and to prevent the president from re-upping an emergency declaration with respect to the same underlying causes after that deadline expires. How long should the time limit be? It might vary depending on the nature of the emergency or the powers conferred by a particular secondary emergency statute, but under no circumstances should any emergency be longer than two years. The Army Clause provides this outer limit.[42] As mentioned above, that clause requires Congress to re-apportion money for the Army every two years with no exceptions. Not even in the case of an invasion. If the response to that emergency ends after two years without Congressional action, then no emergency need last longer.

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accorded the Executive in this field, we decline to interpret the legislative grant of [emergency] authority parsimoniously."); United States v. Spawr Optical Rsch., Inc., 685 F.2d 1076, 1080 (9th Cir. 1982) ("Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed 'the essentially political questions surrounding the declaration or continuance of a national emergency'. . . .") (quoting United States v. Yoshida Int'l, Inc., 526 F.2d 560, 573 (C.C.P.A. 1975)); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 31 (D.D.C. 2020) ("[Plaintiff's] claim raises one obvious question: was the President correct that a national emergency exists at the southern border? The trouble is that this is a quintessential political question.").

[39] Merriam-Webster Dictionary (definition of "emergency"), https://www.merriam-webster.com/dictionary/emergency (last visited May 5, 2022).

[40] Youngstown Sheet, 343 U.S. at 652 (Jackson, J., concurring) ("[E]mergency powers are consistent with a free government only when their control is lodged elsewhere than in the Executive who exercises them.").

[41] *See* German, *supra* note 16.

[42] U.S. CONST., Art. II, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;").

A third solution would be to give the president temporary emergency powers on a case-by-case basis at his request. Rather than create a vast array of powers that the president can activate by saying the magic words "national emergency," Congress should make the president come, hat-in-hand so to speak, to ask for them. This eliminates the incentive for the president to find useful emergencies that let him get around Congress. It also restores the approach contemplated by the Extraordinary Occasions Clause.[43] Lastly, it encourages Congress to act before an emergency response is formulated, and thus is more likely to spark congressional action than the ex-post review period of the NEA, which Congress has used only once.

A few additional solutions apply specifically to emergencies declared under the Stafford Disaster Relief and Emergency Assistance Act.[44] As explained in more detail in a 2019 Heritage Foundation report,[45] that act has been used to circumvent the Budget Control Act of 2011 and has permitted emergency spending to balloon year after year. It also creates a perverse incentive for states not to spend their own money to prepare for disasters in advance, trusting instead that the federal government will pick up most of the tab after the fact.[46] A few reforms can improve this situation. Congress should, for example, put a time limit on how long Stafford Act funds can be spent. Emergencies require quick action, but billions of dollars of Stafford Act funds often sit unused for years or are earmarked for long-term projects rather than "immediate and critical needs."[47] Congress should also index disaster thresholds to inflation so that the federal government does not pick up the tab for small-scale events within states. Additionally, Congress should reduce the share or disaster remediation paid for by the federal government from so that states have an incentive to prepare in advance for disasters and so that FEMA's budget is not depleted when a real calamity occurs.[48]

III. RECENT LEGISLATION

Last year, Senator Mike Lee introduced the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies (ARTICLE ONE) Act, which would amend the NEA to automatically terminate any emergency declarations and attendant emergency powers after 30 days unless Congress passes a joint resolution approving them.[49] It would set a one-year deadline on any emergencies unless, again, Congress approves a renewal. Lastly, it would require the president to provide periodic reports to Congress about ongoing emergencies. This act largely comports with the constitutional guidelines I articulated above and would be a step in the right direction. Although it leaves in place all the secondary emergency statutes without reviewing and revisiting them, it forces Congress to review and approve of specific invocations of emergency power and therefore improves the status quo.

Also last year, Senator Chris Murphy introduced the National Security Powers Act.[50] It includes several provisions; I focus here only on those dealing with reforming the NEA. It mirrors Senator Lee's bill but includes the additional provision that "under no circumstances may a national emergency declared by the President under section 201(a) continue on or after the date that is five years after the date on which the national emergency was first declared."[51] Like the ARTICLE ONE Act, this would improve the NEA. Still,

[43] U.S. CONST., Art. II, § 3 ("[The President] may, on extraordinary Occasions, convene both Houses . . . .").
[44] Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified at 42 U.S.C. ch. 68 § 5121 *et seq.*).
[45] *See* Bogie, *supra* note 22.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] S.241, 117th Cong. (2021). It includes a limited exception: "If Congress is physically unable to convene as a result of an armed attack upon the United States or another national emergency, the 30-day periods . . . shall begin on the first day Congress convenes for the first time after the attack or other emergency." *Id.* at § 201(c)(3).
[50] S.2391, 117th Cong. (2021).
[51] *Id.* at § 202(b).

a five-year deadline is longer than necessary. As discussed above, there is no reason an emergency should last longer than two years.

In the House, Representative Adam Schiff introduced the Protecting Our Democracy Act, which is less a serious piece of legislation and more a platform for partisan talking points.[52] Again, I'll focus only on that part of it addressing the NEA. Like Senator Lee's bill, it includes a deadline (20 session days) on any emergencies unless Congress grants an extension by joint resolution. It also includes a provision prohibiting the president from re-declaring a national emergency with respect to the same circumstance if Congress does not approve of his declaration. And like Senator Murphy's bill, it includes a five-year deadline on all emergencies. Divorced from the rest of the bill, these are improvements over the current NEA.

Lastly, in 2020, Senator Edward Markey introduced the Restraint of Executive In Governing Nation (REIGN) Act.[53] This act would require the president to turn over to Congress all "presidential emergency action documents," a defined term.[54] Although disclosure of such documents is probably good in the abstract, the bill does nothing to solve the underlying issue.

IV. CONCLUSION

There is broad agreement that the current state of executive emergency powers is out of whack. Congress has given the president too much latitude to declare national emergencies and thus to give himself extraordinary powers that allow him to circumvent Congress. Congress's ability to impose procedural checks on these powers is limited, but it can and should impose substantive checks. First, Congress should, in most circumstances, retain for itself the power to declare national emergencies. Second, it should set a deadline on any emergencies not longer than two years. And third, it should generally give the president temporary emergency powers on a case-by-case basis upon his request instead of giving him a vast array of powers to be used whenever he sees fit.

[52] H.R.5314, 117th Cong. (2021).
[53] S.4279, 116th Cong. (2020).
[54] *Id.* § 2(c)(2).

Mr. COHEN. Thank you, sir. Our final Witness is Mr. Joel McCleary. He is managing partner of Four Seasons Ventures which has conducted in-depth studies for Department of Defense, the Department of Homeland Security on biodefense. He studies reviewed emergency powers of the President in the event of a pandemic or major biologic weapons attack. He is also co-founder of the organization Keep our Republic, a non-partisan civic action organization dedicated to protecting a republic of laws and strengthening the checks and balances of our democratic electoral system, although he is testifying today in his personal capacity.

Mr. McCleary works on issues related to Presidential emergency powers with the former Ambassador William G. Miller, was Staff Director of the Senate Special Committee on National Emergencies. He previously served as Deputy Assistant to the President during the Carter Administration and accordingly, President Carter. A graduate of Harvard University and he is recognized for five minutes.

STATEMENT OF JOEL McCLEARY

Mr. MCCLEARY. Chair Cohen, Ranking Member Johnson, and distinguished Members of the Subcommittee, thank you for this opportunity to testify today.

I think it's important in this busy town to take a deep breath sometimes and drink in the moment that we're in. Really today is a historical moment. After 50 years this Committee is going to return to an issue that this Congress tried to struggle with, the nation tried to struggle with and was unable to resolve.

What provoked the first real analysis of this issue 50 years ago were three giants, Republican giants of the Senate: Senator Baker, Chuck Mathias, and Senator Cooper, who were extremely worried about the assumption of powers that President Johnson was taking in the administration of the war and in the suppression of the anti-war movement and the work that he was doing with J. Edgar Hoover.

So, what's important about the discussion is we're going—the origin of the discussion is—was basically bipartisan and it was, in fact, driven by the Republican Party, by the giants of the Republican Party who were worried at that time period about these extraordinary powers. In that context I would like to talk for a second about how I got introduced to the first part of the issue and then deal with how Miller and others tried to deal with it in the Congress.

My first introduction to the issue was as a young and very insignificant Member of the White House staff. I was asked to go to Nelson Rockefeller's funeral. We went up on Air Force One and I was sitting at the table with Judge Bell, Brzezinski, and Carter. My only role really was to carry bags. I got to overhear a conversation that's taken me 30 or 40 years to really understand, and that conversation is important to understand in terms of the powers that a President must have and must assume. Then of course the second part of the conversation is how do we balance those powers that that President must have?

The conversation I overheard that day was Brzezinski and Carter talking about his option—oh, and by the way, the person sitting

next to us was the gentleman carrying the nuclear suitcase. Carter asked Brzezinski how he could buy more minutes before he destroyed the planet and launched thousands of nuclear weapons? What he didn't want to do was to follow the plan that had so appalled President Kennedy when he was first introduced to this—was the idea of launching within probably 8–9 minutes, 3,000 or 4,000 nuclear weapons, and destroying life as we know on the earth.

So, Carter had asked whether we could have a phased in escalation so we could determine if there had been an accident or if there was some way that we could work with the Soviets to scale back. From that became a document called PD–59, which in itself became very controversial because Carter and Brzezinski maybe overstepped or controversy overstepped their powers in determining what the nuclear policy would be. They kept tremendous secrecy around it, which is still discussed today.

So, after that conversation for years I thought about how do you ensure that the President has that freedom and how do we make sure that it's not encumbered?

When I left the plane that day I drove into the funeral with Judge Bell, who was then Attorney General, and he was a wonderful man from Georgia. He said, "son, do you understand what you just heard?" I said, "I'm so happy I heard it," and he said, "well, you better think about that for a long time." He said, "but you understand what it means for an assistant to the President for political affairs if such an event were to unfold?" I said, "what's that?" and he says, "you're irrelevant. So, because we're going to enter into a whole other new world."

Later, my first cousin was Bill Miller, who was the man that was asked to come back to Washington by Senator Cooper, by Senator Mathias to deal with these issues. I, yes, I know I'm running out of time.

Mr. COHEN. Your time is extended, such time as you may consume.

Mr. MCCLEARY. Okay. So, Senator Miller was brought back to work with the Republican giants of the Senate to figure out how they could contain Johnson's powers and then of course Nixon's powers, and he was instrumental in writing the legislation that we're discussing today.

Shortly before he died in 2019 he called myself and Mark Medish, who is my co-founder of Keep our Republic, and he said,

> I want you guys to write me an op-ed for *The New York Times*, for the *Washington Post* on the failure of our work 50 years ago and to not only articulate why that legislation failed, but the issues we must now address.

We promised to do that. He died before we had the opportunity to do it, but he also asked us to pick up this flag or this mission and work to try to deal with this issue. That was the origin of Keep Our Republic, which is a bipartisan—again bipartisan organization that is trying to put together the kind of coalition that we had at that time period 50 years ago.

Days before he died, he said—he told me; and I will close with this, Joel, "you're focusing on the statutory powers and how to use that vehicle to deal with the abuse that can occur with a President." He said that is essential and it's very essential that the

record be complete and that you pass this legislation, but you have to understand at the end of day it probably will not work. It's important to have that record before the courts to see when they make final deliberations about the inherent powers of the President. I'd like to close with that.

To get this legislation passed or to get these reforms in place in a bipartisan way is absolutely essential, but it is just the first step of the task ahead of us. What I would in closing ask that the Committee really focus in the next step and we start wrestling with these whole issues of inherent powers without ever restricting those powers that a President needs in the kinds of crises that President Putin is reminding us of every day these days. Sorry for the extra time, Mr. Chair.

[The statement of Mr. McCleary follows:]

Chairman Cohen, Ranking Member Johnson, and distinguished members of the subcommittee, thank you for the opportunity to testify today.

It is an honor to join Ms. Goitein on this panel. She is an important national leader on presidential emergency powers and the reforms needed to The National Emergencies Act.

I am not a legal scholar. Thus, Ms. Goitein and the cofounder of Keep Our Republic, Mark Medish, have been my invaluable legal and constitutional advisors on these matters.

Two defining experiences have brought me here today to discuss concerns regarding presidential emergency powers.

In 1979, I was included as a White House staffer to fly on Air Force One to attend Vice President Nelson Rockefeller's funeral. On the flight I sat around a table with President Carter, National Security Advisor, Brzezinski, and Attorney General Bell. Sitting close by was the man with the nuclear suitcase, which of course contained the top-secret launch codes and the menu of target options required for the President to launch a counterattack.

The President had only minutes to select a nuclear counterattack option determining which of the thousands of targets within the Soviet Union and its allied countries would be turned to ashes in a counterattack. Only the president, if alive after the launch of a first strike, can still make such split decisions once a nuclear attack is detected.

During the flight I listened to a conversation between Carter and Brzezinski regarding these options. Since 1977 Carter had been working with Brzezinski on alternative response options. Some were designed to give him greater

flexibility so he might limit the dimensions of a nuclear apocalypse. Their views where later enshrined in the controversial Presidential Directive 59.

As they discussed these issues I noted in Carter's face and body language the weight of his responsibilities. This snapshot engraved in me the nightmare reality a president alone faces in matters of nuclear weapons and now regarding the existential threats of biological weapons.

Consequently, there has never been a question for me whether a president should be given or should assume such extraordinary existential powers for these realities. The question is on what authorities are these powers granted or assumed and with what conditions and with what oversight, if any?

Over the years I have grown to not only appreciate the weight of a president's decisions on these matters, but equally the weight of the decisions Congress or the Courts must weigh in granting or approving such powers. There is fault in not granting the powers needed by a president in a cataclysmic crisis. There is equal fault in granting such powers without guidelines and oversight. The potential for abuse or overreach is far too tempting and consequential.

This second consideration was brought home to me in the summer of 2019, when former Ambassador William Miller invited Mark Medish and me to his home.

Miller was ill and died a few months later. He called to request we co-author an op-ed to address his concerns regarding the weaknesses in The National Emergencies Act and to raise still unanswered questions regarding the assumptions of inherent presidential powers.

As staff director of the U.S. Senate's Special Committee on National Emergencies and Delegated Emergency Powers, he had overseen the drafting of the 1976 Act. His insights and concerns on these matters were and are still invaluable.

Over time, Miller had realized the flaws in his committee's legislation. Those flaws were compounded by the Supreme Court's 1983 Chadha decision.

The op-ed was to be his final call to arms for reform of the 1976 Act and for the need to address the issues surrounding the assumed inherent powers of a president.

His death came before we could draft the op-ed.

At that meeting Miller also ask us to dedicate ourselves to the mission he was unable to finish. We agreed, having no idea the consequences of our consent and the enormity of the task.

It is in the context of these two experiences I appear today to voice support for the Committee's leadership and reform efforts.

In closing let me reiterate that Miller's views on presidential emergency powers were not naïve or simplistic. His aim was always two-fold. One: to empower in times of crisis the president with the full might of our nation. But also, to ensure that Congress, in granting these powers, had the transparency and oversight required and is now lacking.

Through decades of Congressional service and oversight, especially regarding the intelligence community, he knew the potential for executive abuse and overreach. He never tired of warning of the latent dictatorial powers a president had and might be tempted to abuse. His mantra was that a president had the power to blow up the world with the push of a button and the power to blow up the Constitution with not even a stroke of the pen.

He warned that "hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process."[1]

The question before us remans how to best balance these concerns with legislation and oversight regarding statutory authorities. I am confident much progress can be made.

[1] Special Committee on National Emergencies Source Book

The question for tomorrow is how to address the second elephant in the room: issues raised regarding the assumed inherent powers of a president.

The Supreme Court has been asked multiple times to define the scope of inherent presidential powers. It has not given clear and consistent guidance.

> "...the courts failure to articulate a standard for when the President may act without the express constitutional or statutory authority has significantly lessened the judicial checks on the Chief Executive. The Court's inconsistence has left the President with no guidance as to when he may act or even what will determine whether his actions will be upheld or declared unconstitutional. As a result, the President may take almost any action under the guise of 'inherent' authority."[2]

The Committee should consider the need to establish a record on this matter. Silence or lack of a clear Congressional view on inherent presidential powers, powers assumed but not explicitly granted by statute or the Constitution, might well be interpreted by the Court and the President as implicit consent.

We should not rule out the possibility that a president might one day use the claims to these inherent powers to avoid the transparency and oversight now being considered in the reform of the 1976 Act.

Thank you.

[2] "Controlling Inherent Presidential Power: Providing a framework for Judicial Reform.", Southern California Law Review (1983), Erwin Chemerinsky

Mr. COHEN. Thank you, Mr. McCleary, and thank you for your time and your work.

There are a couple of articles I would like to introduce into the record, without objection.

Mr. COHEN. First, is a treatise by Ms. Linda Green, a professor of laws called, "Up Against the Wall: Congressional Retention of the Spending Powers in Times of 'Emergency.'" Without objection, it will be introduced.

Second, there is a letter from a bipartisan group: National Taxpayers Union, Americans for Prosperity, Concerned Veterans for America, FreedomWorks, Our Street Institute, Taxpayer Protection Alliance, Taxpayers for Common Sense, rather by a partisan group, with a one-page letter simply asking for support for efforts to reform the act. So, without objection, that will be entered into the record as well.

[The information follows:]

MR. COHEN FOR THE RECORD

Up Against the Wall: Congressional Retention of the Spending Power in Times of "Emergency"

*Linda Sheryl Greene**

President Trump's border wall has evolved from an ambitious campaign promise into a real opportunity to explore presidential versus Congressional authority to determine how the president spends Congressionally appropriated funds. The president's arguments that he has the power to build the wall under either the National Emergencies Act or the funding provisions of 10 U.S.C. § 9705 or 10 U.S.C. § 284 lack merit—the cited non-emergency-tied statutes do not provide funding for the wall. The former authorizes the utilization of Treasury Forfeiture funds tied to specific law enforcement activities but excludes the ambitious and broad construction project the president proposed; the latter authorizes support only for counterdrug activities. The wall constitutes an unprecedented appropriation for a project without mooring in statutory language permitting only unspecified minor military construction projects.

Nor does The National Emergencies Act authorize the president to use Congressionally appropriated funds to build a wall that congress has expressly declined to fund. Congress enacted the National Emergencies Act after Executive abuses during the Vietnam War and to curb—not encourage—presidential usurpation of Congressional spending power based on emergency rationales. Although the National Emergencies Act imposes scant substantive and procedural limitations on a president's ability to declare a national emergency and divert funds to address such an emergency, the Act does not allow the president to manufacture a basis for such a declaration where none exists. Even so, the chronology of events leading up to the emergency declaration demonstrates that the president's invocation of an emergency is a ruse.

Additionally, the president's Executive Order cites 10 U.S.C. § 2808, which requires the declaration of a national emergency under the National Emergencies Act. That Act authorizes a president to undertake "military construction projects" when he declares a national emergency in accordance with that Act. But Section 2808 only applies where a national

* Evjue Bascom Professor, University of Wisconsin Law School, J.D. Berkeley Law. I thank my research Assistant Charles Urena (2019), and my research Librarian Genevieve Zook for their invaluable assistance on this project.

emergency "requires the use of the armed forces" and only authorizes military construction projects "necessary to support such use of the armed forces." The statutory language of 10 U.S.C. § 2808 makes it clear that effectuating immigration policy does not qualify as a military construction.

It has been long settled that presidential power must stem from an act of Congress or from the president's own Article II powers. That dictum need not deprive a president of flexibility in the execution of powers delegated to her by Congress or in the execution of power delegated to her by the Constitution. Neither the foreign affairs power to recognize nations nor Commander in Chief authority to repel sudden attacks authorize the president to spend funds appropriated by Congress for other purposes. The Constitution did delegate to Congress the power to "provide for the common defense and general welfare" of the United States with the proviso that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." That provision does not deprive Congress of the flexibility to delegate power to the president, but here Congress did not authorize these expenditures and expressly declined to provide funding for "the Wall" on two occasions. Thus, the president's use of Congressionally appropriated funds to build "his Wall" is in conflict with Congress's will and unlawful. So far, though lower courts have agreed with this result, a Supreme Court stay of the decision that enjoined the use of Defense Department funds in effect permits the president to finalize contracts and begin wall construction pending the resolution of the dispute on the merits in the Ninth Circuit and the Supreme Court. In its short decision that granted the stay, the Supreme Court signaled that if the case arrives via certiorari and the Court grants review, a majority will conclude that the Sierra Club plaintiffs have "no cause of action." If that transpires, the favorable outcome for the president will turn on the nature of the litigants not the legality of the Wall construction project. For those concerned with the preservation of constitutional limitations on the Executive, "better half a loaf than none at all."[1]

1. So far, plaintiffs have filed seven lawsuits challenging Trump's national emergency declaration.

INTRODUCTION: FUNDING THE PRESIDENT'S PREROGATIVES

The idea that Congress must fund the executive's prerogatives is, as Zachary Price puts it, "off the table."[2] Although debated early in America's history,[3] and suggested occasionally since,[4] "the great weight

2. Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 382 (2018).

3. The issue arose as early as 1774. At the same time, however, Congress did not take Washington's invitation to promote "science and literature" either "by affording aids to seminaries of learning already established" or "by the institution of a national university." David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–91*, 61 U. CHI. L. REV. 775, 799 (1994) (quoting 1 ANNALS OF CONG. 970 (1789) (Joseph Gales ed., 1834) (statement of Representatives Madison and Page)).

4. *See, e.g.*, Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350–51 (1988).

of historical practice contradicts it."[5] In fact, in the earliest years of the Republic, many members of Congress quickly adopted the view that "the general power of granting money, also vested in Congress, would at all events be used, if necessary, as a check upon, and as controlling the exercise of the powers claimed by the President and the Senate."[6] This check is generally accepted today as an essential component of the separation of powers. How, then, may a president fulfill campaign promises in situations where Congress has expressly refused to appropriate the funds that he has asked for?

President Trump found an answer to this question in the form of a highly publicized and sensationalized declaration of a national emergency. The president campaigned on constructing a "great, great wall" on the United States-Mexico border[7] and took steps to prepare for that construction early in his presidency,[8] but had trouble securing congressional funding to build it—even when his party controlled both chambers of congress. In the third year of his presidency, the longest government shutdown in United States history ended with congressional authorization of about one-quarter of the funding that the president had requested.[9]

Although many considered this turn of events a major loss for the administration, the president countered by declaring a national

5. Price, *supra* note 2, at 382.

6. 4 ANNALS OF CONG. 466 (1796) (statement of Albert Gallatin). This view is widely adopted today. *See* Price, *supra* note 2, at 382 (discussing whether Congress's power of the purse comes with strings attached); Stith, *supra* note 4, at 1344 (describing Congress's power of the purse).

7. Donald J. Trump, 2016 Presidential Announcement Speech (June 16, 2015) [hereinafter Trump Presidential Announcement Speech] (transcript available at http://time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/AJ3T-JSEN]).

8. In Executive Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 27, 2017), "Border Security and Immigration Enforcement Improvements," the president cited the powers vested in him by the Constitution as well as three statutes to undertake numerous policies "to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation's immigration laws are faithfully executed," including "the immediate construction of a physical wall on the southern border . . . ." Environmental groups unsuccessfully challenged the Department of Homeland Security (DHS) decision to waive applicable environmental laws in the course of the installation of "additional physical barriers and road . . . in the vicinity of the United States border" that DHS contended were authorized by Section 102a of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *In re* Border Infrastructure Envtl. Litig., 284 F. Supp. 3d 1092, 1104, 1119–20 (S.D. Cal. 2018), *aff'd*, Border Infrastructure Envtl. Litig. v. Dep't of Homeland Sec., 915 F.3d 1213 (9th Cir. 2019). The Ninth Circuit concluded that both the projects and the environmental law waivers were specifically authorized by the IIRIRA. 915 F.3d. at 1226.

9. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230, 133 Stat. 13, 28 (providing $1.375 billion, less than one quarter of the $5.7 billion sought); Mihir Zaveri, Guilbert Gates & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html [https://perma.cc/952N-VLYC].

emergency at the southern border.[10] Invoking his authority under the National Emergency Act (NEA), which authorizes the president to "declare [a] national emergency,"[11] the proclamation detailed:

> The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.[12]

At the same time, the White House issued additional information regarding the declaration in a "fact sheet," which stated that "the Administration [had] so far identified up to $8.1 billion that will be available to build the border wall once a national emergency is declared."[13] Specifically, the White House laid out three funding sources to be used sequentially: (1) "[a]bout $601 million from the Treasury Forfeiture Fund"; (2) "[u]p to $2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities"; and (3) "[u]p to $3.6 billion reallocated from Department of Defense military construction projects under the president's declaration of a national emergency."[14]

Many legal scholars were quick to criticize the declaration. Yale Law Professor Bruce Ackerman wrote that diverting military funds to pay for

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

11. National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255 (1976).

12. Proclamation No. 9844, 84 Fed. Reg. at 4949.

13. *President Donald J. Trump's Border Security Victory*, NAT'L SEC. & DEF. FACT SHEETS (Feb. 15, 2019) [hereinafter *Border Security Fact Sheet*], https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory [https://perma.cc/NW4D-Y5VH].

14. *Id.*

a wall and the use of the military would not only be illegal, but that "members of the armed forces [who] obeyed [President Trump's] command" to build such a wall "would be committing a federal crime."[15] Susan Hennessey, a Senior Fellow in National Security in Governance Studies at the Brookings Institution, wrote that "for the president to transparently abuse the emergency discretion granted by statute and for Congress to accede to that abuse is an exceptionally grave signal of serious structural breakdown."[16] Moreover, Boston University International Law Scholar Robert Sloane characterized the declaration as "an effort to get one's way outside the ordinary political and legal processes . . . [that] gradually erodes the shared norms that sustain our constitutional democracy."[17]

Democratic members of Congress also pushed back. For example, House Democratic Caucus Chairman Hakeem Jeffries claimed that Congress's "power of the purse . . . has been invaded by Donald Trump."[18] Speaker of the House Nancy Pelosi released a statement finding that "[t]he President's sham emergency declaration and unlawful transfers of funds have undermined our democracy, contravening the vote of the bipartisan Congress, the will of the American people and the letter of the Constitution."[19] Senate Minority Leader Chuck Schumer characterized a potential declaration as "a lawless act, a gross abuse of the power of the presidency, and a desperate attempt to distract from the fact that President Trump broke his core promise to have Mexico pay for the wall."[20] He continued, "[i]t will be another demonstration of President Trump's naked contempt for the rule of law and congressional authority."[21]

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15. Bruce Ackerman, *No, Trump Cannot Declare an 'Emergency' to Build His Wall*, N.Y. TIMES (Jan. 5, 2019), https://www.nytimes.com/2019/01/05/opinion/no-trump-cannot-declare-an-emergency-to-build-his-wall.html [https://perma.cc/9AQP-97CX].

16. Andrew Rudalevige, *Does Trump Really Have 'Absolute Power' to Declare a National Emergency? Let's Examine the Statute.*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/10/does-trump-really-have-absolute-power-to-declare-a-national-emergency-lets-examine-the-statute/ [https://perma.cc/KX2H-5RVJ].

17. Rich Barlow, *Is Trump's Declaration of a National Emergency Constitutional?*, BU TODAY (Feb. 20, 2019), http://www.bu.edu/articles/2019/is-trumps-declaration-of-a-national-emergency-constitutional [https://perma.cc/7CGK-KDH3].

18. Deirdre Walsh, *Trump's National Emergency Stands as House Fails to Override Veto*, NPR (Mar. 26, 2019), https://www.npr.org/2019/03/26/706843365/ trumps-national-emergency-stands-as-house-fails-to-override-veto [https://perma.cc/C4FE-R7Y8].

19. Press Release, Nancy Pelosi, Speaker, House of Reps., Pelosi Statement on House's Intention to File Lawsuit to Block the President's Transfer of Funds for His Ineffective, Wasteful Wall (Apr. 4. 2019), https://www.speaker.gov/newsroom/4419-2/ [https://perma.cc/B54Q-GN3N].

20. 165 CONG. REC. S1365 (daily ed. Feb. 14, 2019) (statement of Sen. Schumer).

21. *Id.*

Congressional condemnation was not limited to Democrats. Thirteen House Republicans and twelve Senate Republicans voted for a joint resolution to overturn the national emergency.[22] Many of these members of Congress cited political reasons, primarily refusing to give Trump a power that they would not want to see a future democratic president hold.[23] But others voted for the resolution because they did not believe the president had the authority to make such an emergency declaration:

> For the Executive Branch to override a law passed by Congress would make it the ultimate power rather than a balancing power . . . We experienced a similar erosion of congressional authority with President Obama's unilateral immigration orders—which I strenuously opposed. In the case before us now, where Congress has enacted specific policy, to consent to an emergency declaration would be both inconsistent with my beliefs and contrary to my oath to defend the Constitution.[24]

Of course, not all House and Senate Republicans voted to overturn the national emergency, either believing it was constitutional or placing what they believe to be an important policy move over their beliefs of what the Constitution and federal statutes allow.

Despite its current salience, no scholarship focuses directly on the NEA's applicability where Congress has expressly said no first and its relation to a domestic policy. This is unsurprising, as it appears as though no president in history has cited the NEA to sidestep the congressional appropriations process after Congress has expressly declined to fund a proposed presidential domestic program. This article explores the NEA's applicability, through a separation of powers lens, in just these situations

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22. H.R.J. Res. 46, 116th Cong. (2019). House Representatives Amash (MI), Fitzpatrick (PA), Gallagher (WI), Massie (KY), Johnson (SD), Hurd (TX), Herrera Beutler (CA), Rodgers (WA), Rooney (FL), Sensenbrenner (WI), Stefanik (NY), Upton (MI), and Walden (OR) joined the joint resolution. 165 CONG. REC. H2217–18 (daily ed. Feb. 26, 2019) (relating, through Roll Vote no. 94, to a national emergency declared by the president on February 15, 2019). Overall, the measure passed 245-182 in the House, with 5 not voting. *Id.* In the Senate, Senators Alexander (TN), Portman (OH), Romney (UT), Blunt (MO), Rubio (FL), Collins (ME), Lee (UT), Toomey (PA), Moran (KS), Murkowski (AK), Wicker (MS), and Paul (KY) all voted to overturn the national emergency. 165 CONG. REC. S1882 (daily ed. Mar. 14, 2019) (relating, through Roll Vote no. 49, to a national emergency declared by the president on February 15, 2019). In the Senate, the measure passed 59-41. *Id.*; *see also* H.R.J. Res. 46 (terminating the national emergency declared on Feb. 15, 2019).

23. Tennessee Senator Lamar Alexander said he supported the border wall, but voted on a resolution to overturn the president's emergency declaration, claiming "this declaration is a dangerous precedent." Sen. Lamar Alexander, *Why I Am Voting Against Donald Trump's State of Emergency Declaration*, TENNESSEAN (Mar. 14, 2019), https://www.tennessean.com/story/opinion/2019/03/14/lamar-alexander-emergency-declaration-vote-donald-trump/3161542002/ [https://perma.cc/RZJ3-H7GV].

24. Veronica Stracqualursi & Dana Bash, *Romney Says He'll Vote to Block Trump's National Emergency Declaration*, CNN (Mar. 14, 2019), https://www.cnn.com/2019/03/14/ politics/mitt-romney-resolution-trump-national-emergency/index.html [https://perma.cc/MPM6-ZPUP].

and concludes that President Trump has exceeded any express or implied authority he may have.

Part II describes the metamorphosis of candidate Trump's "moonshot" campaign promise to have Mexico pay for the construction of a "great, great wall" into a constitutional controversy over presidential usurpation of Congressional appropriation authority.

In Part III, I explore the president's assertions of statutory authority to fund the Wall based on the NEA, the Treasury Forfeiture Fund,[25] and the counterdrug activities provision of 10 U.S.C. § 284.[26] Neither the Treasury Forfeiture Fund nor § 284 require a presidential declaration for their utilization of the NEA. I conclude that neither the Treasury Forfeiture Fund nor § 284 provide a basis for President Trump's southern border wall because of their textual limitations. Next, I conclude that the scope of the congressional delegation to the president under the NEA must be read against its intent and prior presidential utilization. I conclude that the NEA's broadly-worded text grants the president wide discretion in declaring an emergency, but President Trump's declaration extends far beyond what the statute allows. The NEA's substantive limits require at least an emergency. Although "emergency" is not defined in the statute, historical and common understandings of the term invoke notions of foreseeability and urgency. The national emergency that President Trump declared was neither unforeseen nor urgent, considering his own comments that he "did not need" to declare it. Moreover, prior presidential utilizations of the NEA provide no precedent for the wall. Instead, President Trump's invocation of the NEA is inconsistent with Congress's intent to forbid presidents from using national emergency declarations to usurp congressional appropriations power.

Part IV addresses the constitutional considerations. This discussion necessarily requires an examination of *Youngstown Sheet & Tube Company v. Sawyer*, in which the Supreme Court invalidated President Truman's attempt to nationalize steel mills to prevent labor strikes. *Youngstown* dictates that the executive's power is at its lowest when Congress has expressly said no.[27] Part IV also discusses the unique political history surrounding President Trump's declaration of a national emergency—including the long back-and-forth between the president and Congress, which demonstrates Congress's disapproval of the border wall. President Trump's attempt to sidestep congressional authority over appropriations is an attempt to "aggrandize" the executive's power at the expense of Congress's constitutional power to control appropriations.

25. 31 U.S.C. § 9705(a) (2019).
26. 10 U.S.C. § 284(a), (a)(1)(A) (2019).
27. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

Although the emergency powers Congress conferred under the NEA are broad, the statute was conceived as a limitation on the president's authority to redirect funds Congress has appropriated for other purposes. Thus, the NEA is not "congressional approval" under *Youngstown* where Congress has addressed the specific appropriation request and withheld authority. The president's actions are unconstitutional.

In an Epilogue, this Article notes that although so far the lower federal courts agree with the above view, the Supreme Court has already stayed an important ruling that enjoined the wall construction and has signaled that it will side with the president. It will reach that result not because the president acted lawfully but because a set of plaintiffs who prevailed below had no right to sue.

I. BREAKING DOWN THE HISTORY OF A "GREAT, GREAT WALL"[28]

A wall spanning the southern border has evolved from an ambitious campaign goal into a politically divisive feature of President Trump's domestic policy agenda. The wall was integral to President Trump's announcement of his candidacy on June 16, 2015,[29] throughout the 2016 campaign,[30] and to his victory speech.[31] In the third presidential debate, he infamously explained, "[w]e have to keep the drugs out of our country. Right now, we're getting the drugs, they're getting the cash. . . . Now, I want to build the wall. We need the wall. The border patrol, I.C.E., they all want the wall."[32] He justified the need for the wall by discussing drugs that come through the border: "We stop the drugs; we shore up the border . . . we have some bad hombres here and we're going to get them out."[33] At his inauguration he said, "[w]e must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength."[34] Once president, Trump immediately scaled

28. Trump Presidential Announcement Speech, *supra* note 7.

29. *Id.* ("I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.").

30. *See generally The Third Presidential Debate: Hillary Clinton and Donald Trump* (NBC television broadcast Oct. 19, 2016) [hereinafter *The Third Presidential Debate*], https://www.youtube.com/watch?v=smkyorC5qwc [https://perma.cc/2VFF-C7ZP] (transcript available at https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063 [https://perma.cc/Q6JR-N6SF]).

31. Donald J. Trump, Election Night Victory Speech (Nov. 9, 2016), https://www.cnn.com/2016/11/09/politics/donald-trump-victory-speech/index.html [https://perma.cc/PBK5-69NF] ("[W]e will always put America's interests first[.]").

32. *The Third Presidential Debate*, *supra* note 30.

33. *Id.*

34. Donald J. Trump, Inaugural Address (Jan. 20, 2017), https://www.whitehouse.gov/briefings-statements/the-inaugural-address/ [https://perma.cc/F59L-GXLL].

back his broad promise to make the Mexican government pay for the wall, but did not back down on building the wall.

A. During the 2016 Campaign

The wall was a focal point from the inception of Donald Trump's campaign. When Donald Trump announced his candidacy on June 16, 2015, he first announced his plans regarding immigration:

> When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. . . . I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I'll have Mexico pay for that wall.[35]

On Super Tuesday, Candidate Trump cited the Great Wall of China to support the wall: "The Great Wall of China, built 2,000 years ago, is 13,000 miles, folks, and they didn't have Caterpillar tractors, . . . [t]hey didn't have cranes. They didn't have excavation equipment," he said.[36] "We can do that so beautifully."[37]

Many—including the Mexican government—were quick to condemn Trump's broad comments and specifically the border wall as racist and hateful rhetoric.[38] Mexican President Enrique Peña Nieto said that he was "saddened" by the wall and stated that "Mexico does not believe in walls. . . . Mexico will not pay for any wall."[39] In the United States, Senator Jeff Merkley went as far as to call the wall a "racist symbol."[40]

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35. Trump Presidential Announcement Speech, *supra* note 7.

36. Donald J. Trump, Super Tuesday News Conference (Mar. 2, 2016), https://time.com/4245134/super-tuesday-donald-trump-victory-speech-transcript-full-text/ [https://perma.cc/J7EA-HRUL].

37. *Id.*

38. Dave Graham, *Mexico Blasts Trump Stance on Immigrants as Absurd, Racist*, REUTERS (Aug. 19, 2015), https://www.reuters.com/article/us-usa-election-trump-mexico/mexico-blasts-trump-stance-on-immigrants-as-absurd-racist-idUSKCN0QO1SZ20150819 [https://perma.cc/PRF2-2SSM].

39. Enrique Peña Nieto (@EPN), TWITTER (Jan. 25, 2017, 6:41 PM), https://twitter.com/EPN/status/824447050066468865 [https://perma.cc/Q4NY-4CCN]; *see also Mexico: We Will Not Pay for Trump Border Wall*, BBC NEWS (Jan. 26, 2017), https://www.bbc.com/news/world-us-canada-38753826 [https://perma.cc/85VJ-62VQ] (providing English subtitles and discussing the Twitter exchange between the presidents).

40. *Merkley: Dems Support Border Security, Not 'Racist Symbol' Border Wall* (MSNBC television broadcast Feb. 5, 2019), https://www.msnbc.com/mtp-daily/watch/merkley-dems-support-border-security-not-racist-symbol-border-wall-1437745731696 [https://perma.cc/GW3G-9LXX]; *see also* Press Release, Sen. Jeff Merkley, Merkley Responds to State of the Union Address (Feb. 5, 2019), https://www.merkley.senate.gov/news/press-releases/merkley-responds-to-state-

But the sentiment stuck—Trump and the Republican Party used the wall to gain support for this campaign. For example, although a CBS News/New York Times poll showed a drop in overall support for a border wall from 47 percent in January 2016 to 39 percent in July 2016,[41] a Rasmussen poll in December 2016 showed that Republican support for the wall remained unchanged in that time, with 65 percent of Republicans believing Trump should build the wall during his first year of office.[42] Thus, Republicans employed the wall as a mechanism to rally support for not only Trump, but the entire Republican party. Senator Ted Cruz, who had run against Trump in the Republican primaries, sought to excite the crowd at the Republican National Convention in Cleveland by criticizing then-President Barack Obama and drumming support for the wall:

> President Obama is a man who does everything backwards. He wants to . . . open up our borders. He exports jobs, and imports terrorists. Enough is enough. . . . We deserve an immigration system that puts America first, and yes, builds a wall to keep America safe.[43]

Later that day, in his acceptance speech, Trump said, "[w]e are going to build a great border wall to stop illegal immigration, to stop the gangs and the violence, and to stop the drugs from pouring into our communities."[44] The Republican Party endorsed Trump's plan, amending its party platform to include support for the wall: "The border wall must cover the entirety of the southern border and must be sufficient to stop both vehicular and pedestrian traffic."[45]

After Trump secured the Republican nomination, his advisors made it clear that he would not need the support of Congress to build a wall. Rudy Giuliani told CNN that "[Trump] can do it by executive order, by just

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of-the-union-address [https://perma.cc/X9CT-DX9A] ("[Trump] remains singularly focused on his unpopular, racist wall, and in using terror and trauma as a deterrence against refugees seeking asylum.").

41. Sarah Dutton et al., *Poll: Trump and Clinton Voters on Immigration, Economy, Trade*, CBS NEWS (July 14, 2016), https://www.cbsnews.com/news/donald-trump-hillary-clinton-voters-on-race-the-economy-trade-immigration/ [https://perma.cc/MP6H-9S7R].

42. *Most GOP Voters Want a Border Wall in Trump's First Year*, RASMUSSEN REPS. (Dec. 6, 2016), http://www.rasmussenreports.com/public_content/politics/current_events/ immigration/ december_2016/most_gop_voters_want_a_border_wall_in_trump_s_first_year [https://perma.cc/T3BE-26X2].

43. Sen. Ted Cruz, Speech at the Republican National Convention (July 21, 2016), https://time.com/4416396/republican-convention-ted-cruz-donald-trump-endorsement-speech-transcript-video/ [https://perma.cc/G3QN-KNAQ].

44. Donald J. Trump, Acceptance of the Republican Nomination Speech (July 21, 2016), https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974 [https://perma.cc/BE3A-A5EB]).

45. COMM. ON ARRANGEMENTS FOR 2016 REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 26 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [https://perma.cc/H4EH-8EQ6].

reprogramming money within the [sic] immigration service, and not only that, they have actually approved a wall for certain portions of the border that hasn't even been built yet. So you could take a year building that out . . . ."[46] This foreshadowed various statements during the Trump presidency that would signal the president's willingness to use a national emergency and other reprogramming mechanisms in the event that Congress failed to make funds available. In a 2018 meeting with Democratic congressional leaders, for example, President Trump said, "if we don't get what we want, one way or the other—whether it's through [Congress], through a military, through anything you want to call—I will shut down the government."[47]

B. After the Election and Into the Shutdown

Shortly after candidate Trump became President-Elect Trump, he scaled back his ambitions. He conceded that a wall-like physical barrier might not be necessary.[48] In various interviews after the election, Trump indicated that fencing might be more appropriate than an actual wall in some portions, and that, in some sections, "you don't need a wall, because you have, you know, you have mountains, you have other things. You have large and rather vicious rivers."[49] He continued that Mexico would not actually pay for the wall, and that was not what he had meant: "When —during the campaign, I would say, 'Mexico is going to pay for it.' Obviously, I never said this and I never meant they're going to write out a check."[50] He continued, "They are [going to pay for the wall]. They are paying for it with the incredible deal we made, called the United States, Mexico, and Canada USMCA deal. . . . So, Mexico is paying for the wall indirectly."[51] In time, it soon became clear that Mexico indeed would not pay for the wall.[52]

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46. *New Day With Chris Cuomo and Alisyn Camerota* (CNN television broadcast Nov. 10, 2016) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/1611/10/nday.07.html [https://perma.cc/HCS7-TSGS]).

47. President Donald Trump, Remarks in Meeting with Senate Minority Leader Chuck Schumer and House Speaker-Designate Nancy Pelosi (Dec. 11, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/ [https://perma.cc/3XM7-RAKW].

48. *Hannity*: *Here's Trump's Message to Those Who Are Upset About His Election Victory* (Fox News Channel television broadcast Dec. 01, 2016), https://insider.foxnews.com/2016/12/01/donald-trump-hannity-his-election-victory-message-protesters [https://perma.cc/9MPU-FAUR].

49. *Id.*

50. President Donald Trump, Remarks Before Marine One Departure (Jan. 10, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-30/ [https://perma.cc/UWS8-F3SU].

51. *Id.*

52. Mexican President Enrique Peña Nieto wrote on Twitter: "I repeat what I said personally,

More importantly, Congress declined appropriate funding for the wall. The president initially asked for support of "$1.6 billion for 65 miles of new border wall construction in the the Rio Grande Valley . . . ."[53] During the negotiations leading up to the 2019 fiscal year appropriations bill, the president declared that he would not sign a bill that did not include funds for the border wall: "I've made my position very clear: Any measure that funds the government must include border security. . . . Walls work whether we like it or not. They work better than anything."[54]

This impasse led to the longest government shutdown in history, which began on December 22, 2019.[55] The White House's request nearly quadrupled on January 6, 2019, when the Acting Director of the Office of Management and Budget, Russell Vought, sent a letter to the United States Senate Committee on Appropriations, emphasizing that "any strategy to achieve operational control along the southern border is physical infrastructure to provide requisite impedance and denial."[56] The White House thus requested $5.7 billion for construction of a steel barrier for the Southwest border,[57] which "would fund construction of a total of approximately 234 miles of new physical barrier."[58] Still, the House and Senate did not present the president with a bill that included his requested funding.[59]

C. Refocusing the Effort: Declaring a National Emergency

When the shutdown ended with a temporary funding bill on January 25, 2019,[60] President Trump refocused his effort to obtain funding through an emergency declaration. Alluding to his emergency authority, he stated: "As everyone knows, I have a very powerful alternative, but I

Mr. Trump: Mexico would never pay for a wall." Enrique Peña Nieto (@EPN), TWITTER (Google trans., Sept. 1, 2016, 12:06 PM), https://twitter.com/EPN/status/771423919978913792 [https://perma.cc/9XS9-VKF6].

53. U.S. DEP'T HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2019, at 3 (2018).

54. President Donald Trump, Remarks at Signing of H.R. 2, the Agriculture Improvement Act of 2018 (Dec. 20, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-2-agriculture-improvement-act-2018/ [https://perma.cc/5MBP-ZK4L].

55. 164 CONG. REC. H10590 (daily ed. Dec. 22, 2018) (statement of Rep. McGovern) ("I think it is embarrassing and it is wrong. 800,000 Federal employees will not get paid during this holiday season because of the shutdown.").

56. 165 CONG. REC. H588 (daily ed. Jan. 15, 2019) (statement of Rep. Perry).

57. *Id.*

58. *Id.*

59. *See* 164 CONG. REC. S8012 (daily ed. Dec. 21, 2018) (statement of Sen. Feinstein) ("I cannot support the version of the short-term continuing resolution that the House passed last night. The $5.7 billion in wall funding added by House Republicans is accompanied by no meaningful justification from the White House.").

60. *See* Further Additional Continuing Appropriations Act, Pub. L. No. 116–5, 133 Stat. 10, 10 (2019) (providing funding for several agencies, but failing to provide any money for southern wall).

didn't want to use it at this time."[61] President Trump furthermore made clear that he would see the issue through, whether he had Congress's approval or not: "The Wall will get built one way or the other!"[62] His Chief of Staff, Mick Mulvaney, confirmed that intent, stating that the president was going to "build the wall . . . . [W]e'll take as much money as you can give us and then we will go off and find the money someplace else legally in order to secure that southern barrier. But this is going to get built with or without Congress."[63] Mulvaney continued:

> There are other funds of money that are available to [the President] through what we call reprogramming. There is money that he can get at and is legally allowed to spend, and I think it—needs to be said again and again that all of this is going to be legal. There are statutes on the books as to how any President can do this. . . . There are certain funds of money that he can get to without declaring a national emergency and other funds that he can only get to after declaring a national emergency.[64]

All-in-all, the Chief of Staff claimed these funds would amount to well over $5.7 billion.[65] Further shedding light on the president's intent, he explained, "The President doesn't really want to do it. . . . He would prefer legislation because that's the right way to go, and it's the proper way to spend money in this country."[66] However, the bipartisan funding bill for fiscal year 2019 authorized about $1.375 billion—far short of the $5.7 billion the president wanted.[67] On the same day the president signed into act the Appropriations Bill, he issued a proclamation "declaring a national emergency concerning the southern border of the United States."[68]

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61. President Donald Trump, Remarks by President Trump on the Government Shutdown (Jan. 25, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-government-shutdown/ [https://perma.cc/Y3D2-TSPJ].

62. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2019, 4:02 PM), https://twitter.com/realdonaldtrump/status/1094355899194454017?lang=en [https://perma.cc/35CJ-EA4Y].

63. *Mick Mulvaney on Chances of Border Deal, Democrats Ramping Up Investigation of Trump Admin*, (Fox News Channel television broadcast Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M [https://perma.cc/ULT2-7UW7].

64. *Id.*

65. *Id.*

66. *Id.*

67. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230(a)(1), 133 Stat. 13, 28. That $1.375 billion was specifically designated "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector . . . ." *Id.*

68. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019). The details of the proclamation and accompanying fact sheet are detailed *infra*, notes 102–04.

Following the declaration, Congress terminated the president's national emergency,[69] but he vetoed the termination,[70] and Congress failed to override that veto.[71] Texas Democratic Representative Joaquin Castro introduced the override measure in the House of Representatives, stating that:

> The Constitution provides Congress with the power of the purse and expressly prohibits the President from spending funds that Congress has not appropriated. Here, Congress has not authorized or appropriated funding to build a wall on the southern border. Indeed, Congress has repeatedly chosen not to do so in response to the President's multiple requests for such funding since becoming President.[72]

Representative Castro's resolution passed in the House with a vote of 245-182, and in the Senate with a vote of 59-41, garnering bipartisan support in both chambers.[73] The president vetoed Congress's joint resolution on March 15, 2019.[74] In his statement accompanying the veto, the president described his reasoning:

> [O]ur porous southern border continues to be a magnet for lawless migration and criminals and has created a border security and humanitarian crisis that endangers every American. Last month alone, [United States Custom and Border Protection (CBP)] apprehended more than 76,000 aliens improperly attempting to enter the United States along the southern border—the largest monthly total in the last 5 years. In fiscal year 2018, CBP seized more than 820,000 pounds of drugs at our southern border, including 24,000 pounds of cocaine, 64,000 pounds of methamphetamine, 5,000 pounds of heroin, and 1,800 pounds of fentanyl. . . . The situation at the southern border is rapidly deteriorating because of who is arriving and how they are arriving. . . . My highest obligation as President is to protect the Nation and its people. Every day, the crisis on our border is deepening, and with new surges of migrants expected in the coming months, we are straining our border enforcement personnel and resources to the breaking point. H.J. Res. 46 ignores these realities.[75]

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69. H.R.J. Res. 46, 116th Cong. (2019).

70. President Donald Trump, Veto Message to the House of Representatives for H.J. Res. 46 (Mar. 15, 2019) [hereinafter Veto Message], https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/ [https://perma.cc/2XM7-95M9].

71. 165 CONG. REC. H2814–15 (daily ed. Mar. 26, 2019).

72. 165 CONG. REC. E193 (daily ed. Feb. 22, 2019) (statement of Rep. Castro).

73. H.R.J. Res. 46, 116th Cong. (2019); 165 CONG. REC. H2217–18 (daily ed. Feb. 26, 2019) (relating, through Roll Vote no. 94, to a national emergency declared by the president on February 15, 2019); 165 CONG. REC. H2814–15 (daily ed. Mar. 26, 2019); 165 CONG. REC. S1882 (daily ed. Mar. 14, 2019).

74. Veto Message, *supra* note 70.

75. *Id.*

The House responded with override proceedings.[76] Representative DeFazio spoke first, asking the House to "override the President's veto of Congress' bipartisan action to terminate his so-called national emergency declaration. The bottom line is that this emergency declaration is nothing more than an end run around a majority . . . in complete disregard of our constitutional system of separation of powers."[77] On March 26, 2019, the House voted on whether to override the president's veto.[78] In the end, all of the House Democrats and fourteen Republicans made a final tally of 248 votes in favor versus 181 against, short of the two-thirds required to override a presidential veto.[79]

II. STATUTORY UNDERPINNINGS

Did the president have authority to divert congressional funds to build the wall? The president relied on three statutes for his authority to divert congressional appropriations to build the wall, relying on the Treasury Forfeiture Fund, funds in support of counterdrug activities, and Department of Defense funds for military reconstruction projects to divert congressional appropriations to build the wall.[80] This section addresses those claims, and concludes that not one of these statutes would authorize the president to build the wall.

A. Emergency Independent Statutes

Two statutes the president relied upon do not require the declaration of a national emergency at all. This includes a provision of the Treasury Forfeiture Fund and a counterdrug activities construction fund. However, those cited non-emergency-tied statutes do not provide funding for the wall.

1. Treasury Forfeiture Funds

Congress established the Department of the Treasury Forfeiture Fund, which is generally available to the Secretary of the Treasury "with respect to seizures and forfeitures made pursuant to [applicable] law," and for certain "law enforcement purposes."[81] These specific "law enforcement purposes" include the seizure of property, contracting services to

76. 165 CONG. REC. H2806 (daily ed. Mar. 26, 2019).

77. *Id.* (statement of Rep. DeFazio).

78. 165 CONG. REC. H2814–15 (daily ed. Mar. 26, 2019).

79. *Id.*

80. *The Funds Available to Address the National Emergency at Our Border*, NAT'L SEC. & DEF. FACT SHEETS (Feb. 26, 2019) [hereinafter *Funds Fact Sheet*], https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border [https://perma.cc/58TG-ZVBV].

81. 31 U.S.C. § 9705(a) (2019).

maintain seized properties, and payment for training foreign law enforcement.[82] Notably excluded from the list is the use of funds to pay for a broad, multi-billion-dollar construction project tenuously related to non-Treasury law enforcement activities.

2. Counterdrug Activities

The second statutory provision on which the president relied, 10 U.S.C. § 284, authorizes "support for the counterdrug activities," including the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States" and "[t]he establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purposes of facilitating counterdrug activities[.]"[83] Section 284 further authorizes "support for the counterdrug activities . . . of any other department of the Federal Government" if "such support is requested . . . by the official who has responsibility for [such] counterdrug activities."[84] Although this section may be used for a "fence," in a "drug smuggling corridor" it does not authorize a wall spanning the entirety of the southern border.[85] Moreover, an authorized "minor military construction project" must have a cost less than $6 million, and Congress has only appropriated $881 million under § 284—far short of the $2.5 billion that the White House claims these funds will provide.[86]

The president claimed that his authority under § 284 works in conjunction with § 8005 of the 2019 Department of Defense Appropriations Act.[87] Under 31 U.S.C. § 1532, "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law."[88] The president claims § 8005 provides such law.[89] Section 8005 authorizes the Secretary of Defense to augment the drug interdiction fund and authorizes the reprogramming of up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act

82. *Id.* §§ 9705(a)(1)(A)–(J).

83. 10 U.S.C. § 284 (2016).

84. *Id.* § 284(a), (a)(1)(A).

85. *Id.* § 284(b)(7).

86. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2982, 2997 (2018).

87. *Funds Fact Sheet*, *supra* note 80.

88. 31 U.S.C. § 1532 (2019).

89. *Funds Fact Sheet*, *supra* note 80.

to the Department of Defense."[90] However, in order to reprogram funds under the Act, § 8005 requires that "such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated."[91] Further, § 8005 provides that reprogramming will be proscribed "in [any] case where the item for which funds are requested has been denied by the Congress."[92]

B. The National Emergencies Act

1. Statutory Framework

The NEA allows the president to declare a national emergency.[93] The NEA passed and went into effect on September 14, 1976; it prescribes rules for the declaration of modern national emergencies.[94] It states that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect . . . only when the President . . . specifically declares a national emergency."[95] The NEA is the main statutory source for the president's ability to declare a domestic national emergency.

The NEA lacks substantive limits on the president's ability to declare a national emergency.

> The initial draft of the bill provided that the president could declare a national emergency in the event the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States.[96]

Legislators removed this text because they were concerned that a future president would see it as a conferral of substantive authority.[97] But the removal of this requirement was not meant to provide the president with a blank check for declaring an emergency—the NEA does not provide an independent legal basis that justifies declaring an emergency. To the contrary, Congress intended "that the NEA regulate emergency powers

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90. § 8005, 132 Stat. at 2999.

91. *Id.*

92. *Id.*

93. National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1621 (1976)).

94. *See generally id.*

95. 50 U.S.C. § 1621(b) (2019).

96. Patrick A. Thronson, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 749 (2013) (quoting S. REP. NO. 93-1170, at 7 (1974)).

97. *Id.*

exercised pursuant to other statutes."[98] Even so, Congress ultimately did not provide any substantive limits in the NEA.

Substantive limits within the NEA have been ruled unconstitutional. The initial draft of the NEA had a mechanism for oversight of national emergencies through accountability and reporting requirements.[99] In the original framework of the NEA, Congress had to vote by concurrent resolution to extend a national emergency after six months, and could vote to terminate one at any time.[100] Concurrent resolutions were later found unconstitutional in *INS v. Chadha*, which struck down a concurrent resolution process in the context of authority over aliens.[101] Congress responded to this by implementing a joint resolution mechanism to overturn a presidential declaration of emergency, which requires the president's signature to become law.[102] Although Congress can override a president's veto of a joint resolution, the effect is that two-thirds of both chambers is required to invalidate a president's emergency declaration.

As a result, the limits on presidential authority to declare an emergency that do appear in the text of the NEA are procedural. The NEA allows the president to "declare [a] national emergency" with respect to "[statutes] authorizing the exercise, during the period of a national emergency" and requires that a president transmit the declaration of a national emergency to Congress and publish it in the Federal Register.[103] Moreover, the NEA

> eliminated or modified some statutory grants of emergency authority, required the President to formally the existence of a national emergency and to specify what statutory authority activated by the declaration would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought.[104]

Once an emergency is declared, the president must "specif[y] the provisions of law under which he proposes that he, or other officers will act."[105] Finally, the NEA states that "Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated" no more than six months after an emergency is declared.[106]

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98. *Id.*

99. *See* National Emergencies Act § 201(b), 50 U.S.C. § 1621(b) (2019) (restricting the powers and authorities of the Act to "(1) only when the President . . . specifically declares a national emergency, and (2) only in accordance with this Act").

100. *See* National Emergencies Act § 202, 50 U.S.C. § 1622 (2019).

101. INS v. Chadha et al., 462 U.S. 919 (1983).

102. 50 U.S.C. § 1622(a)(1).

103. *Id.* § 1621(a).

104. L. ELAINE HALCHIN, CONG. RESEARCH SERV. REP. 98-505: NATIONAL EMERGENCY POWERS, at Summary (2019).

105. 50 U.S.C. § 1631 (2018).

106. *Id.* § 1622(b).

The result is that the president is given a lot of discretion with respect to substance, so long as they follow these procedural requirements.

Even these procedural requirements, however, do not have the full force the framers of the statute intended. In *Beacon Products Corp. v. Reagan*, the First Circuit interpreted the procedural requirement that "Congress shall meet" to consider a joint resolution to determine whether the emergency will be terminated.[107] Even though both parties stipulated that Congress did not meet to consider such a resolution after President Reagan had used a national emergency declaration to impose trading restrictions with Nicaragua, the First Circuit found the emergency valid:

> It seems far more likely that Congress meant the "shall meet to consider a vote" language to give those who want to end the emergency the chance to force a vote on the issue, rather than to *require* those who do *not* want to end the emergency to force congressional action to prevent automatic termination.[108]

The NEA's lack of substantive requirements, coupled with the softening of its procedural requirements, has led to abuse of the Act.[109]

2. The President's Contentions and Section 2808

Invoking his authority under the NEA, the president proclaimed:

> The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and

107. Beacon Products Corp. v. Reagan, 814 F.2d 1, 4–5 (1st Cir. 1987) (discussing what legal remedy the NEA affords for Congressional inaction violating the "periodic meeting" clause).

108. *Id.* at 5.

109. *See* Thronson, *supra* note 96, at 753–54 (questioning whether emergency powers are "consistent with our conceptions of the presidency or limited government" given how the powers have been used to justify "extrajudicial authority to deprive" persons and organizations of personal assets and "unilaterally suspend wage-rate requirements for public contracts").

> resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.[110]

The White House issued additional information regarding the declaration in a fact sheet.[111]

The president wishes to use the NEA as a key to access § 2808, which he claims will provide up to $3.6 billion in military reconstruction funding to build the wall.[112] Section 2808 allows the Secretary of Defense to "undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law."[113] Section 2808 requires (1) that the president declare a national emergency under the NEA, which "requires the use of the armed forces," (2) the use of funds be for "military construction projects," and (3) those construction projects be "necessary to support such use of the armed forces."[114]

The legal basis of the use of the non-emergency-tied statutes is dubious. First, although 31 U.S.C. § 9705 authorizes Treasury Forfeiture Funds "in connection with the law enforcement activities of any Federal agency,"[115] it also limits the use of those funds by listing the specific "law enforcement purposes."[116] Expressly allowed in this list are using funds to pay for seizure of property, contracting services to maintain seized properties, and payment for training foreign law enforcement.[117] Notably excluded from the list is the use of funds to pay for a broad, multi-billion-dollar construction project tenuously related to non-Treasury-related law enforcement activities. Additionally, while § 284 authorizes the construction of a "fence," in a "drug smuggling corridor,"[118] it does not

110. Press Release, President Donald Trump, Presidential Proclamation Declaring a National Emergency Concerning the Southern Border of the United States (Feb. 15, 2019) [hereinafter *National Emergency Declaration*], https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/ [https://perma.cc/S6DZ-MDZQ].

111. For a discussion of this fact sheet in more detail, see generally *supra* note 13.

112. *See Funds Fact Sheet*, *supra* note 80 (stating that, after declaring a national emergency, the president may invoke 10 U.S.C. § 2808 allowing the Secretary of Defense to direct the military construction); *see also* 31 U.S.C. § 1532 (2018) (providing that "an amount authorized to be withdrawn and credited" from one agency or department "is available for the same purpose and subject to the same limitations provided by the law appropriating the amount").

113. 10 U.S.C. § 2808(a) (2018).

114. *Id.*

115. 31 U.S.C. § 9705(g)(4)(B) (2018).

116. *Id.* § 9705(a).

117. *Id.* §§ 9705(a)(1)(B)–(J).

118. 10 U.S.C. § 284 (b)(7) (2018).

authorize a wall spanning the entirety of the United States-Mexico border. However, 10 U.S.C. § 2805 also states that an authorized "unspecified minor military construction project" in support of counterdrug activities is one that has an approved cost equal to or less than $6,000,000.[119] In toto for fiscal year 2019 Congress only appropriated $881 million under § 284—far short of the $2.5 billion that the White House claims these funds will provide, and of course, far short of the $5.7 billion the president requested that Congress provide for the wall.[120]

3. Tall Story for a Tall Wall? Substantive Challenges to the National Emergency Declaration Under the NEA

After President Trump declared a national emergency, fifty-eight former national security officials, including Madeleine Albright, filed a Joint Declaration against the decision challenging the substantive validity of the president's national emergency.[121] The officials cited four main reasons for their protestation:

> To our knowledge, the President's assertion of a national emergency here is unprecedented, in that he seeks to address a situation: (1) that has been enduring, rather than one that has arisen suddenly; (2) that in fact has improved over time rather than deteriorated; (3) by reprogramming billions of dollars in funds in the face of clear congressional intent to the contrary; and (4) with assertions that are rebutted not just by the public record, but by his agencies' own official data, documents, and statements.[122]

According to the report, border crossings are at a historic low, rather than a current, urgent issue.[123] Moreover, the report cites to the administration's own reports that "there was no credible evidence indicating that international terrorist groups have established bases in Mexico" and a lack of terrorists crossing the United States-Mexico border.[124] Additionally, the declaration criticizes the president's justifications, namely the presence of violent crime at the southern border

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119. 10 U.S.C. § 2805(d)(1)(A) (2018).

120. Letter from Russell T. Vought, Acting Dir., Exec. Office President, Office Mgmt & Budget, to Richard Shelby, Chairman, U.S. Senate Comm. Appropriations (Jan. 6, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/01/Final-Shelby-1-6-19.pdf [https://perma.cc/7T4F-W5JM].

121. FORMER UNITED STATES GOVERNMENT OFFICIALS, JOINT DECLARATION 1–5 (Feb. 25, 2019), (available at https://www.washingtonpost.com/read-the-letter-58-former-national-security-officials-protest-trump-s-emergency-declaration/f5bbafbb-eabd-41d9-8cab-740fd515e8a7_note.html?utm_term=.0938210747cb [https://perma.cc/Q4LW-DQCZ]).

122. *Id.* at 6.

123. *Id.*

124. *Id.* at 7.

and the occurrence of human and drug trafficking.[125] Finally, the report challenges the use of a national emergency to circumvent the typical appropriations process.[126]

Additionally, sixteen states sued the president over the diversion of funds.[127] The complaint in *California v. Trump* alleged that the president's declaration is substantively invalid. The complaint argued that, while President Trump has alleged a crisis since his campaign, he did not declare a national emergency until 2019, undermining any urgency of the emergency declaration.[128] Similar to the joint declaration of former defense officials, the complaint alleged that there is no "crisis" or "invasion" at the southern border to support the declaration of an emergency; that the "[a]dministration's assertions that terrorism concerns justify its actions are without factual basis"; that there is no evidence that a wall will decrease crime rates; and that there is therefore no basis to divert funds.[129] Moreover, it claimed that "[t]he federal government's own data prove[s] there is no national emergency at the southern border that warrants [the] construction of a wall."[130] It accused the president of using the wall as a "vanity project" that would "cause significant harm to the public safety, public fisc, environment, and well-being" of the people living in those states.[131] Citing the Constitution, the complaint claimed that the declaration of a national emergency violates the separation of powers, that the president may not spend money that Congress has not expressly appropriated, and that any agency acting to carry out the wall would be acting beyond the powers of their offices.[132] On May 24, 2019, the United States District Court for the Northern District of California agreed.[133]

In *El Paso City v. Trump*, the plaintiffs in a Western District of Texas also challenged the substantive validity of the president's national emergency declaration.[134] First noting that President Trump's declaration

125. *Id.* at 7–8.

126. *Id.* at 10–11.

127. *See generally* Complaint, California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (No. 19-CV-00872), 2019 WL 669456 [hereinafter *California v. Trump* Complaint].

128. *Id.* at 21–25.

129. *Id.* at 37–38.

130. *Id.* at 4; *see also* Complaint at 1, Sierra Club v. Trump, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019) (No. 19-CV-00892), 2019 WL 669456 [hereinafter *Sierra Club* Complaint] (alleging very similar concerns to plaintiffs in *California v. Trump*).

131. *California v. Trump* Complaint, *supra* note 127, at 5.

132. *Id.* at 49–52.

133. *See* California v. Trump, 379 F.Supp. 3d 928, 948 (N.D. Cal. 2019) (stating that it agrees with the plaintiff's contention that, the use of the funds in this way would likely violate separation of powers principles).

134. First Amended Complaint, El Paso Cty. v. Trump, 407 F.Supp.3d 655 (W.D. Tex. Feb. 20,

"marks the first time a President has used the NEA to contravene the clearly expressed will of Congress on a policy and appropriations matter,"[135] those plaintiffs allege that the "NEA thus permits the President to direct the use of certain resources, but only in a qualifying emergency and only in the manner and to the extent that Congress has previously authorized by statute."[136] Thus, while the NEA grants broad authority, those plaintiffs claim that the president has "fabricate[d] an improper or pretextual basis for [his] declaration."[137]

4. Faithful Execution & the Take Care Clause

The president's arguments are categorial yet untenable. President Trump's national emergency declaration under the NEA claimed that there is a "border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency."[138] It continued that the "border is a major entry point for criminals, gang members, and illicit narcotics."[139] It additionally claimed unlawful immigration at the southern border has been continuing and long-standing and characterizes migration as worsening.[140]

The declaration employs the use of the Armed Forces to aid in the construction of the wall.[141] In addition to the $601 million from the Department of the Treasury Forfeiture Fund and $2.5 billion from funds pursuant to 10 U.S.C. § 284, President Trump planned to reprogram $3.6 billion from the Department of Defense military construction budget.[142] The $3.6 billion are the only funds the president is attempting to use that require the declaration of a national emergency.

The declaration of a national emergency grants the president 136 new statutory powers.[143] However, despite these new statutory powers and the NEA's lack of statutory substantive and procedural requirements, the NEA cannot be used where Congress has expressly declined to fund the project at issue. Given the lack of clear statutory guidance, there must be a standard under which to judge the president's decision. This section will

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2019) (No. 19-CV-00066), 2019 WL 6689002.

135. *Id.* at 24.

136. *Id.* at 11.

137. *Id.*

138. *National Emergency Declaration*, *supra* note 110.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Border Security Fact Sheet*, *supra* note 13.

143. BRENNAN CTR. JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE (Dec. 5, 2018), https://www.brennancenter.org/analysis/emergency-powers [https://perma.cc/5DC6-4PCT].

develop an approach and standard under which a declaration of a national emergency may be judged.

a. The Need for a Standard

The NEA does not impose any substantive limits on the declaration of a national emergency.[144] However, that does not mean that decisions made under it should be unreviewable.

First, in an influential article, *Emergency Power and the Decline of Liberalism*, Jules Lobel argued that the main underlying issue surrounding modern national emergencies is that executives have strayed too far from a liberalist theory of emergencies.[145] Under that theory, emergency action is viewed as aberrational—where only the gravest emergencies warrant drastic action—and as "extra-legal"—that is, inherently unconstitutional (because the Constitution does not expressly provide for it).[146] Additionally, liberalists would require the executive to act outside of the scope of her powers in hopes that Congress later indemnifies him,[147] essentially raising the stakes of declaring an emergency.[148] In the wake of World War II, Vietnam, and the Korean War, the "line separating executive emergency power and normal constitutional government [became] blurred . . . primarily because of an aggressive United States assertion of power in the international arena."[149] Lobel argues that the answer to emergency powers does not lie in creating a standard by which to judge the executive's actions but requires a return to this liberalist train of thought.[150]

However, such a return would first require a redefinition of American national security, wherein executives "reject a foreign policy based upon an ever present worldwide communist threat."[151] A return to liberalism

144. *See* Beacon Products Corp. v. Reagan, 814 F.2d 1, 4–5 (1st Cir. 1987) (holding that the NEA does not require Congress to meet in order to avoid automatic termination of a declared national emergency, but rather allows those who wish to end the emergency to "force a vote" on the matter); *see also* Thronson, *supra* note 96 at 752–53 (discussing how the First Circuit interpreted "Congress shall meet" requirement of 50 U.S.C § 1622(b)).

145. *See generally* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1386 (1989).

146. Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736, 738 (1989) (stating "[t]he Constitution is predicated on the assumption that crisis is aberrational").

147. *See* Lobel, *supra* note 145, at 1390 (stating that this system has "allowed the executive to act without creating inherent emergency power under the Constitution")

148. *Id.*

149. *Id.* at 1424.

150. *See id.* at 1389–90 (explaining how liberalism creates a legally significant dividing line between societal and political positions and how liberalism seeks to separate emergency rule from constitutional order by preserving the Constitution while still providing the executive power).

151. Lobel, *supra* note 145, at 1430.

seems unlikely after the War on Terror—something that Jules Lobel could not have foreseen at the time of his article. Moreover, Lobel was focused specifically on the issues surrounding international crises that invoked emergency powers with their primary effects abroad, such as trade restrictions and the like. Trump's national emergency will have its broadest impact in the United States, and part of the answer may lie in defining what national emergencies the president can and cannot declare. This would reduce use of emergencies just for the sake of grabbing additional power at will.

Likewise, the sheer amount of power that comes with the declaration of a national emergency may warrant a standard to determine whether the emergency is valid. Upon the declaration of a national emergency, the president gains access to 136 new authorities, 96 of which require "nothing more than her signature on the emergency declaration."[152] For example, the Communications Act of 1934 allows a president to "modify, change, suspend, or annul . . . any facility or station for wire communication" upon a national emergency declaration.[153] Perhaps more shocking, another statute allows the president to suspend its proscription of tests and experiments of chemical and biological agents on civilians "during the period of any national emergency declared . . . by the President."[154] Given the sheer amount of power an emergency declaration grants a president, a standard for judging the legitimacy of any emergency declaration would serve as a prudent check upon the executive.

b. Developing a Standard

Article II of the Constitution specifies that it is the president's duty to "take Care that the Laws be faithfully executed."[155] While the Supreme Court has not fully delved into what this clause permits or requires, it has noted:

> [W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as

152. Elizabeth Goitein, *Trump's Hidden Powers*, BRENNAN CTR. JUSTICE (Dec. 5, 2018), https://www.brennancenter.org/blog/trump-hidden-powers [https://perma.cc/S8VE-D5KY].

153. 47 U.S.C. § 606(a) (2018).

154. 50 U.S.C § 1515 (2018) (stating a president may suspend any portion or chapter of Title 50 during a period of war declared by Congress, including § 1520a(a)(1), which prohibits the Secretary of Defense from conducting any tests or experiments involving the use of chemical or biological agents on a civilian population).

155. U.S. CONST. art. II, § 3.

> it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.[156]

In terms of the statutory provisions, President Trump's national emergency simply does not "take care" to see that the NEA's provisions are "faithfully executed." A fundamental canon of statutory construction holds that, unless otherwise defined, words must be interpreted as taking their ordinary, contemporary, and common meaning.[157] The meaning of the term "national emergency," evidenced through Merriam-Webster's dictionary, is "a state of emergency resulting from a danger or threat of danger to a nation from foreign or domestic sources and usually declared to be in existence by governmental authority."[158] Moreover, prior to the NEA, the Tenth Circuit held that "[a] national emergency must be based on conditions beyond the ordinary. Otherwise it has no meaning. The power of the Soviet Union in world affairs does not justify placing the United States in a constant state of national emergency."[159] In Congress, an early version of the NEA provided:

> In the event the President finds that a proclamation of a national emergency is essential to preservation, protection, and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States, the President is authorized to proclaim the existence of a national emergency.[160]

Elsewhere in the United States Code, "emergency" is defined as:

> [A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.[161]

Finally, during the debates surrounding the NEA, Senator Matthias explained: "[t]o understand the full significance of the National Emergencies Act, one must place it within the context of Congressional efforts to reclaim prerogatives abandoned to the Executive."[162]

In 1976, in a study written at the request of Senators Frank Church and Charles Mathias, who were on the Special Committee on National Emergencies in the Senate, Dr. Harold C. Relyea, an analyst in American National Government at the Library of Congress, wrote that

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156. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

157. Perrin v. United States, 444 U.S. 37, 42 (1979).

158. *National Emergency*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/national%20emergency [https://perma.cc/74YS-LEDY].

159. United States v. Bishop, 555 F.2d 771, 777 (10th Cir. 1977).

160. H.R. 3844, 94th Cong. § 201(a) (1976).

161. 42 U.S.C. § 5122 (2018).

162. 121 CONG. REC. S2302 (daily ed. Mar. 6, 1975) (statement of Sen. Charles Mathias).

"[e]mergency powers must be carefully managed if for no other reason than their authoritarian nature and breadth of scope."[163] He continued, "the necessity of the Executive meeting a crisis or national exigency in the absence of a declaration of war could prompt the utilization of emergency powers, and this authority extends into almost every aspect of public business."[164] According to Dr. Relyea, these concerns necessitated procedures for the declaration of an emergency as well as "equitable controls upon their use," which he saw as "fundamental to the continuance of a democratic order."[165]

Echoing these concerns, Congress enacted the NEA in 1976 after a Senate committee found that the United States had been operating under four presidentially declared states of emergency for over forty years.[166] Such a state made it "distressingly clear . . . that our Constitutional government has been weakened by 41 consecutive years of emergency rule."[167] Thus, the NEA was Congress's attempt to "comprehensively regulate and limit future declarations of national emergency."[168]

This goal of preventing this proliferation of national emergencies has, in large part, failed. As of 2019, "the United States has been in a continuous state of emergency for four full decades—since 1979."[169] Almost all these declarations have involved international relations.[170]

One of the few relating to domestic policy involved Hurricane Katrina, in which President Bush suspended the Davis-Bacon minimum wage provisions in the wake of a national emergency in New Orleans.[171] The effect of his proclamation was to authorize payment lower than wages payed to workers employed on federally funded construction projects in

163. Harold C. Relyea, *Declaring and Terminating a State of National Emergency*, 6 PRES. STUDS. Q. 36, 41 (1976).

164. *Id.*

165. *Id.*

166. *See* H.R. REP. NO. 93-1170, at 1 (1974) (discussing how the United States has been in a state of emergency for the past four decades dating back to President Roosevelt declaring an emergency in 1933 for the Great Depression).

167. *Id.*

168. *See* Thronson, *supra* note 96, at 737–38, 743–46 (giving a thorough account of the legislative record and intent leading to the passage of the NEA).

169. Rudalevige, *supra* note 16.

170. BRENNAN CTR. JUSTICE, *DECLARED NATIONAL EMERGENCIES UNDER THE NATIONAL EMERGENCIES ACT* (Oct. 18, 2019), https://www.brennancenter.org/sites/default/files/2019-10/Declared%20Emergencies%20under%20NEA101719.pdf [https://perma.cc/Y9R7-YJ5M].

171. *See* Proclamation 7924—To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina, 70 Fed. Reg. 54,227 (Sept. 8, 2005) [hereinafter Proclamation 7924] (suspending Section 3142(b) of Title 40 which provides federal minimum wages that are determined by the Secretary of Labor).

the area devastated by Hurricane Katrina.[172] Although few would argue that Hurricane Katrina did not constitute a national emergency, paying relief workers less than other federal workers was controversial.[173] The president laid out the following justifications:

> (a) Hurricane Katrina has resulted in unprecedented property damages. (b) The wage rates imposed by section 3142 of title 40, United States Code, increase the cost to the Federal Government of providing Federal assistance to these areas. (c) Suspension of the subchapter IV of chapter 31 of title 40, United States Code . . . , and the operation of related acts to the extent they depend upon the Secretary of Labor's determinations under section 3142 of title 40, United States Code, will result in greater assistance to these devastated communities and will permit the employment of thousands of additional individuals.[174]

President Bush rescinded the emergency less than one month later.[175]

Another domestic policy declaration involved President Obama's declaration of a national emergency in the wake of the H1N1 influenza epidemic in the United States.[176] The president sought to "proactively address the ongoing pandemic," by "allow[ing] healthcare systems to quickly implement disaster plans should they become overwhelmed."[177] Specifically, the declaration allowed healthcare facilities to "petition for HHS approval of waivers in response to particular needs within the geographic and temporal limits of the emergency declarations."[178]

The question then becomes whether President Trump's national emergency falls within or outside of this precedent for domestic national emergencies. In both above mentioned cases, the underlying emergencies carried a sense of urgency. First, the effects of Hurricane Katrina necessitated the use of federal aid after the hurricane swept across much of the southeastern United States. Second, the H1N1 pandemic caused widespread panic and killed more than one thousand Americans and

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172. *See id.* (stating that lowering minimum wage will provide result in greater assistance to the devastated areas).

173. *See A Shameful Proclamation*, N.Y. TIMES, Sept. 10, 2006, at A16 (criticizing the suspension of federal minimum wage because it harms those who already are poor, and stating this proclamation subjects individuals to subpar wages).

174. Proclamation 7924, *supra* note 171, at 54,227.

175. *See generally* Proclamation 7959—Revoking Proclamation 7924, 70 Fed. Reg. 67,899 (Nov. 3, 2005).

176. *See* Proclamation 8443—Declaration of a National Emergency With Respect to the 2009 H1N1 Influenza Pandemic, 74 Fed. Reg. 55,439 (Oct. 23, 2009) (detailing the public health emergency and declaring the rapid increase in illness due to the H1N1 virus a national emergency).

177. *President Obama Signs Emergency Declaration for H1N1 Flu*, WHITE HOUSE (Oct. 25, 2009), https://obamawhitehouse.archives.gov/blog/2009/10/25/president-obama-signs-emergency-declaration-h1n1-flu [https://perma.cc/T2F9-7QSX].

178. *Id.*

hospitalized over twenty thousand.[179] The use of powers associated with President Bush's declaration was controversial and political pressures led to the rescission of the emergency action; the H1N1 emergency expired when the pandemic ended.

President Trump's declaration lacks these urgencies. Political pressures and campaign promises, not a sudden change of circumstances like a hurricane or flu pandemic, actually led to the declaration of a national emergency. Additionally, the nature of the emergency at the southern border—the influx of drugs—could potentially be dire, but building a wall could take at least ten years, even with thousands of workers.[180] Thus, the wall is fundamentally different in scope and duration from the other two declarations, which allowed lowering the price of contracts allowed the federal government to employ more workers to get reconstruction work done faster; allowing medical facilities to seek HHS waivers and provide more medical care. Here, the wall is a massive, long term project meant to solve a long term, non-emergency issue, which does not require those sorts of measures, particularly in light of President Trump consistently saying he didn't need to declare a national emergency.

III. CONSTITUTIONAL CONSIDERATIONS

A. Youngstown *and Congressional Disapproval*

Youngstown Sheet & Tube Co. v. Sawyer guides the constitutional analysis of President Trump's emergency declaration.[181] There, the Supreme Court famously held that President Truman did not have the authority to issue a national emergency to seize and operate the nation's steel mills in order to avert to expected effects of a strike by the United Steelworkers of America.[182] In an oft-cited concurring opinion on the relation between executive and congressional power, Justice Jackson wrote:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these

179. Jackie Calmes & Donald G. McNeil, Jr., *H1N1 Widespread in 46 States as Vaccines Lag*, N.Y TIMES (Oct. 24, 2009), https://www.nytimes.com/2009/10/25/us/politics/25flu.html [https://perma.cc/U3VB-AJQM].

180. Todd C. Frankel, *Build the Wall? It Could Take at Least 10 Years, Even with 10,000 Workers*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/business/economy/build-the-wall-it-could-take-at-least-10-years-even-with-10000-workers/2019/01/09/62d5eaae-1376-11e9-803c-4ef28312c8b9_story.html?utm_term=.d11f940a5f37 [https://perma.cc/SCH5-KRS7].

181. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

182. *Id.* at 588.

> circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. . . .
>
> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
>
> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[183]

President Trump's declaration of a national emergency appears to be a straightforward application of scenario three of Justice Jackson's *Youngstown* concurrence.

Congress has expressly declined to provide funding for the wall on two occasions. Congress has expressly disapproved the president's utilization of the NEA to build the wall. Bipartisan majorities in both the House and the Senate voted to disapprove the use of congressional appropriations to build the wall.[184] In March 2017, White House Office of Management and Budget Director Mick Mulvaney announced that the president was seeking $4.1 billion to build the wall.[185] In May 2017, the White House scaled back this request and asked for $1.6 billion in a budget submitted to Congress.[186] In the 2018 Consolidated Appropriations Bill, H.R. 1625, Congress approved $1.6 billion for "14 miles of secondary fencing . . . along the southwest border in the San Diego Sector," "25 miles of primary pedestrian levee fencing along the southwest border in the Rio Grande Valley Sector," "primary pedestrian fencing along the southwest border in the Rio Grande Valley Sector," and "the replacement of existing primary pedestrian fencing along the southwest border."[187]

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183. *Id.* at 635–38 (Jackson, J., concurring).

184. 165 CONG. REC. H2814, H2217–18 (daily ed. Feb. 26, 2019); 165 CONG. REC. S1882 (daily ed. Mar. 14, 2019).

185. *H.R. 3219—Make America Secure Appropriations Act, 2018*, WHITE HOUSE (Jul. 24, 2017), https://www.whitehouse.gov/briefings-statements/h-r-3219-make-america-secure-appropriations-act-2018/ [https://perma.cc/LY4N-SBQ2]; *see also Off-Camera Briefing of the FY18 Budget by Office of Management and Budget Director Mick Mulvaney*, WHITE HOUSE (May 2, 2017) [hereinafter *Mulvaney Briefing FY18 Budget*], https://www.whitehouse.gov/briefings-statements/off-camera-briefing-fy18-budget-office-management-budget-director-mick-mulvaney-052217/ [https://perma.cc/SK2U-BA7Q].

186. *Mulvaney Briefing FY18 Budget*, *supra* note 185.

187. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 230, 132 Stat. 348, 616–

Additionally, Congress approved of "$38,000,000 for border barrier planning and design."[188] Thus, the Republican-controlled Congress declined to fund outright the wall.

The president persisted but did not get the money from Congress. On January 6, 2019, the president wrote a letter to Congress asking it appropriate $5.7 billion for "construction of a steel barrier for the Southwest border."[189] While Congress considered his funding request in the End the Shutdown and Secure the Border Act, a Senate Amendment to H.R. 268, the Senate eventually rejected the request on a 50-47 vote—leading to the longest government shutdown in United States history, spanning thirty-one days from December 22, 2018 until January 25, 2019.[190] In late December 2018, House Democrats introduced legislation that would fund many important agencies through September 30, 2019 and a Continuing Resolution to fund the Department of Homeland Security through February 8, 2019.[191] Eventually, on January 25, 2019, the Senate passed H.J. Resolution 28, a Continuing Resolution that funded all federal agencies through February 8, 2019, without a penny for the wall.[192] Between the end of December and January 25, members of Congress introduced various bills that proposed to provide appropriations for the wall, including a bill that would give the president $25 billion, and a bill that would create a separate account in the Treasury to hold deposits to be used to secure the southern border.[193] No House or Senate Committee held hearings on these proposals. The government reopened on January 25, 2019 when the president signed a bill that funded the government for three weeks.[194] Thus, the president's use of congressionally appropriated funds to build the wall is in conflict with Congress's will.

When the president made his February 15, 2019 emergency declaration, he also relied on the authority vested in his office by the Constitution. Under *Youngstown*, he cannot proceed except in reliance on his independent powers. No such independent power exists. This section

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17 (2018); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-614, SOUTHWEST BOARDER SECURITY: CBP IS EVALUATING DESIGNS AND LOCATIONS FOR BORDER BARRIERS BUT IS PROCEEDING WITHOUT KEY INFORMATION (2018), https://www.gao.gov/assets/700/693488.pdf [https://perma.cc/H6QM-7JWX].

188. Pub. L. No. 115-141, § 230(a)(5).

189. 165 CONG. REC. H587, H588 (daily ed. Jan. 15, 2019).

190. 165 CONG. REC. S327–482 (daily ed. Jan. 22, 2019).

191. 164 CONG. REC. S8012 (daily ed. Dec. 21, 2018).

192. Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10, 11–12 (2019).

193. 164 CONG. REC. S7319 (daily ed. Dec. 5, 2018) (statement of Sen. Inhofe for himself, Sen. Rounds, Sen. Kennedy, and Sen. Cruz).

194. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 10, 13 (2019).

will detangle the arguments associated with these powers, beginning first with the notion of an inherent presidential power. Next, the section will show neither his foreign affairs power to recognize nations nor Commander-in-Chief authority to repel sudden attacks authorize the president to spend funds appropriated by Congress for other purposes to build the wall on the United States-Mexico border. Ultimately, the president has unconstitutionally usurped Congress's spending power to fulfill his campaign promise to build the wall.

B. Inherent "Emergency Power": Traditional Notions & Modern Understandings

The Constitution does not provide for any general "emergency power"—but that does not mean that the framers did not contemplate emergencies.[195] Thomas Jefferson, for example, believed that emergencies were necessarily contrary to the law—that is, using the law to circumvent the law—and that reading an emergency power into the executive would be unwise because that would lead to unjustified emergencies acting as an underpinning for "vast assertions" of power.[196] He believed that the Constitution was designed to carefully limit executive emergency power and thus acknowledged that some emergency actions were unlawful.[197] Alexander Hamilton, on the other hand, believed that the constitutional power to defend the nation

> [O]ught to exist without limitation, because it is impossible to foresee or define the extent and variety of national emergencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.[198]

In that essay, Hamilton was discussing joint congressional and congressional authority; however, some presidents have used these arguments to justify power under a unilaterally declared emergency.[199] President Franklin Roosevelt, in demanding that Congress repeal the Price Control Act, told Congress: "In the event the Congress should fail

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195. 3 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 907 (3d ed. 1970) (contrasting various constitutions from several Asian, Latin American, and European countries).

196. Lobel, *supra* note 145, at 1396–97 (describing how this principle is understood as the "Jeffersonian" position regarding national emergencies).

197. *Id.* at 1392.

198. THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (J. Cooke ed., 1961).

199. Lobel, *supra* note 145, at 1388.

to act, and act adequately, I shall accept the responsibility, and I will act . . . ." Roosevelt later noted that "[t]he President has the power . . . to take measures necessary to avert a disaster which would interfere with winning of the war."[200] President Nixon believed the difference between constitutional and unconstitutional conduct with respect to national security was the president's judgment: "When the President does it, that means that it is not illegal."[201] President Trump also echoed these arguments in his speech declaring a national emergency at the southern border after failing to secure congressional funding: "So we are going to confront the national security crisis on our southern border. And we're going to do it one way or the other."[202] He continued, "I didn't need to do this, but I'd rather do it much faster."[203]

The proliferating use of emergency powers led Clinton Rossiter to publish Constitutional Dictatorship, which examined the experiences of crisis governments ranging from the ancient constitutional state of Rome to the United States.[204] He uses the term "constitutional dictatorship" as a "convenient hyperbole" underscoring how many and how extensive emergency powers have been utilized by American presidents.[205] Therein, he discussed the need for Congress to pass legislation that would allow the executive to respond to emergency situations.[206] Rossiter recognized that "[t]he use of constitutional emergency powers may well become the rule and not the exception."[207] As such, the future of the nation may very well "rest in the capacity of the Presidency as an institution of constitutional dictatorship."[208] Rossiter believed that a "criterion of cardinal importance" was that Congress adopt a stringent procedure for the invocation of executive power during emergencies, which would dictate that emergency powers be narrowly drawn and subject to tight control:

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200. BILL PRESS, TRAIN WRECK: THE END OF THE CONSERVATIVE REVOLUTION 109 (2008).

201. James M. Naughton, *Nixon Says a President Can Order Illegal Actions Against Dissidents*, N.Y. TIMES (May 19, 1977), https://www.nytimes.com/1977/05/19/archives/nixon-says-a-president-can-order-illegal-actions-against-dissidents.html [https://perma.cc/G96E-TUMJ].

202. Aaron Blake, *Trump's National Emergency Press Conference, Annotated*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/politics/2019/02/15/trumps-bewildering-national-emergency-press-conference-annotated/?utm_term=.7e7cc66860fc [https://perma.cc/Z2LK-6FVG].

203. *Id.*

204. *See generally* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 209 (1948).

205. *Id.* at 292.

206. *Id.* at 297.

207. *Id.* at 297.

208. *Id.* at 309.

> All uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements. In short, constitutional dictatorship should be legitimate. It is an axiom of constitutional government that no official action should ever be taken without a certain minimum of constitutional or legal sanction. This is a principle no less valid in time of crisis than under normal conditions.[209]

But Rossiter's concerns went unanswered until the passage of the NEA. The second half of the twentieth century brought the largest increase of emergency powers ever seen in the United States. President Truman started the trend on December 16, 1950, when he declared a national emergency in response to the Korean conflict.[210] This declaration remained in effect for almost twenty-five years and gave subsequent presidents authority to

> [S]eize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens.[211]

The passage of the NEA may not eliminate naked claims of inherent emergency power. But the law removed the argument that Congress has conceded that point of view undercuts any argument today that the president has an inherent emergency power under the Constitution.

C. Commander-in-Chief & Foreign Affairs

A persistent but doubtful claim that the president is "the sole organ of foreign affairs" has been used to justify broad emergency power. In 1800, then-Representative John Marshall explained: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[212] Justice Sutherland cited Marshall in *United States v. Curtiss-Wright Export Corp* to justify claims of broad claims of emergency power.[213]

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209. *Id.*

210. Proclamation No. 2914—Proclaiming the Existence of a National Emergency, 15 Fed. Reg. 9029 (daily ed. Dec. 19, 1950).

211. U.S. GOV'T PRINTING OFFICE, THE NATIONAL EMERGENCIES ACT (PUBLIC LAW 94-412) 20 (1976) (citing S. REP. NO. 93-1170 (1974)).

212. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (citing 10 ANNALS OF CONG. 613 (1800)).

213. *Id.* at 316–19.

But the few cases on the foreign affairs powers of the president don't lend the claim of sole authority much support.[214] *Curtiss-Wright* involved the presidential exercise of authority pursuant to congressional statute. *Youngstown* struck down the presidential seizure of the steel mills during the Korean War.[215] The Supreme Court decision in *Dames & Moore v. Regan*,[216] which approved President Carter's seizure of Iranian assets during the Tehran American Embassy hostage crises, as well as his suspension of Iranian claims in United States courts, turned on the Court's conclusion that Congress had authorized and acquiesced in these specific action, not on the approval of a "sole authority" theory.[217]

Nor is the Commander in Chief power, which all agree permits the president to "repel sudden attacks," a province of sole emergency authority. Although it is true that the presidents of both parties have used military troops without advance authorization, they have also sought and received from Congress authorization to use military troops in combat.[218] In *Hamdan v. Rumsfeld*, a divided Supreme Court declared that the president could not establish military commissions to try enemy combatants without express Congressional authority.[219] And in *Boumediene v. Bush*,[220] the Supreme Court struck down the congressional suspension of habeas corpus with respect to enemy combatants.[221]

Under the War Powers Act, § 2(c) states the policy that the powers of the president as commander in chief to introduce United States armed forces into situations of hostilities or imminent hostilities "are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[222] The resolution required presidential consultation with Congress in advance

214. Linda S. Greene, *Comment: After the Imperial Presidency*, 47 MD. L. REV 99, 103–04 (1987).

215. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 603 (1952).

216. Dames & Moore v. Regan, 453 U.S. 654, 659–65 (1981).

217. *Id.* at 673, 680–81.

218. *See generally*, Jennifer K. Elsea & Matthew C. Weed, Cong. Research Serv., RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (2014), https://fas.org/sgp/crs/natsec/RL31133.pdf [https://perma.cc/E7VT-DS5M].

219. Hamdan v. Rumsfeld, 548 U.S. 557, 559 (2006).

220. Boumediene v. Bush, 553 U.S. 723, 730 (2008).

221. *Id.*

222. 50 U.S.C § 1541(c) (2018).

"in every possible instance" and as long as troops are involved in hostilities.[223]

The record shows that both democratic and republican presidents have used military force with and without congressional authorization. But presidents of both parties have provided the required reports to Congress in 168 times between 1973 and 2019, and that Congress has also ordered the termination of the use of military force.[224] The record is not a perfect one and presidents have not always reported and important areas of disagreement on obligation and definition remain.[225] But the clear picture is one of joint responsibility for war and congressional oversight over the commander in chief consistent with Congress's war related enumerated powers.

The words of the Supreme Court in *Ex Parte Milligan* still ring true.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. . . . [I]t could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.[226]

D. Appropriations Clause & the Separation of Powers

The separation of powers doctrine provides the most disapproving glance at the notion of presidential inherent authority justifying the national emergency declaration. The Constitution's system of the separation of powers and checks and balances is designed to prevent any one branch from gaining too much power. The federal separation of powers is inferred from the vesting clauses in Articles I, II, and III of the Constitution. It is through the separation of powers lens that we should be viewing the spending power and the Appropriations Clause.

The Constitution expressly vests the spending power in the legislature. The Appropriations Clause is the cornerstone of Congress's power to spend, providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[227] Early on in the nation's history, James Madison enumerated this understanding in Federalist No. 58:

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223. 50 U.S.C § 1542 (2018).

224. MATTHEW C. WEED, CONG. RESEARCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 68–94 (2019), https://fas.org/sgp/crs/natsec/R42699.pdf [https://perma.cc/ZQY9-S6C2] (reporting when presidents have acted under the War Powers Resolution).

225. *Id.* at 95.

226. *Ex Parte* Milligan, 71 U.S. 2, 120–26 (1866) (highlighting the responsibility for both war and congressional oversight).

227. U.S. CONST. art. I, § 9, cl. 7.

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They in a word hold the purse; that powerful instrument by which we behold in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people . . . .[228]

The Court's interpretation of the spending power has underscored this understanding. In *Cincinnati Soap Co. v. United States*, the Court found that the Appropriations Clause was "intended as a restriction upon the disbursing authority of the Executive department."[229] It continued, the Appropriations Clause is an explicit command that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[230] In *United States v. MacCollom*, the Court again explained that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[231] The Constitution solely vests the spending power in Congress. The president's attempts to gather funding for the wall by declaring a national emergency violates the Constitution and are a serious attempt to usurp the powers of another branch of the national government.

IV. WHAT NOW MY LOVE: RESOLUTION IN THE FEDERAL COURTS OR POLITICAL PROCESS?

> What now, my love, now that you've left me? How can I live through another day? Watching my dreams turn into ashes, and all my hopes into bits of clay? Once I could see, once I could feel. Now I am none, I've become unreal.
>
> —Shirley Bassey[232]

Despite the several lawsuits pending during the writing of this paper, one question still remains: Is this a controversy that will be resolved in the courts or in the political process? One lawsuit has been dismissed on justiciability grounds. In *United States House of Representatives v.*

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228. THE FEDERALIST NO. 58, at 296–97 (James Madison) (Buccaneer Books 1992).

229. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (holding the Appropriations Clause was "intended as a restriction").

230. Office of Pers. Mgmt. v. Richmond, 466 U.S. 414, 424 (1990) (quoting *Cincinnati Soap*, 301 U.S. at 321) (interpreting the commands of the Appropriations Clause).

231. United States v. MacCollom, 426 U.S. 317, 321 (1976) (citing Reeside v. Walker, 52 U.S. 272, 291 (1851)) (explaining that spending is only proper if congress has authorized it).

232. SHIRLEY BASSEY, WHAT NOW MY LOVE (Columbia Records 1962).

Mnuchin, the District Court for the District of Columbia ruled that Democrats in the House of Representatives did not have standing to enjoin the Secretaries of Departments of the Treasury, Defense, Homeland Security, and the Interior from spending funds to build a wall.[233] The court found that there was no concrete and particularized injury required for Article III standing. The court reasoned that historical practice and precedent signals that the House of Representatives may not challenge injury to official authority and the availability of institutional remedies in the statute providing for two-thirds override of the president's veto of a National Emergency Declaration.[234]

Two additional doctrines are significant in this realization: the political question doctrine and ripeness. This section aims to dissect these doctrines with respect to national emergency declarations, ultimately concluding that the question is not a political question and is ripe for judicial resolution.

Under the political question doctrine, a controversy is a nonjusticiable political question when there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ."[235] The doctrine is prudential, and generally a matter of constitutional interpretation that attempts to determine whether the controversy falls within the judiciary's purview.[236] This means that the "textually demonstrable commitment" element and the "lack of judicially discoverable and manageable standards" element are not entirely distinct.

In the context of national emergencies, some courts have ruled the declaration of an emergency a nonjusticiable political question when the emergency dealt with foreign relations.[237] In *Beacon Products Corp. v.*

233. U.S. House of Reps. v. Mnuchin, 379 F. Supp. 3d 8, 10 (D.D.C. 2019) (holding that spending was improper).

234. *Id.* at 15–23 (citing Raines v. Byrd, 521 U.S. 811, 826 (1997)).

235. Baker v. Carr, 369 U.S. 186, 217 (1962) (stating the rules and test regarding when there is a nonjusticiable political question).

236. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 229–38 (1993); *see also Baker*, 369 U.S. at 211 ("[W]hether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

237. *See* Chang v. United States, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) ("[T]o the extent that the plaintiffs' inquiry into the 'true facts' of the Libyan crisis would seek to examine the President's motives and justifications for declaring a national emergency, such an inquiry would likely present a nonjusticiable political question."); *see also* Regan v. Wald, 468 U.S. 222, 242 (1984) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); Beacon Products Corp. v. Reagan, 633 F. Supp. 1191, 1194–95 (D. Mass 1986), *aff'd*, 814 F.2d 1 (1st Cir. 1987) (emphasizing that the concerns underlying the political question doctrine are "particularly acute whenever a court is called upon to

Reagan, for example, the District of Massachusetts found that President Reagan's declaration of a national emergency prohibiting imports into the United States from Nicaragua and exports to Nicaragua from the United States was a nonjusticiable political question.[238] There, the Reagan Administration found that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States,"[239] and declared a national emergency under the International Emergency Economic Powers Act.[240] The court began its analysis by emphasizing that the justifications underlying the prudential political question doctrine are "particularly acute whenever a court is called upon to review the conduct of American foreign policy."[241] Then, the court noted that addressing whether or not Nicaragua actually posed an unusual and extraordinary threat "would be an imprudent exercise of judicial review," which would "require the court to assess the wisdom of the President's judgment concerning the nature and extent of that threat, a matter not susceptible to judicially manageable standards."[242] Because the court does not have the resources to determine whether Nicaragua poses more than an ordinary or usual threat, a decision would boil down to "policy judgments about national security and foreign policy, judgments best left to the political branches of the federal government."[243]

Although matters dealing with foreign governments are commonly considered political questions, there is no reason that a national emergency affecting primarily domestic relations would face the same fate. Recently, in *Rucho v. Common Cause*, the Supreme Court found the domestic issue of political redistricting was non-reviewable as a political question.[244] There, however, the Supreme Court emphasized that it would be impossible for the judiciary to determine "fairness" in the context of redistricting:

> "Fairness" does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems

review the conduct of American foreign policy," the court found that "whether Nicaragua poses a sufficient threat to trigger the President's IEEPA powers is a nonjusticiable political question").

238. *Beacon Products*, 633 F. Supp. at 1199 (holding President Reagan's declaration was a nonjusticiable political question).

239. Proclamation No. 12513, 50 Fed. Reg. 18,629 (1985).

240. 50 U.S.C. § 1701 (2018).

241. *Beacon Products*, 633 F. Supp at 1194 (finding separation of powers issues particularly acute when foreign policy is involved).

242. *Id.* at 1194–95.

243. *Id.* at 1195.

244. Rucho v. Common Clause, 139 S. Ct. 2484, 2506–07 (2019) ("[P]artisan gerrymandering claims present political questions beyond the reach of federal courts.").

> to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.[245]

In contrast, there are judicially manageable standards to determine what constitutes an "emergency."

Second, the doctrine of ripeness may present a barrier to judicial resolution. Under the doctrine, federal courts require that a dispute be sufficiently mature to warrant a decision. Under the doctrine, courts will address to main factors: (1) the fitness of the issues for judicial resolution—that is, whether they are factual or legal; and (2) the hardship to the parties of withholding court consideration.[246]

While the first element of the ripeness inquiry would likely be met, the facts relevant to actual hardship are more nuanced. The parties including the states who have sued the president because they lost the diverted funding suffered immediately from the diversion of funding from other sources. For example, California has alleged injury "due to the loss of federal drug interdiction, counter-narcotic, and law-enforcement funding to the State caused by Defendants' diversion of funding."[247] Similar injuries will occur immediately to the other states should a court not decide the case on the merits. Those hardships are both qualitative and quantifiable.

Thus, it is not surprising that no lower federal court has concluded that litigation challenging the President Trump's invocation of emergency power raise nonjusticiable political questions. Although the Court may properly defer to the president foreign affairs cases or to Congress in the a pure domestic relations context, and short term funding diversions will escape judicial scrutiny on mootness grounds, the federal courts will decided the legality of multi-billion dollar multiyear funding diversions.[248]

CONCLUSION

It has been long settled that presidential power must stem from an act of Congress or from the president's executive power under the Constitution. That understanding need not embrace the view that the

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245. *Id.* at 2499–500 (citing Vieth v. Jubelirer, 541 U.S. 267, 291 (2004)).

246. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Cmty., 461 U.S. 190, 190–91 (1983) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)).

247. *California v. Trump* Complaint, *supra* note 127, at 7.

248. *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2404 (2018) (holding in a 5-4 Supreme Court ruling that the president had authority under two statutes to ban from the United States Muslims who lacked "credible claims" of a relationship with a United States national or entity).

president does not have flexibility to carry out her responsibilities whether they are based on explicit constitutional provisions or implicit claims related to the effective discharge of enumerated powers. [249]

But here, the president has no constitutional safe harbor. Congress expressly declined to provide funding for the wall on two occasions. The statutory sources that the president cited do not support justification his national emergency declaration. Thus, the president's use of congressionally appropriated funds to build the wall is in conflict with Congress's will and the president has failed to "take care" that the laws were "faithfully executed."[250]

Under *Youngstown*, the president cannot proceed except in reliance on his independent powers. Neither the foreign affairs power to recognize nations nor the commander in chief authority to repel sudden attacks authorize the president to spend funds appropriated by Congress for other purposes to build the wall on the United States-Mexico border. Ultimately, courts will conclude that the president has unconstitutionally usurped Congress's spending power to fulfill his campaign promise to build the wall.

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249. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 883 (1983).

250. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."); *id.* at 633 (Douglas, J., concurring) ("Section 3 also provides that the President 'shall take Care that the Laws be faithfully executed.' But, as Mr. Justice Black and Mr. Justice Frankfurter point out, the power to execute the laws starts and ends with the laws Congress has enacted."); *id.* at 646–55 (Jackson, J., concurring) ("The third clause in which the Solicitor General finds seizure powers is that 'he shall take Care that the Laws be faithfully executed . . . .' That authority must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty or property, without due process of law . . . .' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules. . . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law."). *Compare* Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (affirming that Obama's authorization of deferred action undocumented immigrants children violated the Administrative Procedure Act), *with* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, United States v. Texas, 136 S. Ct. 2271 (2016). *See also* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019) ("But our findings here at least suggest that the President—by original design—is supposed to be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his self-interest, and who must diligently and steadily execute Congress's commands.").

EPILOGUE: STAY IN YOUR LANE

The ultimate question may not be the question of whether the president's actions are legal, but whether the courts can—and should—find that these issues can be resolved in the courts rather than through the political process. So far, the lower courts have all found that plaintiffs had standing, that the claims were ripe, and, by focusing discretely on whether the president's acts are within the statutory provision, the claims were not political questions. Yet, as the litigation continues to unfold in the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court, the questions presented include not simply whether the reprogramming action is legal, but whether it is subject to judicial review, who or what entities may make those claims, and whether judicial disposition will prevent or enable unlawful actions by the executive branch.

A. California v. Trump

In *California v. Trump*, with which the lawsuit Sierra Club case had been consolidated,[251] eighteen states initially challenged the reprogramming of funds for the El Paso sector Project 1 portion of the wall.[252] On May 24, 2019, the United States District Court for the Northern District of California concluded that the reprograming exceeded the president's authority.[253]

> Defendants argue that "Congress never denied DoD funding to undertake the [Section] 284 projects at issue," Opp. at 20, such that Section 8005 and Section 2214(b) are satisfied. But in the Court's view, that reading of those sections is likely wrong, when the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction. Border barrier construction, expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress denied the requested funds for that item. . . . It thus would be inconsistent with the purpose of these provisions, and would subvert "the difficult judgments reached by Congress". . . to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here.[254]

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251. Sierra Club v. Trump, 929 F.3d 670, 685 (9th Cir. 2019).

252. *Compare California v. Trump* Complaint, *supra* note 127, at 1, *with* California v. Trump, 379 F. Supp. 3d 928, 935–36 (N.D. Cal. 2019) (noting that the original complaint had sixteen states and the District of Columbia but by the time the court consolidated there were twenty states not including the District of Columbia).

253. *California v. Trump*, 379 F. Supp 3d at 945–46.

254. *Id.* at 946.

The Court also concluded that the Defendant's would be unlikely to establish that the need for a wall was based on an "unforeseen military requirement."[255]

> Defendants' argument that the need for the requested border barrier construction funding was "unforeseen" cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018. . . . [In] February 2018 [the administration made a] White House Budget Request describing "the Administration's proposal for $18 billion to fund the border wall". . . , failed bills . . . , [and] December 11, 2018 transcript from a meeting with members of Congress, where the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other—whether it's through you, through a military, through anything you want to call [sic]—I will shut down the government."[256]

The Court denied without prejudice the States' motion for a preliminary injunction, and set a date less than two weeks later for a case management conference to plan for resolution of the case on the merits.

After the Secretary of Defense announced on May 10, 2019, that the Pentagon would re-program $1.5 billion in funding Congress appropriated for security in Afghanistan to build a border wall in Tucson, Arizona and in El Centro, Texas,[257] the *California v. Trump* state plaintiffs expanded their motion for summary judgment to include this reprogramming as well.[258] The court in California v. Trump relied on its finding that the president exceeded his statutory authority in connection with the El Paso Sector to reach an identical conclusion with respect to the new reprogramming.

> The Court previously only considered Defendants' reprogramming and subsequent use of funds for border barrier construction for El Paso Sector Project 1. It did not consider Defendants' more-recently announced reprogramming and subsequent diversion of funds for border barrier construction for the El Centro Sector Project, pending further development of the record as to this project. . . . Defendants . . . present no new evidence or argument for why the Court should depart from its prior decision, and it will not. The Court thus stands by its prior finding that Defendants' proposed interpretation of the statute is unreasonable, and agrees with Plaintiffs that Defendants' intended reprogramming of funds . . . to the Section 284 account for border

255. *Id.* at 947.

256. *Id.*

257. Robert Burns, *Pentagon Shifting $1.5 Billon to Border Wall Construction*, ASSOCIATED PRESS (May 10, 2019), https://apnews.com/fde3f382fb1943e69d773eaac9f75eb1 [https://perma.cc/XMP7-9B3Y] (discussing that the $1.5 billion in funds was "originally targeted for support of the Afghan security forces").

258. *California v. Trump*, 379 F. Supp. 3d at 944 n.9.

> barrier construction is unlawful . . . . Because no new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong, Plaintiffs' likelihood of success on the merits has ripened into actual success. The Court accordingly grants Plaintiffs' request for declaratory judgment that such use of funds reprogrammed . . . for El Paso Sector Project 1 and El Centro Sector Project is unlawful.[259]

B. Sierra Club v. Trump

1. In the Northern District of California

In *Sierra Club v. Trump*, in which environmental plaintiffs in sought a preliminary injunction to halt wall construction, the Northern District of California also found that the plaintiffs were likely to succeed on their claim that the president was acting ultra vires because of § 8005's requirements.[260] The court found that the plaintiffs had "shown a likelihood of success as to their argument that Congress previously denied 'the item for which funds [were] requested,' precluding the proposed transfer."[261] Because the president asked Congress for $5.7 billion, and Congress did not grant that amount in the Consolidated Appropriations Act, the plaintiffs were likely to show that "Congress denied funding, and that [the reprogramming] thus [ran] afoul of the plain language of § 8005."[262] Second, the court found that the plaintiffs were likely to succeed on a claim that the president failed to meet the "unforeseen military requirement" of § 8005.[263] Refusing the president's argument that the "unforeseen" events "did not arise until February 2019, when DHS requested support from [Department of Defense] to construct fencing in drug trafficking corridors," the court found that the "argument that the need for the requested border barrier construction funding was 'unforeseen' cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018."[264]

The Northern District of California also found that challenges to the president's authority under § 2808 had a likelihood of success.[265]

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259. *Id.* at 941–52.

260. Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction, at 27, Sierra Club v. Trump, No. 19-CV-00892 (N.D. Cal 2019), 2019 WL 2715422, at *27 [hereinafter *Sierra Club* Preliminary Injunction Order] (noting that the order granting injunctive relief held plaintiffs were likely to succeed on their first claim).

261. *Id.* at 32.

262. *Id.* at 33.

263. *Id.* at 34–36.

264. *Id.* at 35.

265. *Id.* at 42.

Congress has defined the term "military construction" to "include[] any construction, development, conversion, or extension of any kind carried out with respect to military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road."[266] "Military installation" is in turn defined as:

> [A] base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.[267]

The president argued that although the statute defines both "military construction" and "military installation," both terms broadly define "military construction as 'includ[ing] (but not limited to . . .) construction with respect to a military installation, and defin[e] military installation to include non-specified 'other activity.'"[268] The president therefore claimed that these broad definitions "are not the kind of clear and mandatory statutory language that is a necessary predicate to an ultra vires claim."[269]

Casting these arguments aside, the court found that under "traditional tools of statutory construction," the statute "likely precludes treating the southern border as an 'other activity'" qualifying for military construction treatment.[270] "Other activity," the court reasoned, must be read in conjunction with "the company it keeps"—that is, with the words "base, camp, post, station, yard, center," and "defense access road."[271] Otherwise, the statute would be "so broad as to transform literally any activity conducted by a Secretary of a military department into a 'military installation,'" and there "would have been no reason to include a list of specific, discrete military locations."[272] The Northern District of California thus found that the president acted outside of his authority under § 2808. Importantly, the court not address the substantive validity of the president's declaration under the NEA.[273]

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266. 10 U.S.C. § 2801(a) (2018).

267. *Id.*

268. *Sierra Club* Preliminary Injunction Order, *supra* note 260, at 43.

269. *Id.*

270. *See id.* at 43 (noting that the court dedicated one sentence to this argument before reaching the merits of the claim, and that the "defendants misunderstand the standard for *ultra vires* review").

271. *Id.*

272. *Id.* at 45.

273. Order on Plaintiff's Motion For Summary Judgment at 12, Sierra Club v. Trump, 2019 U.S. Dist. LEXIS 108933 at 12, No. 19-CV-00892, (N.D. Cal., June 28, 2019) [hereinafter *Sierra Club* Summary Judgment Order].

The court did grant a permanent injunction enjoining the Trump Administration from diverting funds after ruling that the public's interest in "ensuring that statutes enacted by their representatives are not imperiled by executive fiat" outweighs the public's "'weighty' interest 'in efficient administration of the immigration laws at the border."[274] The court emphasized that "Congress considered all of [the Administration's] proffered needs for border barrier construction, weighed the public interest in such construction against [the Administration's] request for taxpayer money, and struck what it considered to be the proper balance—in the public's interest—by making available only $1.375 billion in funding."[275]

2. In the Ninth Circuit

In the Ninth Circuit, whether Courts should resolve these claims arose and took center stage alongside the merits.[276] The Ninth Circuit took pains to identify the issues not before the court:

> Before turning to the merits, we highlight what is not at issue in end, this appeal. First, Defendants at oral argument acknowledged that they are "not challenging [Article III] standing for purposes of the stay motion." Thus, Defendants do not dispute that Plaintiffs have suffered an "actual or imminent," "concrete and particularized," "injury in fact" that is "fairly traceable" to Defendants' actions and that will "likely" be "redressed by a favorable decision." We have satisfied ourselves that Defendants' assessment is correct. Plaintiffs have alleged enough to satisfy the requirements for standing under Article III at this stage of the litigation.[277]

In contrast, the president's lawyers argued that district court decision was an inappropriate "'intrusion into the budgeting process' which 'is between the legislative and executive branches—not the judiciary.'"[278] The Ninth Circuit majority responded with authority dating to *Marbury v. Madison*,[279] an indication that the issue presented was about much more than Congress' authority over appropriations but about the role of the judiciary in the resolution of a dispute over the performance of a duty Congress has assigned to the executive branch.[280] In the Ninth Circuit's words:

> Chief Justice Marshall's answer to "whether the legality of an act of the head of a department be examinable in a court of justice" or "only

274. *Id.* at 12–13.
275. *Id.* at 13.
276. *Id.*
277. *Id.* at 27 (citations omitted).
278. *Id.* at 29.
279. *Id.* at 30–31.
280. *Id.* at 30.

> politically examinable" remains the same: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." Pursuant to its exclusive power of appropriation, Congress imposed on the Executive Branch a duty—contained in section 8005—not to transfer funds unless certain circumstances were present. As discussed above, . . . Defendants have not disputed that Plaintiffs have sufficiently alleged injuries that satisfy Article III's standing requirement to enable them to pursue this action. Although "our decision may have significant political overtones, courts cannot avoid their responsibility merely 'because the issues have political implications.'" In sum, it is appropriate for this action to proceed in federal court.[281]

There were several arguments that the judiciary lacked the power to intervene. One argument was grounded on a difference of opinion as to whether Department of Defense § 8005 barred the transfer. The Ninth Circuit concluded that it was so barred under the circumstances.

Another question was whether the district court injunction ought to be stayed because the plaintiffs had no right to seek judicial review of the reprogramming decision.[282] If they did not have such a right, then they had no likelihood of success on the merits, the Government was likely to prevail, and the district court injunction ought to be stayed.

Ultimately, the debate over this issue took center stage in the Ninth Circuit decision whether to block the district court's injunction against the use of the Department of Defense funds for wall construction.

One disagreement focused on whether the Sierra Club's claim was statutory or constitutional. The majority concluded that the claim was based on the Appropriations clause and thus Constitutional in nature.[283] Another question was whether § 8005 permitted the reprogramming. The majority agreed with the district court that § 8005 did not permit the reprogramming.[284]

The second key question, answered in the affirmative by the district court and the Ninth Circuit and in the negative by the dissent, was whether the Sierra Club's interests were within the "zone of interests"

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281. *Id.* at 30–31 (citations and internal cross-references omitted).

282. *Id.* at 9.

283. *Id.* at 33.

284. *Id.* at 40–44. The 9th Circuit majority also examined and rejected the possible argument that the Department of Defense's reprogramming decision was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and its progeny as a congressionally authorized "agency's interpretation of an ambiguous statute administered by the agency" or entitled to deference based on the doctrine in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (citations omitted), which permits judicial deference if the "agency's reasoning is persuasive."

implicated by § 8005. The Ninth Circuit majority concluded that the "zone of interests" tests was a limit on statutory based challenges, not constitutional ones such as Sierra Club's appropriations claims.[285] The majority agreed with the dissent that the "zone of interest" test was applicable to the statutory claim of § 8005 violation, but concluded that zone of interests encompassed not merely those embodied in the statute allegedly violated but "claims about structural provisions of the Constitution . . . [where] it has applied a very lenient version of that test," one the majority concluded that Sierra Club claim's satisfied.[286]

> Accordingly, if Plaintiffs must fall within a zone of interests served by the constitutional provision they seek to vindicate, we are persuaded that they do. The Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties—not merely separation for separation's sake . . . Because "individuals, too, are protected by the operations of separation of powers and checks and balances," it follows that "they are not disabled from relying on those principles in otherwise justiciable cases and controversies."[287]

In contrast, the dissent concluded that, under *Dalton v. Specter*, "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review,"[288] because the president is not an agency and Congress has not otherwise provided for judicial review.[289]The dissent's distinction between a statutory claim and a constitutional claim was integral to its conclusion that Sierra Club had no right of action. The dissent concluded that the plaintiff had no "implied right of action" because Congress did not intend to create a judicial remedy for violations of § 8005.[290]

The dissent agreed that the reprogramming actions of the Department could be the subject to APA review, but that the Sierra Club's interest did not "fall within the zone of interests protected by [§ 8005] . . . ."[291] In contrast to the majority, which considered constitutional interests that lay beyond the four corners of § 8005 relevant, the dissent concluded that the transfer of funds did not affect the Sierra Club's aesthetic, recreational, and environmental interests, nor did § 8005 require that the Department of Defense consider those interests before making transfers.[292] To be

285. *Sierra Club* Summary Judgment Order, *supra* note 273, at 55–62.
286. *Id.* at 62.
287. *Id.* at 63–64 (citations omitted).
288. Dalton v. Specter, 511 U.S. 462, 473 (1994).
289. Sierra Club v. Trump, 929 F.3d 670, 707 (9th Cir. 2019) (Smith J., dissenting).
290. *Id.* at 712.
291. *Id.* at 712–14.
292. *Id.* at 714–15.

sure, the dissent agreed that § 8005 arguably protects Congress and those who would have been entitled to funds as originally appropriated.[293] It also agreed the statute arguably protects economic interests in the use of the funds as originally appropriated.[294] Damning to Sierra Club, the dissent concluded that "[p]laintiffs interests are only 'marginally related to . . . the purposes implicit in the statute [such] that it cannot reasonably be assumed that Congress intended to permit the suit . . . ."[295]

3. The Supremes

In a tersely worded one paragraph unsigned opinion on July 26, 2019, a divided Supreme Court agreed to stay the June 28, 2019 district court decision, upheld by the Ninth Circuit, that had permanently enjoined the president and the Defense Department from using reprogrammed Department of Defense funds to build the wall.[296] The rational was "that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with § 8005."[297] The stay would remain in place until the litigation until the Ninth Circuit ruled on the merits and throughout any further Supreme Court litigation.[298]

Justice Breyer concurred in part and dissented in part from the grant of the stay.[299] He noted that the "case raises novel and important questions about the ability of private parties to enforce Congress'[s] appropriations power," but offered no view on those merits.[300] Instead, his opinion focused on the possibility that the stay might be tailored to avoid irreparable harm to both parties—to the environmental interests of the Sierra Club as well as to operational interests of the government in finalizing the contracts necessary for the construction of the wall before

293. *Id.* at 715.

294. *Id.* at 714–15.

295. *Id.* at 715 (citing Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399 (1987)). A coalition of environmental groups, led by the Center for Biological Diversity, challenged the authority of DHS to waive dozens of laws, including the National Environmental Policy Act, the Endangered Species Act, and the Religious Freedom Restoration Act, to make it easier to build the border infrastructure. California Attorney General Xavier Becerra (D) also filed suit. *In re* Border Infrastructure Envtl. Litig., 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

296. Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019). Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh voted in favor of the stay, while Justices Ginsburg, Sotomayor, and Kagan voted to deny the application. *Id.* Justice Breyer concurred in part and dissented in part. *Id.* at 1–2.

297. *Id.* at 1.

298. *Id.*

299. *Id.*

300. *Id.*

the September 30th deadline to use those funds.[301] His solution was to grant the stay to permit the government to finalize its contracts so they would be in place should the government ultimately prevail, but to deny the stay of the injunction against wall construction to avoid irreparable harm to environment and the Sierra Club.[302]

> I can therefore find no justification for granting the stay in full . . . [but] would grant the Government's application to stay the injunction only to the extent that the injunction prevents the Government from finalizing the contracts or taking other preparatory administrative action, but leave it in place insofar as it precludes the Government from disbursing those funds or beginning construction.[303]

The Supreme Court's cryptic disposition of the stay suggests several possibilities for the ultimate resolution of the litigation. Should the litigation return to the Court via a grant of certiorari, the stay language signals that a majority is prepared to dispose of the case on what might appear at first blush a narrow ground focused on the right of the Sierra Club to seek judicial review of the reprogramming decision. That resolution might focus on of whether Congress created a private right of action to enforce § 8005. This approach might include an endorsement of the view that private parties may not complain in court about executive spending in violation of congressional directives unless Congress explicitly or implicitly authorized those lawsuits. That majority could avoid a discussion of the justiciability of executive branch-congressional spending disputes, an argument the executive branch offered to Supreme Court in its stay application.[304] A slightly narrower approach, though still consistent with an executive win, would be the "zone of interest" approach endorsed by the Ninth Circuit dissent that the "reprograming decision" itself did not affect the plaintiff.[305] These are a few of the possibilities presented by the four corners of the Stay Application, a portion of which the cryptic Supreme Court stay decision seems to endorse.[306]

In light of the Supreme Court stay of the district court injunction, involving a relatively small portion of the funding needed for the wall and the intervention of the Supreme Court, the resolution of this dispute at this stage is a symbolic win for the Trump administration but not the

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301. *Id.* at 1–2.
302. *Id.* at 2.
303. *Id.*
304. Application for Stay at 25, Trump v. Sierra Club, 140 S. Ct. 1 (2019) (No. 19A-60).
305. Sierra Club v. Trump, 929 F.3d 670, 709 (9th Cir. 2019) (Smith, J., dissenting).
306. *Id.* at 4, 20–25.

end of its potential trouble in the federal court.[307] The injunction stayed by the Supreme Court involved questions on the president's funding diversion activity pursuant to Section 8005. But the litigation continued with respect to the president's diversions under Section 2808 in the *Sierra Club* companion case *California v. Trump*.[308] There, on December 11, 2019, the district court concluded that the president did not have authority under Section 2808 to "redirect military construction funds to the eleven border barrier projects . . . ." [309] And the legal skirmishes continue.[310]

In the near term, the ball for control over the wall is in Congress's court. Congress continues to fund humanitarian efforts on the border,[311] while Court has provided and opportunity for the president to claim a victory in a battle while the war continues in the federal courts.[312] Thus even though lower Courts agree that the president acted unlawfully in his reprogramming of Defense Department funds, the Supreme Court stay of *Sierra Club* in effect permits the president to finalize contracts and begin wall construction pending the resolution of the dispute on the merits in the Ninth Circuit and the Supreme Court. And in its short decision granting the stay, the Supreme Court signaled that if the case arrives via certiorari and the Court grants review, a majority will likely conclude that those plaintiffs have no cause of action. Thus, though courts have so far concluded that the president has unlawfully usurped Congress's spending power to fulfill his campaign promise to build the wall, the favorable outcome for the president may ultimately turn on the nature of the litigants, not the constitutionality or legality of the president's decision. For those concerned with the stature of constitutional limitations on the executive, hope is alive.

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307. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

308. *See* California v. Trump, 407 F. Supp. 3d 869 (N.D. Cal. 2019).

309. *Id.* at 898–99.

310. In *El Paso Cty. v. Trump*, 407 F. Supp. 3d 655 (W.D. Tex. 2019), a district court declined to stay its prior decision that the president had no authority to build a Texas portion of his wall under Section 2808, *Id.* at 658, and entered a permanent injunction. *Id.* at 667. The Fifth Circuit stayed the district court injunction, relying on the Supreme Court stay in *Sierra Club*. El Paso Cty. v. Trump, No. 19-51144, 2020 U.S. App. LEXIS 567, at *2 (5th Cir. Jan. 8, 2020).

311. *See* 107 CONG. REC. H5085 (daily ed. June 25, 2019) (noting that Democratic leadership was considering H.R. 3401, which provided $4.5 billion in humanitarian assistance, but expressly declined the use of those funds for the wall).

312. After the stay decision, the president tweeted "Wow! Big VICTORY on the Wall. The United States Supreme Court overturns lower court injunction, allows Southern Border Wall to proceed. Big WIN for Border Security and the Rule of Law!" Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2019, 5:37 PM), https://twitter.com/realdonaldtrump/status/1154883345546928128 [https://perma.cc/NMG7-FH6N].

The Ninth Circuit had concluded its opinion with this observation:

> In his concurrence in *Youngstown*, Justice Jackson made eloquent comments that seem equally apt today:
>
> > . . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[313]

There is an old adage that a half a loaf is better than none at all. That option may be satisfy a starving person, but it won't sate the hunger of a nation for the rule of law.

313. Sierra Club v. Trump, 929 F.3d 670, 707 (9th Cir. 2019) (citations omitted).

May 16, 2022

The Honorable Steve Cohen
Chair, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary
2141 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Mike Johnson
Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee:

On behalf of the undersigned organizations, advocates for fiscal responsibility and limited government, we write to underscore our support for efforts to reform the National Emergencies Act (NEA) as you convene your May 17 hearing, "Examining Potential Reforms of Emergency Powers."

The NEA has been widely used – and occasionally abused – by presidents of both parties since former President Gerald Ford signed the National Emergencies Act into law in 1976.[1] Presidents have declared 75 national emergencies since President Carter issued the first NEA declaration in 1979, and more than half (41 total) remain in effect today.[2] Under current law, there are no substantive criteria that need to be met for presidents to declare national emergencies, and the president may renew the declaration indefinitely. The only way for Congress to terminate an emergency declaration is to pass a law, which in all likelihood would require a supermajority to override the president's veto.

NEA declarations afford presidents a wide variety of potential emergency powers. In fact, the Congressional Research Service has identified "117 sections of the U.S. Code potentially activated by a presidential declaration of a national emergency," including several that could materially affect U.S. government spending or private sector activity.[3] For instance, there are laws allowing the executive branch to restrict various types of exports, including crude oil[4] and agriculture products;[5] to control domestic transportation;[6] and to suspend statutory wage-rate requirements for public contracts.[7] Some Congressional leaders have even urged President Biden to declare a national emergency on climate change, in order to unlock emergency powers afforded by an NEA declaration.[8]

While true emergencies may justify the use of emergency powers, there is a significant risk that the NEA could become a substitute for rigorous, regular order in Congress, deployed as a means to abrogate the legislative branch's constitutional power over the nation's purse strings or to greatly expand the size and scope of the executive branch.

Our organizations are encouraged that a bipartisan group of lawmakers have demonstrated leadership on NEA reform, including Republican and Democratic members of this Subcommittee, like Subcommittee Chair Cohen (D-TN) and Congressman Chip Roy (R-TX). The ARTICLE ONE Act, spearheaded by Congressman Roy, would flip the switch on presidential NEA declarations, empowering Congress to serve as a meaningful check on the executive branch. Under the current NEA, Congress merely has the ability to disapprove of an NEA declaration through a joint resolution. The ARTICLE ONE Act would require congressional approval for an emergency to continue after an initial 30-day period.[9] Similar legislation has been supported by both Democrats and Republicans in Congress, and the Republican Study Committee

[1] Brennan Center for Justice. "Declared National Emergencies Under the National Emergencies Act." Updated April 22, 2022. Retrieved from: https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act (Accessed May 6, 2022.)
[2] *Ibid.*
[3] Congressional Research Service. "Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act." Updated July 14, 2020. Retrieved from: https://crsreports.congress.gov/product/pdf/R/R46379 (Accessed May 6, 2022.)
[4] 42 U.S.C. § 6212a(d)(1)(a).
[5] 7 U.S.C. § 5712(c).
[6] 49 U.S.C. § 114(g).
[7] 40 U.S.C. § 3147.
[8] Carney, Jordain. "Schumer calls for Biden to declare climate emergency." *The Hill*, January 25, 2021. Retrieved from: https://thehill.com/homenews/senate/535811-schumer-suggests-biden-should-declare-climate-emergency/ (Accessed May 6, 2022.)
[9] Congress.gov. Introduced May 4, 2021. "H.R.2996 - ARTICLE ONE Act." Retrieved from: https://www.congress.gov/bill/117th-congress/house-bill/2996 (Accessed May 6, 2022.)

(RSC) has referenced the ARTICLE ONE Act in expressing its support for broader NEA reform efforts.[10] This is certainly a meritorious piece of legislation that lawmakers should consider further.

We encourage you to work with your colleagues to pass NEA reform legislation into law this year. Regardless of who is in control of the White House, or which party is in control of Congress, NEA misuse and abuse puts all Americans – and their tax dollars – at risk. Thank you for your consideration of our views.

Sincerely,

National Taxpayers Union

Americans for Prosperity

Concerned Veterans for America

FreedomWorks

R Street Institute

Taxpayers for Common Sense

Taxpayers Protection Alliance

CC: The Honorable Deborah Ross, Subcommittee Vice Chair
The Honorable Jamie Raskin
The Honorable Hank Johnson
The Honorable Sylvia Garcia
The Honorable Cori Bush
The Honorable Sheila Jackson Lee
The Honorable Tom McClintock
The Honorable Chip Roy
The Honorable Michelle Fischbach
The Honorable Burgess Owens

[10] Republican Study Committee. "Power, Practices, Personnel: 100+ Commonsense Solutions to a Better Government." February 14, 2020. Retrieved from: https://rsc-banks.house.gov/sites/republicanstudycommittee.house.gov/files/GEAR%20Report_Single%20Spread%20FINAL.pdf?page=17 (Accessed May 6, 2022.)

I did mention in my opening that we do not have direct jurisdiction over these laws. I knew that. I asked again my counsel Mr. Park why. Apparently in the early 1990s the parliamentarian ruled that it goes to Transportation. That parliamentarian is gone, but this Congress continues. Just like with the National Emergency Act his—that work and that decision lingers. It was because of that, as I understand it there was a national emergency issued concerning a transportation issue. So, he ruled on the particular bill without ruling on the concept, which was stupid, but we still are burdened by that.

So, we are going to put in—counsel says you can change the rules. I guess you can change the rules now. Does it take two-thirds? Well, we will put in a rule change and try to get it changed with two-thirds and have them directed to Judiciary, which is where it should be, and we will try to change that. That is something we are laboring under.

Mr. DeFazio, I have a lot of appreciation and I think he is right about Boeing not moving to Virginia, but he doesn't probably give a hoot about this or even know what is in his jurisdiction.

With that, we will go to questions. I will be first and I will proceed under the five-minute rule of questions.

Ms. Goitein, you mentioned that there are certain inherent powers that Presidents sometimes claim. What are those inherent powers that they sometimes claim?

Ms. GOITEIN. Thank you for that question. Let me just quickly point out that Congressman DeFazio has actually sponsored National Emergencies Act reform in the National Security Reforms and Accountability Act and is—

Mr. COHEN. Well, don't tell anybody else that I said that.

[Laughter.]

Ms. GOITEIN. Well, he's a very a strong champion on this issue, so I hope that the two of you will be working together.

I am very worried about claims to presidential—sorry, presidential claims to inherent constitutional emergency powers. As I mentioned before, the Constitution does not give the President any explicit powers and the handful of powers that it does include that look like crisis response powers are granted to Congress, not the President. GianCarlo covered that in his testimony.

Nonetheless, it has not stopped Administrations, in the last few decades anyway, from laying claim to vast inherent emergency powers and these claims are very often set forth in secret Department of Justice legal memoranda that we only know about when they happen to be leaked such as in the case of the torture memos, as an example.

These claims cannot be tested because there is no way to get them in front of a court. They have not been validated by the courts, but they are lying there like loaded guns. One of the reasons why this concerns me so much is because of the existence of a category of emergency powers known as Presidential emergency action documents.

These documents are draft Executive Orders, proclamations, directives, messages to Congress that are prepared in anticipation of a range of worst-case scenarios, ready for the President's signature, if one of those scenarios were to come to pass. They originated as

part of the Eisenhower Administration's planning for continuity of government in the wake of a Soviet nuclear attack, but they've since expanded to address other types of emergencies.

These documents are almost completely shrouded in secrecy. None of them has ever been released or even leaked. Moreover, they're not shared with Congress, despite the fact that, even the most highly classified covert military and intelligence operations have to be shared by law with at least the gang of eight.

Nonetheless, we do know a little bit about their contents from other official records: Department of Justice memoranda and the like that have been made public over the years. From these sources we know that emergency action documents up to about 1970 purported to authorize martial law, suspension of habeas corpus by the President, the round-up and detention of subversives inside the United States, and censorship of the news media. Presumably at least some of these proposed actions rested on claims of inherent emergency powers because there were not statutes in place at the time that would have permitted them.

We know a lot less, frighteningly, about the contents of current emergency action documents, but we do know that as of 2017 there were 56 of them and they were undergoing review and revision by the Trump Department of Justice.

Now, I want to be very clear there is nothing wrong with advanced planning for emergencies. It's a good idea. That's not the problem here. The problem is twofold: First, at least some of the older documents that we know about had plans in them that would violate the Constitution or laws passed by Congress. Second, and perhaps relatedly, Congress is being cut out of the planning process and that prevents Congress from exercising its constitutionally-assigned oversight role. It also allows the President to rely on secret claims of inherent authority that have never been tested or approved by any court.

Senator Ed—sorry.

Mr. COHEN. That is all right. Let me ask you this: I can't google emergency powers and it will all come up. Is there any—there is no place in the world where you can just go and look them up in the back of a book and go emergency powers and they will show up?

Ms. GOITEIN. You cannot see any Presidential Emergency action documents. The Brennan Center has a resource page that compiled all the publicly available documents that refer to them, that describe them to try to get a sense of what's in them, but the documents themselves you cannot find them anywhere. They have never, ever been disclosed in any way, shape, or form.

Mr. COHEN. Did the 1976 law require them to expire after one year?

Ms. GOITEIN. No, it did not apply to Presidential Emergency action documents. Now, let me say that these documents are planned actions. So, they are directives that are not signed yet. The idea is if an emergency were to happen, they would be put into place. It's possible that some of these documents, some of these directives would trigger emergency powers under the National Emergencies Act, that then would expire after a year.

My concern is that some of them rely on claims of inherent presidential authority that would fall under the National Emergencies Act. This is very—

Mr. COHEN. Thank you.

Ms. GOITEIN. Sorry.

Mr. COHEN. Go ahead. Go ahead.

Ms. GOITEIN. I wanted to quickly say that Senator Ed Markey has a bill that would address this problem in the simplest and most-tailored way possible. It would require the President to disclose Presidential Emergency action documents to the relevant Oversight Committees in Congress. That legislation has been incorporated into the Protecting our Democracy Act, which has passed the House, and also the bipartisan National Security Reforms and Accountability Act.

Mr. COHEN. Thank you.

Mr. Johnson, you are recognized for five minutes or more.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. Appreciate the insight of our Witnesses today; really do. It is really important.

Thanks for the history lesson, Mr. McCleary. We could listen to you all morning.

Listen, my questions are for Mr. Canaparo. Congress passed the National Emergencies Act, as we have all discussed, to try to place guard rails around the President's use of emergency authority. So, not to crash the bipartisan mood of the hearing, but I got to talk about current real-life events, right?

So, some on the left right now as we speak are calling on President Biden to use this authority to circumvent Congress and to accomplish radial political agendas. So, for example, just last January 2021, Senate Majority Leader Chuck Schumer said that President Biden should declare a national emergency to address climate change. Obviously, this is something I believe Congress should be deliberating. President Biden should declare a national emergency on other things. Last few weeks White House scrambled to hold meetings to determine how it can declare a national emergency in the wake of the *Dobbs* case leak regarding keeping abortion on demand in place.

So, the question is kind of a broad one: Would declaring a national emergency to address climate change, for example, be an abuse of the President's Emergency authority? What do you think about it?

Mr. CANAPARO. So, I'll take a slightly unusual attack. It reminds me of—I don't know if you're familiar with the author James Freeman Clarke. He wrote, "politicians look to the success of their party; statesmen look to the success of the country." Politicians take a four-year view and try to achieve whatever they can with whatever power they have in four years; statesmen take 100-year view.

So, the question really is who should decide? If you find yourself cheering on the President's use of emergency power when you agree with the outcome and decrying it when you don't, you might fall into the politician camp and not the statesmen camp. The question is who decides? The answer that the Constitution provides is Congress. Congress should decide except when I think it is fair to

say you all decide, Congress decides that there are some situations in which you truly cannot react with the necessary speed.

I'm going to—a quote from a law review article by then-professor, now-Justice Amy Coney Barrett that, "Rendering the decision legislative also ensures that a decision to suspend emerges from a process that is relatively more representative of the people whose civil liberties are at stake."

So, when we get into the problem of deciding of looking at specific emergencies, what we're trying to do is reason from specific examples that we like or don't like into a general framework, but that's not how we're going to solve the problem. It is much better to start from the Constitution's text and logic and reason forward into a general framework that we can all live with whether we like the outcomes or don't.

Mr. JOHNSON of Louisiana. I love that response. Justice Amy Coney Barrett has been a dear friend of mine since high school and back then in the 80s we used to talk about concepts like this; we were the two nerds in the room, but there was a lot more statesmanship at the time, right, and maybe less politicians, quoting—going back to your earlier statement.

This is the quandary, the situation we find ourselves in, right? Not enough people are talking the national perspective and the long view; we are all trying to achieve these immediate gains. I think it is corrosive to the institutions and I suspect—well, I know you all agree.

Let me ask you, for those of us who have to make some ultimate decisions on this what would you say is the best source of the original intent? Particularly we are talking a lot about inherent emergency powers and that kind of thing. What is some of the best source material we can go study from the Founders' view? Is it the Federalist Papers? Is it particular sources? What would you say on that? I might ask all of you that question.

Mr. CANAPARO. Sure. Just to keep my answer short, my sort of go-to is often Justice Joseph Story's "Commentaries on the Constitution of the United States."

Mr. JOHNSON of Louisiana. Perfect. That's great. I have got that volume.

How about Ms. Goichee?

Ms. GOITEIN. Goitein.

Mr. JOHNSON of Louisiana. Goitein? Okay.

Ms. GOITEIN. Yes.

Mr. JOHNSON of Louisiana. I thought it was French. Sorry.

Ms. GOITEIN. So, I think there are a number of sources in GianCarlo's testimony that are absolutely worth looking at. I would add—these are a little more recent, but I would add Justice Jackson's opinion in *Youngstown* is a seminal articulation of the balance of power between the President and Congress. For looking at sort of the intent of the Framers and sort of an originalist understanding there is a wonderful article by Professor Saikrishna Prakash at the University of Virginia Law School entitled, "The Imbecilic Executive." I love that title.

Mr. JOHNSON of Louisiana. Yes, I wish I had chosen it myself.

Ms. GOITEIN. It's not quite as ad hominem as it sounds. It's a truly wonderful article and I would recommend it to everyone and

it shows how our understanding of inherent presidential authority has just morphed dramatically in recent times from the original understanding, which was that the Congress did not provide the President with any inherent emergency powers.

Mr. JOHNSON of Louisiana. The reason is—I am out of time, but I will just conclude by saying this: Obviously we are going to original intent, talking about the Framers' intent. They wanted a full body of the duly elected representatives of the people to make these important decisions, as you indicated, and not just one person. That was sort of—that is inherent in our system is that we are trying to dilute and separate the powers and this is maybe the most glaring example we have of the abuses and the usurpation.

So, appreciate all your insight. Gives a lot uto think about. I yield back.

Mr. COHEN. Thank you, sir. Interesting to know about you and Justice Barrett's long-time relationship.

Mr. Canaparo—is it John Carlo?

Mr. CANAPARO. GianCarlo, yes.

Mr. COHEN. So, that was the second mistake I made.

[Laughter.]

Mr. COHEN. The first one I got your name right, but that is—thank you.

Ms. Ross, you are recognized for five minutes.

Ms. ROSS. Thank you, Mr. Chair.

Thank you to the Witnesses. This has been a fascinating hearing.

In 1976 Congress formalized the ability of the Executive to exercise emergency powers during times of national duress. You have given us a great history of how that has operated.

Throughout this pandemic we have seen the President and Governors of States across the country use these powers to respond swiftly to a rapidly-evolving public health crisis by expediting the production and delivery of personal protective equipment, implementing mask and vaccine requirements, and issuing shelter-in-place advisories for at-risk communities.

We must remember that this authority is not inherent to the Executive. Rather it is a privilege that exists through an act of law passed by Congress. The ability to frame and limit the power of the Executive ultimately belongs to the people and that is why we are here discussing this important topic.

I strongly believe that our nation ought to grant emergency powers in times of crisis, but we must be diligent in ensuring that such powers are not abused by the Executive. Emergency authorities must only be exercised at times when science and public safety indicate that foregoing the legislative process is critical to protecting the lives and health of Americans who are at immediate risk of harm.

We have seen such scenarios in the past such as during natural catastrophes, wars, and right now a public health crisis. In each of these instances there is a clear and imminent threat to the safety of the public. This ought to be the standard that we follow when determining whether it is appropriate to grant emergency authorities to the Executive.

My first question is for Ms. Goitein. I hope I said that right. How can Congress increase transparency in how Presidents are actually using their emergency powers?

Ms. GOITEIN. Thank you, Congresswoman. That's a wonderful question. The bills that we are talking about, including the Article 1 Act, the Protecting our Democracy Act, the National Security Powers Act—all these bills would require enhanced reporting. Right now, under the National Emergencies Act, the President only needs to report on expenditures that have been—expenditures in relation to emergency declarations every six months. Frankly, it is not clear that this is even happening. We've been unable to track down reports of the expenditures related to the 9/11 emergency declaration, for example.

So, first, Congress needs to insist on getting the reports it should be getting under existing law, but under the reforms that we are talking about the President would not only have to report on expenditures, but would also have to report on the specific actions that had been taken within the reporting period. I think that's very important.

May I say one quick thing also about the COVID emergency declaration, which is actually—it's interesting, very little of the Federal response to COVID–19 has relied on powers available under the National Emergencies Act. National emergency powers are really a very small part of that. Actually, for all the actions that are currently relying on the national emergency declaration, there are non-emergency powers that would allow the President to do the same thing.

Mostly the laws that have been undergirding the Federal response have been—for example, with the mask mandate, that's the Public Health Service Act, and so provision of the Act that's available without any emergency declaration. Similarly in terms of spurring production of vaccines, that was under the Defense Production Act, most of which is available to the President without any emergency declaration.

So, yes, I agree it's important to move flexibly and quickly. It was important when COVID struck, and it remains important that there be flexibility in the provision of home confinement services and similar actions. That flexibility is available under a wide range of laws and very little of it right now is dependent on the national emergency declaration.

Ms. ROSS. Thank you so much. I yield back.

Mr. COHEN. Thank you, thank you, thank you, Ms. Ross.

Now, patiently waiting, but I am sure with great questions and insight, Mr. McClintock.

Mr. MCCLINTOCK. Well, thank you. Mr. Chair, I want to thank you for a truly nonpartisan hearing on a very, very important subject.

James Madison said that in his opinion, the single most important provision in the Constitution was the provision that gave the power to declare war to Congress and not to the President. The reason for that was simply that war enhances the power of the President enormously and therefore it creates an obvious perverse incentive if the Presidents declare war. It follows that any measure that enhances the President's power should not be in the hands of

the President, human beings being what we are. In the words of the great philosopher Jack Handey, "In a former life I must have been a great king because I really like it when people do what I tell them to." That is just in our nature.

There was a discussion at the convention with respect to the wording of that clause. It was originally giving Congress the power to make war solely. That was changed from "make" to "declare" for concern that the President should have some power inherent to repel an immediate invasion before Congress could make a declaration.

December 7, 1941, the Japanese attacked the U.S. fleet at Pearl Harbor. December 8, 1941, the President appears before a Joint Session of the Congress. In that speech he says, "As Commander and Chief of the Army and the Navy I have directed that all measures be taken for our defense." FDR understood that beyond those immediate acts he could not take any offensive act without the Declaration of War by the Congress, which was then forthcoming.

The reason I recount all this is to ask is there any conceivable occasion other than a surprise attack where the President should be able to invoke extraordinary powers without the consent of Congress? Oh, I will start with Mr. Canaparo.

Mr. CANAPARO. Canaparo.

Mr. MCCLINTOCK. Thank you.

Mr. CANAPARO. My name tag has disappeared, so I apologize for that. So, I am generally skeptical of the argument that the President has inherent powers that are beyond those articulated by Article 2.

I think you hit the discussion about the attack on Pearl Harbor sort of illustrates how this is supposed to go. Certainly, as Commander-in-Chief of the Armed Forces the President has certain powers attendant to that constitutional directive. The power to for instance defend the country from an invasion or a hostile attack is certainly inherent in the—in his role as Commander-in-Chief, but—

Mr. MCCLINTOCK. Very limited to repelling an attack, not initiating an attack on his own. My question is, is there any circumstance, conceivable circumstance where the President should be able to invoke powers on his own authority?

Mr. CANAPARO. Powers separate from these attendants to being Commander-in-Chief?

Mr. MCCLINTOCK. Well, I am speaking more broadly of any—a pandemic, for example. Why would the President be given authority to acquire extraordinary powers on his own say without the consent of Congress? Seems to me that is the proper role of the decision-making branch of the United States government.

Mr. CANAPARO. Thank you. In general, yes, the problem we're operating from right now though is that over the last 100 years or so Congress has delegated to him so much power already—

Mr. MCCLINTOCK. Yes, well, maybe we should try to un-delegate all those powers. My question is—

Mr. CANAPARO. Right.

Mr. MCCLINTOCK. —is there any conceivable circumstance—I will throw it open to any of the panelists—where the President should have that authority?

Mr. MCCLEARY. I would argue that we have to look at the circumstance. The President wouldn't even have to ask for the authorities; he would just—I use the term "assumed" inherent power. So, let's take real world cases.

Mr. MCCLINTOCK. Well, I mean, the President can assume the power to stop the tide from coming in, but that doesn't make it right or realistic.

Mr. MCCLEARY. Oh, I understand that.

Mr. MCCLINTOCK. Yes, I mean it doesn't give it any authority.

Mr. MCCLEARY. My point is, and Miller's point was that the President will act regardless of whether you give him authority or not. That is the problem. Now, it's often said that the President has—

Mr. MCCLINTOCK. Well, doesn't the Constitution prevent that? I mean, the Constitution is separation of powers. Its mother's rule writ large. Mother has two hungry sons, one slice of pie. How does mother slice the pie so both of them are satisfied? One slices, the other chooses. That is the constitutional separation of powers. One brother appropriates funds but can't spend them; the other spends funds but can't appropriate them.

Mr. MCCLEARY. Right.

Mr. MCCLINTOCK. One brother makes law, but can't enforce it; the other enforces law, but cannot make it. One brother can declare war, but can't wage it; the other can wage war, but not declare it. That is a self-correcting mechanism. I am out of time now, but it seems to me that it is time that Congress restored that balance which is at the center of the constitutional architecture that keeps us free and keeps the Constitution self-enforcing.

Mr. MCCLEARY. I totally agree.

Mr. MCCLINTOCK. Again, there is no penalty for violating the Constitution because the Constitution is supposed to be a self-enforcing document. The only way that works is if the separation of powers is maintained. We have blurred that separation of powers and I think put at risk the entire architecture of our Constitution. I yield back.

Mr. MCCLEARY. Benjamin Franklin had a very cryptic remark to that. He said, "there are only two ways that you can actually control a President, and that is either to impeach him or assassinate him." This is the problem when you get into let's say a biological attack—is where I looked at it—and also a nuclear attack. Events move so quickly. This—and if it's a normal event, these—we can go through this process, but what happens given the circumstances that we were talking about with President Carter at the beginning where we have 15 or 20 minutes to make decisions? Let's say a smallpox attack hits and we have to make decisions almost instantly about who gets inoculated and who doesn't get inoculated, all these kinds of things. That's when we get into this very dangerous territory.

Ms. GOITEIN. Thank you. I just quickly wanted to jump in on what Mr. McCleary was saying and say that it may be the case in some situations where Presidents are going to act on the spur of the moment very quickly and it may be a situation where they think it's an existential threat and they're not necessarily going to

limit themselves to what the law says or what the Constitution says.

What used to happen in this country; and Professor Prakash discusses this in his article, when that happened is the President would act, but he would acknowledge that he had acted in haste and perhaps outside the bounds of the Constitution to try to preserve the nation and he would go to Congress to try to get some kind of ratification for that. He would not pretend that his actions had been authorized by the Constitution.

What happens today is that Presidents assume that anything that they think is necessary for the preservation of the nation must therefore be authorized under Article 2. It doesn't work that way. I think the system we had in place earlier where the limitations of the Constitution were acknowledged and where if a President stepped outside the bounds, everyone acknowledged that the President stepped outside the bounds. If it was considered in retrospect to be something that was beneficial for the nation, Congress would step in and ratify it, would pass legislation indemnifying the actors, for example.

To say anything that in the moment the President feels that he or she must do by definition is therefore constitutional, that's backwards and it's very dangerous.

Mr. COHEN. Thank you very much.

Mr. Johnson, you are recognized for five minutes.

Mr. JOHNSON of Georgia. All right. Thank you, Mr. Chair. I have got some people doing some work, some heavy construction work on the outside of my apartment which I have no control over. I think it creates a very inconvenient aggravating situation for the Witnesses, so what I will do is I will yield my remaining time to you.

Mr. COHEN. Thank you and good luck.

[Laughter.]

Mr. COHEN. I want to now recognize a man who we have awaited his arrival; he has timed it well, our honored guest, our most noted Member for dealing on this issue in the past, the gentleman from Texas and the University of Virginia, Mr. Roy.

Mr. ROY. Well, I appreciate the Chair and really do appreciate this hearing and appreciate the Witnesses, appreciate you all being here.

This is an important issue. As was noted earlier, I believe we, my friend Mike Lee in the Senate and I, have worked together to introduce this legislation, the Article 1 Act, in the previous Congress, my first Congress when President Trump was President, and I would note it was in response to some degree and much to the chagrin of some of my supporters back home with respect to building the fence along the border and the use of emergency power to go down that road.

I am a strong supporter of needing infrastructure, as is wellnoted in debates in this Committee and believing that we need a fence and a wall and we need to have infrastructure on the border, the southern border to manage that crisis. I believe in limits to Executive Power and I think it is critically important that we do that.

To the point of Mr. Canaparo, the reality of politicians kind of flapping in the breeze I think a little bit on this sort of based on the political expediency of the moment of whatever issue you want

to accomplish is a real risk for all of us, both sides of the aisle, no matter who is in power, and that we ought to, this body, find ways to come together to try to constrain the executive within the appropriate lanes under the Constitution and reassert congressional authority where it is necessary.

So, the bill is obviously designed to rein in these 40—I think you testified 41; I think I had 43 from CRS, whatever it is, 40-some emergencies that we are operating on dating back to 1979. It is just patently absurd that we would be operating under a "emergency" for almost as long as I have been alive. I mean, that is an extraordinary reality that we are dealing with.

I did want to note, and then I want to go to some questions to you all, in the current context—and like my friend from Louisiana mentioned, I don't want to break down in a bipartisan feel here. I actually mean this with respect to both President Trump and President Biden. I am deeply concerned about the use of emergency powers during this pandemic. Deeply concerned. Not because of the motives involved, not because of whatever disagreements we might have on how powers should be—or on the effective of vaccines or so forth, but just literally the power of the government through saying—not—and by the way, not just through the National Emergencies Act, right, but through the Stafford Act, through the Public Health Service Act, and other powers granted to the Executive Branch, that we have a situation where the President of the United States can declare an emergency 700-and-whatever-days-ago it was, 792 days ago, and then have that extended by a subsequent President, and then use these acts and have the power of the President and the Executive Branch say, okay, we have got this problem, this emergency.

Under that have the ability for pharmaceutical companies, whether it is Operation Warp Speed to try to get it done or whether it is the extension of the Biden Administration to try to encourage people to take it, to then have liability protection for those companies with a mandate from the government under the auspices of an emergency that people then get said vaccine and then potentially through the coercion of the power of government say you might lose your job if you don't take said vaccine, if you are in the military and so forth or federal worker, Border Patrol, FBI, anybody else, healthcare worker, the extraordinary power of the Executive Branch doing all that I just said without a single act of Congress to say yes, go do that.

Would the panelists agree that that is a concerning use of emergency power and authority by the Executive Branch? If you could go quickly because I got 40 seconds. Then I will sum up. Go down the line, yes or no roughly.

Mr. COHEN. I will give you 70 seconds.

Mr. ROY. Okay. Well, thank you, sir.

Ms. GOITEIN. I'll be very quick. I think that when COVID struck it was absolutely an emergency. It met the definition. I think broad flexibility for the President and for the Federal Government was appropriate. I think the question is, where are we now, two years after the pandemic and is there a way to transition now to nonemergency powers. If the nonemergency powers in place are not sufficient whether Congress can step in and provide—

Mr. ROY. Mr. Dayton?

Thank you, Ms. —

Mr. DAYTON. I agree with Ms. Goitein's comments. I think that a critical part of any reform is going to be providing for a way to—for Congress to act quickly, and I think that's—your bill does that. Obviously, the Protecting our Democracy Act components on national emergency reform do that. I think that could be a foundation for building this in other areas. We mentioned National Security Reform Accountability Act as a model that uses this in war powers and arms sales to foreign areas, but you could also think about ways to use this domestically.

Mr. ROY. Yes.

Mr. DAYTON. I think this is an opportunity to build a foundation and example that you can use in other areas.

Mr. ROY. Mr. Canaparo?

Mr. CANAPARO. Yes, so what you hit on is this problem with the national emergency laws. The whole panoply of them creates such a draconian and arcane system that these decisions can be made, and the ripple effects can ripple outwards without any say-so from Congress and without any input from the people. So, the problem really is one of this who decides problem, and it's certainly at this point because of the way that Congress has delegated so much power. It's not you anymore and it should be you.

Mr. ROY. Mr. McCleary?

Thanks, Mr. Chair, for the indulgence.

Mr. MCCLEARY. This is the nut of the problem, and I totally agree with you. I totally agree with the Ranking Member that this is the struggle, is to restore the balances of power.

President Trump actually made a very intelligent statement that was rather disparaged when he said, "I have powers you do not even know about." That was a great contribution because it opened this whole discussion in fact. You need to move in this legislation the way we're talking and achieve the objective that you're talking about. Then we also need to explore again what President Trump had introduced, and that is what are these powers that no one knows about? They are dictatorial.

The fact is the President of the United States has two powers:

(1) To blow up the world; President Carter.
(2) With not even a stroke of the pen, blow up the Constitution.

We've got to—it's—as the Ranking Member points, in our role in saving the Republic, to keep the Republic we have got to wrestle with these questions. This is the historical moment to do that. So, I really applaud the work that you've been doing, Congressman.

Mr. ROY. Well, I appreciate you all.

Mr. Chair, thank you for the time. I would just note for the Committee and for our work as the Constitution Subcommittee on a bipartisan basis that—and I mean this truly, my concern here spans across—Presidents from both parties. The pandemic is a good example because there is an altruistic motive to care for people and ensure that there is a vaccine available, and that people can get—and we have had debates about that.

The point here is just the power, like who gets to decide, how does that happen, and the importance of congressional action on that. Anyway, I appreciate the extra time from the Chair.

Mr. COHEN. Thank you.

Let me ask: The legislation has been introduced, Mr. Roy and Mr. Lee. Does anybody here not think that is a law that should be passed?

Everybody thinks that is a good bill? Okay.

You don't think it was a good bill?

Mr. JOHNSON of Louisiana. I think it is a great bill.

Mr. COHEN. Oh, good.

[Laughter.]

Mr. JOHNSON of Louisiana. He is sitting right here. He is sitting right here. You can be honest.

Mr. COHEN. Thank you.

Mr. ROY. I can leave if you want to be able to speak freely, Mike.

Ms. GOITEIN. If I could add to that, that bill has served as the core reform in all of these other bills that we've been talking about. Some of those other bills have added some features. For example, several of them would add a five-year total limitation on the length that any emergency declaration can stay in place. I think some of those additions were helpful and are definitely worth looking at.

Mr. COHEN. That bill hasn't become law though, right?

Ms. GOITEIN. Correct. None of this has become law—

Mr. COHEN. Is it because it is a stand-alone or is it part of another bill now?

Mr. ROY. Well, so the Article 1 Act is still stand-alone, but then there are pieces of it, as the gentlelady is talking about, that it goes—that have been imbedded into other reforms that have been put forward.

Ms. GOITEIN. In fact, in its entirety pretty much that bill was picked up and put into several other pieces of legislation and along the way other features were added. I think it's worth looking at some of those other features—

Ms. JACKSON LEE. You have—

Ms. GOITEIN. I'm sorry.

Ms. JACKSON LEE. Well, you need to let—

Mr. COHEN. We will get to you in a minute. I didn't see you, Ms. Jackson Lee, we will get right to you, but we are going to finish up this discussion quickly, if you don't mind.

So, there were some bills that were put in the Democracy Act, right?

Ms. GOITEIN. Protecting our Democracy Act, yes. That started essentially with the Article 1 Act and it includes a five-year limitation on the total length of any emergency declaration. It also includes a limitation on using emergency powers to deal with anything other than the emergency so that it has the powers have to relate to the nature of the emergency, as you were speaking about in your opening statement. It has a provision that emergency powers cannot be used to take an action that Congress has expressly withheld authorization for.

Mr. COHEN. All right. How about Mr. DeFazio's proposal? Is that something that—

Ms. GOITEIN. Very similar. Very similar to what came out of the Protecting our Democracy Act as it passed the House.

Mr. COHEN. Right. So, the Protecting our Democracy Act turns out to be kind of a problem because it is not going—it is dead. So,

it is taking with it the—down to the bottom of the sea some good things that might be able to pass.

Ms. GOITEIN. Well, the Protecting the Democracy Act has many different provisions in it. The NEA reform provision within the Protecting our Democracy Act has, as we've mentioned, extremely broad partisan support. So, maybe that piece of it—

Mr. COHEN. Those need to be extracted from the law and made a free-standing bill and maybe they would see the light of day.

Ms. GOITEIN. Exactly.

Mr. COHEN. Thank you.

Mr. ROY. Mr. Chair, may I ask one quick follow-up question?

Mr. COHEN. Sure.

Mr. ROY. Mike, or Senator Lee and I, we directed this obviously with—very specifically to the National Emergencies Act, but should we expand that to apply at least in concept to the other bills, or other acts I mentioned, like the Stafford Act or the Public Health—what is the Public Health Service Act, or other things where there is extensive use of Executive power?

Ms. GOITEIN. It should be a longer process of looking at those acts and how they have been used to try to figure out the best solution for them. I would hesitate to say right now that's the right solution for those bills. I think they address different issues and work differently. They have different existing procedural criteria in place.

Mr. ROY. Sure.

Ms. GOITEIN. So, I don't know that it's that simple. It's worth taking a look.

Mr. JOHNSON of Louisiana. Can I add one thing before we go to the great Sheila Jackson Lee? Just one thing, Mr. Chair, briefly?

Mr. COHEN. On that, because it is so important?

Mr. JOHNSON of Louisiana. The Stafford Act of course covers natural disaster—hurricane emergency declarations. Just one parenthetical note: On day 30 sometimes they are just getting on the ground to assess the needs and all that. So, I think that is a totally different calculation, but I yield back.

Mr. COHEN. Thank you.

Ms. GOITEIN. Yes, and just—

Mr. COHEN. Ms. Jackson Lee, you are recognized for five minutes.

Ms. JACKSON LEE. Good morning. Let me thank the Witnesses for their very detailed expression. We will look very deeply at their statements, their written statements.

I want to follow the line of questioning of my colleagues in terms of what I heard, the different aspects of declarations of emergency and anywhere—living in hurricane country anywhere, from the desperation of those who are experiencing hurricanes and we are begging for a declaration of emergency, if you will, sometimes stymied by our State governments not acting quickly, there may be other national if you will weather disasters. There are the medical disasters and of course there is the question of issues dealing with national security.

Let me refer the Witnesses back to January 6 and the early denials from the 2020 election that there was a victory for Joe Biden, but there was a victory for someone else, the prior President. The

texts that we have about potential of martial law, which is a little different from the issue of national emergencies.

I would appreciate if Ms. —each of you Witnesses would answer the question about how careful we need to be in discerning between medical emergencies which may need to go on for a long time versus someone who abuses it and the question that may impact national security. I think changing elections impacts national security. So, what kind of fine line do we need to make sure a President can act when Americans are desperate as opposed to a President using it to overturn elections, to engage in conflict or war outside of declaration of war?

So, would each of you starting with Ms. Goitein answer that question, please? Thank you very much.

Mr. McCleary, Mr. Dayton?

Ms. GOITEIN. Thank you, Congresswoman. I think Congress can and has made that distinction on its own in certain cases. As an example, I will mention the Public Health Service Act and the provision of that Act that allows the CDC to make regulations to prevent the transmission of communicable diseases into the United States from other countries or between States. That authority is not an emergency power. That's because when Congress granted that authority, it knew that this was not the kind of thing that could be where the President needed to do something for a week and then might not need to do that after a week. That a communicable disease; that's hard to say, that is spreading across the country, that is a process. Congress wanted the Federal government to have in place the authority it needed throughout that process to try to limit the spread of that disease.

So, I think Congress itself can distinguish between powers that are going to be needed in the long term. Most legislation doesn't have a limit on how long the President can use those authorities, right? I mean, sometimes there are sunsets, but often it is indefinite. So, Congress can make that distinction.

Now, for things like martial law; the Brennan Center has a report on this, we don't actually think martial law is legal and we don't think that the President has any authority under existing law to declare martial law. So, another important piece of this, especially when you're looking at some of the discussion around January 6, is to separate out the real emergency powers from the imagined ones.

Ms. JACKSON LEE. Thank you.

Mr. McCleary?

Mr. MCCLEARY. I think it would be very advantageous to perhaps if former-Governor Ridge were able to testify; he's had a stroke, but he had to struggle with a lot of these issues. Over at Homeland Security a lot of these PEDs exist and they deal with all these issues of domestic crisis. That's why; maybe Ms. Goitein can comment on this, it is important that in any legislation we—that's put forward that you get insight into the Office of Legal Counsel's rulings on these PEDs. Are they using Second amendment authorities or are they using statutory authorities, or both in assuming these actions?

Congresswoman, I think you would find it most interesting to have Homeland Security or the Secretary, if you have the jurisdiction, to really try to define what their position is on all these ac-

tions having to do with domestic crisis, whether it be a disease or whether it be a hurricane or whatever, because they're there and they have struggled with this issue. Again, right now it's secret. Thank you.

Ms. JACKSON LEE. Mr. Dayton?

Mr. DAYTON. Thank you for the question. I think there's two important parts of my response here. The first part is that we should be talking about clear authority. So, the talk about martial law, as Ms. Goitein has pointed out, there is no actual statute that would allow the President to invoke martial law via an emergency framework. That said, there are a lot of things lying around in the U.S. Code that are somewhat scary and there should be a careful review of those, and probably a substantial pruning of those powers.

Mr. COHEN. Thank you. Thank you.

Ms. JACKSON LEE. Thank you so very much and let me say that this is work that we must do. Thank you. I yield back.

Mr. COHEN. Thank you, Ms. Jackson Lee.

We have I think had a very good bipartisan hearing. Hopefully we can get some work done out of it.

I appreciate the Witnesses for your testimony, which has been so invaluable, and your work.

This concludes today's hearing and I want to thank you all.

Without objection, all Members have five legislative days to submit additional written questions for the Witnesses or material for the record.

With that, the meeting is adjourned.

[Whereupon, at 10:56 a.m, the Subcommittee was adjourned.]

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