

**NEVER-ENDING EMERGENCIES—AN EXAMINATION
OF THE NATIONAL EMERGENCIES ACT**

(118–19)

HEARING
BEFORE THE
SUBCOMMITTEE ON
ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND
EMERGENCY MANAGEMENT
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

MAY 24, 2023

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Washington, DC 20515

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MAY 19, 2023

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Economic Development, Public Buildings, and Emergency Management
FROM: Staff, Subcommittee on Economic Development, Public Buildings, and Emergency Management
RE: Subcommittee Hearing on “*Never-Ending Emergencies—An Examination of the National Emergencies Act*”

I. PURPOSE

The Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure will meet on Wednesday, May 24, 2023, at 10:00 a.m. ET in 2167 of the Rayburn House Office Building to receive testimony on “*Never-Ending Emergencies—An Examination of the National Emergencies Act*.” The hearing will provide a background on the intent of the National Emergencies Act (NEA) (P.L. 94–412) and examine the Presidential powers made available under an NEA declaration to inform whether reforms are needed to improve the oversight and accountability of such powers. At the hearing, Members will receive testimony from subject matter experts: Soren Dayton from the Niskanen Center, Satya Thallam from Arnold & Porter, and Elizabeth Goitein from the Brennan Center for Justice.

II. BACKGROUND

THE DIFFERENT EMERGENCY STATUTES

Non-NEA Emergencies

The scope of this hearing is limited to emergency powers made available under the NEA. However, it should be noted that Federal law authorizes a number of different types of “emergencies.” There are three places in the United States Code that provide guidelines for different types of non-NEA emergencies, which include: public health emergencies, Department of Defense (DOD) peacekeeping efforts to foreign countries and international organizations, and emergencies and major disasters.¹ First, the Public Health Service Act (P.L. 78–410) allows the Secretary of Health and Human Services (HHS) to make an emergency declaration if a disease presents a public health emergency or if there is threat of a significant outbreak of infectious diseases or bioterrorist attacks.² Second, the President can direct the drawdown of

¹ See BRENNAN CENTER FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE, (Feb. 8, 2023), available at <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

² 42 U.S.C. § 247d.

defense articles from the DOD if “an unforeseen emergency exists which requires immediate military assistance to a foreign country of international organization; and the emergency requirement cannot be met under the authority of the Arms Export Control Act [22 U.S.C. 2751 et seq.] or any other law except this section.”³

Third, specifically within the Committee’s jurisdiction, are Emergency and Major Disaster declarations pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (P.L. 100–707, as amended).⁴ These provide for Federal assistance and support to states in responding to and recovering from natural and man-made disasters.⁵ Under the Stafford Act, the Federal Emergency Management Agency (FEMA) is responsible for coordinating and providing supplemental Federal assistance following a Stafford Act declaration.⁶ This declaration occurs when the President determines “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.”⁷

THE NEA DISTINGUISHED

Unlike the above authorities, the NEA is distinct as a statutory framework intended to provide accountability to additional Presidential emergency powers scattered throughout the United States Code.⁸ The NEA states, “with respect to acts of Congress authorizing the exercise, during the period of a National emergency or any special or extraordinary power, the President is authorized to declare such an emergency.”⁹ Notably, there are no statutory definitions of what type of event qualifies as a National emergency—so the President has discretion to determine if an event qualifies as an emergency, until a co-equal branch of government reviews the National emergency declaration.¹⁰

During the 94th Congress (1975–1976) concern was raised regarding “the continuous nature of invoked emergency authorities and the absence of Congressional review after their activation.”¹¹ The Senate Special Committee on the Termination of the National Emergency (Special Committee) was created to examine the statutory powers associated with Presidentially declared National emergencies.¹² In particular, the Special Committee was concerned about four existing emergency declarations, including emergencies related to the 1950 conflict in Korea, the Banking Crisis of 1933, the Post Office Strike in 1970, and foreign trade currency restrictions in 1971.¹³ As a result, the NEA was enacted to terminate the existing National emergencies and create a mechanism for Congressional oversight of future Presidential emergency declarations, including: a framework for expedited procedures to terminate Presidentially declared emergencies, continuous six-month review periods of declarations by Congress, and requirements for emergency spending expenditure reports to be submitted to Congress.¹⁴

The President’s ability to veto Congressional action to terminate a declaration was restricted by the original 1976 law, which only required a concurrent resolution to be passed.¹⁵ Concurrent resolutions do not require the President’s signature to be enacted.¹⁶ In 1983, the United States Supreme Court decision in *Immigration and Naturalization Service (INS) v. Chadha*, 462 U.S. 919 (1983), concluded that legislative vetoes are unconstitutional.¹⁷ Thus, in 1985 Congress amended the NEA to re-

³ 22 U.S.C. § 2318 (a)(1).

⁴ Stafford Act, Pub. L. No. 93–288, 88 Stat. 143.

⁵ *Id.*

⁶ *Id.*

⁷ 42 U.S.C. § 5122.

⁸ H. COMM. ON THE JUDICIARY, REP. TO ACCOMPANY H.R. 3884, 94th Cong. (1975) (H. Rept. 94–238).

⁹ 50 U.S.C. §§ 1601–1651 [hereinafter National Emergencies Act].

¹⁰ See CONG. RSCH. SERV. (LSB10267), DEFINITION OF NAT’L EMERGENCY UNDER THE NAT’L EMERGENCIES ACT, (Mar. 1, 2019), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10267> [hereinafter DEFINITION OF NAT’L EMERGENCY].

¹¹ See MICHAEL GREENE, CONG. RSCH. SERV. (R46567) NAT’L EMERGENCIES ACT: EXPEDITED PROCEDURES IN THE HOUSE AND SENATE, (Oct. 14, 2020), available at <https://crsreports.congress.gov/product/pdf/R/R46567/2> [hereinafter EXPEDITED PROCEDURES].

¹² See DEFINITION OF NAT’L EMERGENCY, *supra* note 10.

¹³ *Id.*

¹⁴ See EXPEDITED PROCEDURES, *supra* note 11.

¹⁵ JENNIFER K. ELSEA, ET. AL., CONG. RSCH. SERV. (R46379), EMERGENCY AUTHORITIES UNDER THE NAT’L EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT, (July 14, 2020), available at <https://crsreports.congress.gov/product/pdf/R/R46379> [hereinafter ELSEA CRS].

¹⁶ *Id.*

¹⁷ ELSEA CRS, *supra* note 15; see also *INS v. Chadha*, 462 U.S. 919 (1983).

quire a joint resolution requiring signature by the President.¹⁸ This effectively removed Congress's ability to terminate an emergency absent a veto-proof majority or agreement by the President.¹⁹

ONGOING EMERGENCY DECLARATIONS

Since the enactment of the NEA in 1976, there have been 76 National emergency declarations.²⁰ Of the 76 declarations, 41 declarations are still active and the earliest dates back to a 1979 action to block Iranian Government Property.²¹ Notably, only one of the 35 terminated declarations was the result of Congressional action.²² H. J. Res. 7 (P.L. 118–3) related to the COVID–19 declaration, which was signed into law on April 10, 2023, was the first time Congress effectively exercised its termination power over the President's emergency powers.²³

NEA REFORMS

In recent years there have been several bills introduced which have sought to reform the NEA, but to date, legislation has not been signed into law. On December 9, 2021, the House passed H.R. 5314, the Protecting Our Democracy Act, which included a limitation on Presidential powers under the NEA.²⁴ Additionally, the Senate Committee on Homeland Security and Governmental Affairs Committee marked up S. 764, the Article One Act, on June 19, 2019.²⁵ S. 764 requires Congress to approve each National emergency proclamation.²⁶ S. 764 would direct that without Congressional approval, the President is prohibited from declaring a different emergency for the same issues in their tenure.²⁷ It would also terminate each declaration after 30 days unless Congress enacted a joint resolution of approval and would automatically terminate each National emergency after one year unless it is renewed by the President and approved by a joint resolution from Congress.²⁸ The President would additionally be required to provide evidence of the need for the declaration and periodic updates on the emergency's status.²⁹

However, the majority of proposed reforms do not include reforms to the International Emergency Powers Act (IEEPA) (P.L. 95–223)—the most commonly used emergency power.³⁰ IEEPA is a statutory power that may be triggered by a declaration under the NEA, upon which 65 of the 71 declarations rely.³¹ IEEPA allows the President to impose economic sanctions on a person or entity when there is an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the National security, foreign policy, or economy of the United States.”³²

Of the six NEA declarations that did not invoke IEEPA, three are still active today: regulation of the anchorage and movement of vessels with respect to Cuba, a 9/11 declaration for terrorist attacks, and the regulation of the anchorage and movement of Russian-affiliated vessels to United States ports.³³

III. POTENTIAL FOR PRESIDENTIAL ABUSE OF POWER

There are over 120 enhanced statutory powers granted to the President under a NEA National emergency and an additional 13 powers that become available when

¹⁸ ELSEA CRS, *supra* note 15.

¹⁹ *Id.*

²⁰ See National Emergencies Act, *supra* note 9; BRENNAN CENTER FOR JUSTICE, DECLARED NAT'L EMERGENCIES UNDER THE NAT'L EMERGENCIES ACT, (Apr. 10, 2023), available at <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [hereinafter DECLARED EMERGENCIES].

²¹ See DECLARED EMERGENCIES, *supra* note 20.

²² *Id.*

²³ Pub. L. 118–3, 137 Stat. 6.

²⁴ See Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021).

²⁵ See Article One Act, S. 764, 116th Cong. (2019).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CHRISTOPHER A. CASEY ET. AL., CONG. RSCH. SERV. (R45618), THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE, (Mar. 25, 2022), available at <https://crsreports.congress.gov/product/pdf/R/R45618>.

³¹ See Andrew Boyle, *Checking the President's Sanctions Powers*, BRENNAN CENTER FOR JUSTICE, (June 10, 2021), available at <https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers>.

³² *Id.*

³³ See DECLARED EMERGENCIES, *supra* note 20.

Congress declares a National emergency.³⁴ These emergency powers span across the government, and currently cannot be terminated without a veto-proof super majority.³⁵ Examples of emergency powers the President may invoke range from removing biological or chemical agents bans for testing such weapons on human subjects; closing borders and expelling foreigners; taking over communication channels as well as production and distribution of goods seized; and determining the government should control the domestic transportation network.³⁶ While many of these powers have never been exercised, they remain at the President's disposal with little ability by Congress to provide accountability. This hearing is not only intended to examine the purpose for the NEA, but also analyze Congressional oversight of Presidential emergency powers and potential solutions to ensure accountability to prevent abuses of power.

IV. WITNESSES

- Mr. Soren Dayton, Director of Governance, Niskanen Center
- Mr. Satya Thallam, Policy Advisor, Arnold & Porter
- Ms. Elizabeth Goitein, Senior Director, Liberty & National Security Program, Brennan Center for Justice at New York University School of Law

³⁴ See ELSEA CRS, *supra* note 15.

³⁵ *Id.*

³⁶ See *e.g.*, 50 U.S.C. § 1515; 19 U.S.C. § 1318; 42 U.S.C. § 265; 47 U.S.C. § 606; 19 U.S.C. § 1318; 49 U.S.C. § 114.

NEVER-ENDING EMERGENCIES—AN EXAMINATION OF THE NATIONAL EMERGENCIES ACT

WEDNESDAY, MAY 24, 2023

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC
BUILDINGS, AND EMERGENCY MANAGEMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2167 Rayburn House Office Building, Hon. Scott Perry (Chairman of the subcommittee) presiding.

Mr. PERRY. Good morning. The Subcommittee on Economic Development, Public Buildings, and Emergency Management will come to order.

I ask unanimous consent that the chairman be authorized to declare a recess at any time during today's hearing. Without objection, so ordered.

The Chair also asks unanimous consent that Members not on the subcommittee be permitted to sit with the subcommittee at today's hearing and ask questions. Without objection, so ordered.

As a reminder, for Members who wish to insert a document into the record, please also email it to DocumentsTI@mail.house.gov.

The Chair now recognizes himself for the purposes of an opening statement for 5 minutes.

OPENING STATEMENT OF HON. SCOTT PERRY OF PENNSYLVANIA, CHAIRMAN, SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

Mr. PERRY. I want to thank our witnesses for being here today to discuss the National Emergencies Act, the NEA, and the Presidential powers associated with it. This is the first time this subcommittee has held a hearing to examine the NEA, and I hope it will be useful for Members to evaluate potential reforms to the NEA, which might be borne out of this hearing on both sides of the aisle.

The NEA was enacted by Congress in 1976 to provide a framework for Congress to provide oversight and accountability of Presidential emergency powers. The law's intent was to allow Congress the ability to review and terminate the President's use of over 120 emergency powers scattered throughout the United States Code.

Unfortunately, the mechanisms put in place by Congress were watered down after the Supreme Court case, *United States v. Chadha*, which resulted in the current requirement that Congress

must pass a joint resolution and that it must be signed by the President—the very person Congress wants to hold accountable.

In effect, this means any check on the President’s use of some of these extraordinary powers needs a supermajority to overcome a veto. The NEA also directs Congress to review declarations every 6 months.

However, there are currently 41 ongoing emergency declarations under the NEA that date back to the Carter administration which Congress has not actively reviewed. I say “actively,” like—I don’t think they have review that—well, I probably shouldn’t have said “actively.” Anyhow.

In fact, the only time Congress has effectively terminated an emergency was earlier this year with the passage of House Joint Resolution 7, which terminated the COVID-19 emergency declaration. This was only after President Biden agreed to end the declaration, signing the resolution last month.

It is absolutely beyond time that we look closer at the Presidential powers authorized for such declarations that we have allowed to continue indefinitely. It is also time we get a handle on the funding associated with these declarations and where the statutorily required expenditure reports are going, if they are going anywhere, if they are even being produced.

It is not clear whether and to whom the required expenditure reports under the NEA have been sent or produced.

There is also no definition for an emergency under the NEA, and unfortunately, in Congress, that is a recipe for chicanery. The President can declare an emergency for anything he or she deems to be an emergency. There is so much risk associated with this, and virtually no checks for accountability.

The NEA can unlock over 120 statutory emergency powers, some of which seem mundane, but others range from commandeering the domestic transportation network, to taking over communication channels and distribution of goods, to waiving restrictions on human testing of biological and chemical weapons.

The document here [indicating “A Guide to Emergency Powers and Their Use,” by the Brennan Center for Justice] lists pages and pages of authorities buried throughout the code that the President can trigger by declaring an emergency under the National Emergencies Act. Do we know the implication of all these laws, not to mention the unaccounted-for funding that has little to no congressional oversight? I would just say no. Probably not even a little. I mean, there might be some complaints, but other than that, practically, we have none.

I look forward to hearing from our panel today on their thoughts on the risks associated with the NEA and potential solutions for Congress to pursue to finally check executive powers when it comes to these emergencies.

[Mr. Perry’s prepared statement follows:]

Prepared Statement of Hon. Scott Perry, a Representative in Congress from the Commonwealth of Pennsylvania, and Chairman, Subcommittee on Economic Development, Public Buildings, and Emergency Management

I want to thank our witnesses for being here today to discuss the National Emergencies Act (NEA), and the presidential powers associated with it. This is the first time this Subcommittee has held a hearing to examine the NEA, and I hope it will be useful for Members to evaluate potential reforms to the NEA.

The NEA was enacted by Congress in 1976 to provide a framework for Congress to provide oversight and accountability of presidential emergency powers. The law's intent was to allow Congress the ability to review and terminate the President's use of over 120 emergency powers scattered throughout the United States Code.

Unfortunately, the mechanisms put in place by Congress were watered down after the Supreme Court case, *United States v. Chadha*, which resulted in the current requirement that Congress must pass a joint resolution and that it must be signed by the President—the very person Congress wants to hold accountable.

In effect, this means any check on the President's use of some of these extraordinary powers needs a super-majority to overcome a veto. The NEA also directs Congress to review declarations every six months.

However, there are currently 41 ongoing emergency declarations under the NEA, that date back to the Carter Administration, which Congress has not actively reviewed.

In fact, the only time Congress has effectively terminated an emergency was earlier this year, with the passage of House Joint Resolution 7, which terminated the COVID-19 emergency declaration. And, this was only after President Biden agreed to end the declaration, signing the resolution last month.

It's time we look closer at the presidential powers authorized for such declarations that we have allowed to continue indefinitely. It's also time we get a handle on the funding associated with these declarations and where the statutorily required expenditure reports are going.

It is not clear whether and to whom the required expenditure reports under the NEA have been sent. There is also no definition for "emergency" under the NEA. The President can declare an emergency for anything he deems to be an "emergency."

There is so much risk associated with this and virtually no checks or accountability. The NEA can unlock over 120 statutory emergency powers, some of which seem mundane, but others range from commandeering the domestic transportation network, to taking over communication channels and distribution of goods, to waiving restrictions on human testing of biological and chemical weapons.

I look forward to hearing from our panel today on their thoughts on the risks associated with the NEA and potential solutions for Congress to pursue to finally check the President's powers when it comes to these emergencies.

Mr. PERRY. I now recognize the ranking member, Ms. Titus, for 5 minutes for her opening statement.

OPENING STATEMENT OF HON. DINA TITUS OF NEVADA, RANKING MEMBER, SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

Ms. TITUS. Thank you very much, Mr. Chairman. I also want to thank our witnesses for being here, and you, for holding this first hearing on the important topic on the National Emergencies Act.

Proper implementation and oversight of the NEA of 1976 are necessary to safeguard our democracy and protect our institutions. Presidents are awarded great power in times of national crises so they can make timely and decisive decisions when Federal assistance is needed in a hurry. This power is granted since Congress may not have enough time during a true emergency to enact the authorities necessary to protect the American public. It's not like we can get anything done in a hurry, as we have seen in the last few days.

The national emergencies declared throughout our Nation's history, however, haven't been terminated promptly, as was mentioned by the chairman. In fact, most U.S. citizens have lived their entire lives under some state of emergency, and at least one national emergency has been active since 1979, and there are, I repeat, 41 national emergencies in effect today.

The perpetual state of emergency that we live in may tempt the President to use the powers he is granted by the National Emergencies Act to circumvent the will of Congress. In theory, Presidents of any party can abuse emergency powers.

But I would be remiss if I didn't mention my concern when former President Trump abused the NEA to fund the construction of a wall at the southern border without congressional authorization or appropriations. In fact, the former President's very first veto in office was on the congressional resolution attempting to block this misuse of the NEA.

Before I became a Member of Congress, I taught American Government classes at the University of Nevada, Las Vegas. So, we spent a lot of time talking about separation of powers and how Article I of our Constitution recognizes Congress first. It enshrines Congress' power to make laws, controls the power of the purse, and checks the power of the President. In fact, it is Congress' responsibility to affirm its status as a coequal branch of Government and ensure that the system of checks and balances is functioning as intended.

This discussion is a matter of principle over politics, a constitutional issue over things that are more fleeting. I hope that we can set partisan policy disagreements aside and focus on oversight and reforms that could be necessary to safeguard our Constitution and democracy during today's hearing, and we rely on the experts for their suggestions. I hope this will reignite congressional oversight of national emergencies the way it was intended.

I thank you all for your time and previous contributions to this important topic, and I look forward to your testimony as it informs us of what we might do to evaluate certain proposed reforms.

[Ms. Titus' prepared statement follows:]

Prepared Statement of Hon. Dina Titus, a Representative in Congress from the State of Nevada, and Ranking Member, Subcommittee on Economic Development, Public Buildings, and Emergency Management

Thank you, Mr. Chairman. I want to thank our witnesses for joining us today for this Subcommittee's very first hearing on an important topic—the National Emergencies Act (NEA).

Proper implementation and oversight of the National Emergencies Act of 1976 are necessary to safeguard our democracy and protect our institutions. Presidents are awarded great power in times of national crises, so they can make the timely and decisive decisions when federal assistance is needed. This power is granted since Congress may not have enough time during a true emergency to enact the authorities necessary to protect the American public.

The national emergencies declared throughout our nation's history, however, have not been terminated promptly. In fact, most U.S. citizens have lived their entire lives under a state of emergency, and at least one national emergency has been active since 1979. Today, there are 41 active national emergencies.

The perpetual state of emergency that we live in today may tempt the President to use the powers he is granted by the National Emergencies Act to circumvent the will of Congress. In theory, Presidents of any political party could abuse emergency

powers. I would be remiss not to mention my concern when former President Trump abused the National Emergencies Act to fund the construction of a wall at the southern border without congressional authorization or appropriations. In fact, the former President's very first veto in office was on the congressional resolution attempting to block this misuse of the NEA.

Before I became a Member of Congress, I taught American government classes at the University of Nevada, Las Vegas (UNLV). So, I know all too well that Article One of our Constitution enshrines Congress' power to make laws, control the power of the purse, and check the power of the President. In fact, it is Congress' responsibility to affirm its status as a co-equal branch of government and ensure the system of checks and balances is functioning as intended.

This discussion is a matter of principle over politics. I hope that we can set partisan policy disagreements aside and focus on oversight and reforms that may be necessary to safeguard our constitution and democracy during today's hearing, and to reignite congressional oversight of national emergencies as it was originally intended.

I thank our witnesses for their time and previous contributions to this important topic. I look forward to your testimony as it informs this Subcommittee's efforts to examine the National Emergencies Act and to better evaluate proposed reforms.

Ms. TITUS. I thank the chairman, and I yield back.

Mr. PERRY. The Chair thanks the gentlelady from Nevada.

The Chair now recognizes the ranking member of the full committee, Mr. Larsen, for 5 minutes.

OPENING STATEMENT OF HON. RICK LARSEN OF WASHINGTON, RANKING MEMBER, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Mr. LARSEN OF WASHINGTON. Thank you. I thank Chair Perry and Ranking Member Titus for calling today's hearing.

We are here to discuss safeguarding our democracy, strengthening our democratic institutions, and Congress' responsibility to maintain its Article I power as a coequal branch of Government.

So, regardless of the sitting President's political party, Congress needs to conduct oversight of emergency powers used by the executive branch.

Now, I will say, in reviewing the testimony from today's panel, it was eye-opening and jaw-dropping: the breadth of the President's powers and the struggle that Congress has been through since 1976 in order to try to define a fence, if you will, around those powers.

A core tenant of the Constitution is a system of checks and balances, which ensures that no one branch of Government has too much control or power. That includes checking the powers granted to a President during national emergencies.

This Nation does grant extraordinary powers to the President during national emergencies. Presidents can determine what rises to the level of a national emergency and declare such emergency without the approval of Congress. A national emergency declaration, in turn, unlocks more than 130 standby authorities for the President, even if they are not relevant to the emergency at hand.

Congress conducted extensive oversight regarding the President's authority to declare emergencies in 1973, and a Senate special committee was appointed to investigate concerns that national emergencies were active for too long and that no congressional mechanism existed to terminate them. I was surprised they actually set this up to look at national emergency powers that were es-

tablished under the Korean War and then discovered there was a lot more out there, which caused a lot of concern for Congress.

So, these emergencies were active for too long, and no congressional mechanism existed to terminate them. So, the committee report resulted in the passage of the National Emergencies Act, which formalized the emergency powers of the President, authorized Congress to biannually review these emergencies, and then vote to terminate Presidentially declared emergencies as well, which the Supreme Court in 1983 removed as an unconstitutional legislative veto.

But today, we exist in arguably what the National Emergencies Act was designed to avoid: a perpetual state of emergency. Currently, 41 separate Presidential national emergencies are in effect. The oldest one pertains to sanctions against Iran, which has been renewed annually since 1979.

I am not disputing the subject matter of any of these national emergencies is not important. I am only arguing that—after reading testimony and thankfully calling this hearing—that we do have an opportunity to examine whether addressing these issues in a manner that gives the President indefinite emergency level powers is appropriate.

I look forward to discussing what an appropriate balance is. Congress is a deliberative body. It does take us time to deliberate and get things done. I can understand why a President needs authority to react quickly in a true emergency and protect the public because Congress is slow to react.

But in the long term, emergency powers should not be a convenience that is used to circumvent congressional action. And we will argue and debate what is appropriate and what is not appropriate. Again, it is really an issue of when a national emergency is declared by the President, what can Congress do to put some bounds around that?

So, the witnesses are clearly highly qualified, much more than me, to discuss this issue for us. But as I always say, I am not an expert. I am a Member of Congress, and I rely on the experts to close that gap. So, I look forward to today's hearing and hearing from our witnesses.

[Mr. Larsen of Washington's prepared statement follows:]

Prepared Statement of Hon. Rick Larsen, a Representative in Congress from the State of Washington, and Ranking Member, Committee on Transportation and Infrastructure

Thank you, Chairman Perry and Ranking Member Titus, for calling today's hearing on "Never-Ending Emergencies—An Examination of the National Emergencies Act."

We are here to discuss safeguarding our democracy, strengthening our democratic institutions and Congress' responsibility to maintain their Article One power as a co-equal branch of government.

Regardless of the sitting president's political party, Congress needs to conduct oversight of emergency powers used by the executive branch.

In reviewing the testimony from today's panel, it was eye-opening and jaw-dropping—the breadth of the President's powers and the struggle Congress has been through since 1976 in order to try to define a fence, if you will, around these powers.

A core tenant of the Constitution is the system of checks and balances which ensures that no one branch of government has too much control or power.

This includes checking the powers granted to a President during national emergencies.

This nation does grant extraordinary power to a President during national emergencies. Presidents can determine what rises to the level of a national emergency and declare such emergency without the approval of Congress.

A national emergency declaration in turn unlocks more than 130 standby authorities for the President—even if they are not relevant to the emergency at hand.

Congress conducted extensive oversight regarding the President's authority to declare national emergencies in 1973.

A Senate Special Committee on National Emergencies and Declared Emergency Powers was appointed to investigate concerns that national emergencies were active for too long and that no congressional mechanism existed to terminate them. I was surprised they actually set this up to look at national emergency powers that were established under the Korean War and then discovered there was a lot more out there, which caused a lot of concern for Congress. These emergencies were active for too long and no Congressional mechanism existed to terminate them.

The Special Committee's report resulted in passage of the National Emergencies Act, which formalized the emergency powers of the President, authorized Congress to biannually review national emergencies, and if necessary, vote to terminate Presidentially declared national emergencies, which the Supreme Court in 1983 removed as an unconstitutional veto.

Today we exist in what arguably the National Emergencies Act was designed to avoid—a perpetual state of emergency.

There are currently 41 separate presidential national emergency declarations in effect. The oldest declaration, which pertains to sanctions against Iran, has been renewed annually since 1979.

I am not disputing that the subject matter of these national emergencies may be highly important.

However, we must examine whether addressing these issues in a manner that gives the President indefinite emergency level powers is appropriate.

I look forward to discussing an appropriate balance.

Congress is a deliberative body.

The President needs the authority to react quickly in a true emergency and protect the public. Congress, by nature, may be too slow to react.

But in the long-term, emergency powers should not become a convenience that is used to circumvent congressional action.

The witnesses on our panel today are highly qualified to discuss this issue. As I always say, I am not an expert, I am a Member of Congress and I rely on the experts to close that gap. I appreciate the service they have demonstrated by dedicating so much time to ensuring Congress' Article One powers are preserved and that our democracy is safeguarded.

My thanks again to today's witnesses. I look forward to hearing your testimony.

Mr. LARSEN OF WASHINGTON. With that, I yield back.

Mr. PERRY. The Chair thanks the ranking member.

The Chair would now like to welcome our witnesses to thank them for being here today.

Briefly, I would like to take a moment to explain our lighting system to our witnesses. There are three lights right in front of you. The green means go. Yellow means you are going to be running out of time shortly, and red means, like, you've got to end it, all right?

We would also just encourage you to pull the mic right in front when you are speaking because some of us flew a helicopter for 30 years and can't hear real well. So, it is important that you are in the mic.

I ask unanimous consent that the witnesses' full statements be included in the record. Without objection, so ordered.

As your written testimony has been made part of the record, the subcommittee asks that you limit your oral remarks to 5 minutes.

With that, Mr. Dayton, you are recognized for 5 minutes for your testimony.

**TESTIMONY OF SOREN DAYTON, DIRECTOR OF GOVERNANCE,
NISKANEN CENTER; SATYA THALLAM, POLICY ADVISOR, AR-
NOLD & PORTER; AND ELIZABETH GOITEIN, SENIOR DIRE-
CTOR, LIBERTY AND NATIONAL SECURITY PROGRAM, BREN-
NAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY
SCHOOL OF LAW**

**TESTIMONY OF SOREN DAYTON, DIRECTOR OF GOVERNANCE,
NISKANEN CENTER**

Mr. DAYTON. Thank you, Chairman Perry and Ranking Member Titus, for inviting me to testify on the National Emergencies Act.

Emergencies present a critical issue of checks and balances in the constitutional balance of power. Congress makes laws and appropriates funds. The President implements laws and spends money. In emergencies, though, Congress gives the President and the executive branch fairly broad leeway because of the need to act quickly. But that doesn't mean Congress wants to give the President unlimited power.

Members of Congress want a say and have an important role in reviewing, supporting, or curtailing the President's execution of delegated powers. Congress found a solution nearly 50 years ago in the National Emergencies Act. The NEA provides a generalized framework for handling emergency powers separate from the national disaster emergency system, also under this committee's jurisdiction. Note that there is a separate public health emergency system that we are not talking about today.

When the President declares an emergency, it unlocks other laws that provide powers, laws written by Congress, delegating congressional powers that the President can use to address that emergency. The NEA gives the President broad flexibility, but required clear reporting, and empowered Congress to call a halt through a legislative veto. Any Member of Congress can demand a vote to block the President's action via concurrent resolution.

Consideration of these resolutions was protected via special procedures, and the President could not block that termination. But that system broke in 1983. The Supreme Court decision *INS v. Chadha* struck down the legislative veto that Congress had relied on to review emergencies. Without that check, the delegation of emergency powers was transformed into something far broader. A President could continue the emergency unless Congress could muster a veto-proof majority in both Chambers.

Indeed, since *Chadha*, there has been virtually no check on the President's national emergency powers. Members of both parties complain about perceived abuses of executive powers by the President of a different party, but they are with little tools to take action.

In 2019, Congress started to exercise its review power. The NEA requires that Congress shall meet for every 6 months to review emergencies, but it never did until 2019, when President Trump declared a national emergency at the southern border. Congress voted two times on a bipartisan, bicameral basis to end the emergency, and in both cases, President Trump vetoed the resolution.

Under the original NEA, President Trump would not have had the opportunity to veto. Instead, President Biden ended the emer-

gency on his first day in office. President Trump also declared an emergency and a separate public health emergency over COVID in March 2020. That emergency was unchallenged until March 2022 and terminated earlier this year.

Last year, the Senate voted to terminate the COVID emergency in March, and then again in November, and this year, the House voted with 219 votes and the Senate with 68 votes to terminate the COVID emergency. And ultimately, under some political pressure, President Biden ultimately agreed to terminate the COVID emergency.

Prior to this year, emergencies had only been terminated by Presidents acting alone, and only for the second time in history has Congress acted like the National Emergencies Act imagined it might. But that does not mean the system works. It is still much harder for Congress to exert its review powers over emergencies, much harder than was intended in 1976.

Chadha flipped the logic of the NEA completely. What started as exceptional uses of powers reviewed by Congress is now a system where the President can and does maximize power up until there is sufficient public outcry to require him to stop.

The current structure of that system is broken by *Chadha* and treats Congress as a bystander. You all are left to cheer or jeer the President, and you are left to cheer or jeer the courts in the inevitable litigation. But that is not what Congress was meant to do.

The good news is that there is a solution to restore a proper balance of power over national emergencies. I am going to let my colleagues on the panel speak about the existing powers and the solutions to fix it.

However, the bipartisan votes against emergencies have been matched by a bipartisan desire to fix the system. Frankly, it has been inspiring to see Members of Congress work together in a time of high-partisan tension to show real agency to restore the power to Congress.

My written testimony provides greater details on all of these questions and recent legislative reform efforts. Thank you for your time, and I look forward to questions.

[Mr. Dayton's prepared statement follows:]

**Prepared Statement of Soren Dayton, Director of Governance,
Niskanen Center**

Thank you Chairman Perry and Ranking Member Titus 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. 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 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.

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.

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 emer-

¹ 462 U.S. 919 (1983).

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>.

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).

agency 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 a resolution 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 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.

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 in two ways: it has started to exercise Congressional review of national emergencies and worked towards a bipartisan consensus for reforms.

CONGRESS HAS STARTED TO REVIEW EMERGENCIES

The National Emergencies Act imagined that Congress would meet every six months to review existing emergencies and terminate those that were no longer appropriate.⁸ Prior to 2019, Congress had not actually ever voted on a resolution to terminate a national emergency.

Now it has been used in two cases, generating bipartisan support to terminate emergencies, namely the 2019 emergency declaration at the southern border and the 2020 COVID emergency. These two emergencies allow you to see how the system was intended to work, and how it broke down after *Chadha*.

⁶Brendan 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).

⁸National Emergencies Act, 50 U.S.C. § 1622(b).

President Trump declared a national emergency with Proclamation 9844⁹ on February 15, 2019 with respect to the southern border. There were two resolutions in the 116th Congress that reached President Trump. Both were vetoed, and the vetoes were sustained:

- H.J.Res.46, which passed the House 248–181, the Senate 59–41, and the vote to override the veto failed in the House 245–182.
- S.J.Res.54, which passed the Senate 54–41, the House 236–174, and the vote to override the veto failed 54–41.

Note that prior to *Chadha*, there would have been no veto, and the emergency would have been terminated on March 14, 2019 when the Senate passed H.J.Res.46. President Biden terminated the emergency on his first day in office.¹⁰

President Trump also declared a national emergency with Proclamation 9994¹¹ on March 13, 2020 on with respect to COVID. It was renewed by President Biden on February 24, 2021,¹² on February 18, 2022,¹³ and February 10, 2023.¹⁴

There were two resolutions in the 117th Congress and one in the 118th Congress that received votes and that would terminate the COVID emergency:

- S.J.Res.38 (in the 117th Congress), which passed the Senate 48–47 and did not receive a vote in the House.
- S.J.Res.63, which passed the Senate 61–37 and did not receive a vote in the House.
- H.J.Res.7 (in the 118th Congress), which passed the House 229–197, the Senate 68–23, and was signed by President Biden on April 10, 2023.

The COVID emergency is the first national emergency since the NEA was passed in 1976 that was terminated because of Congressional action. Even then, it required the assent of the President to accomplish that termination.

The original NEA would not have required that. Fortunately, there are ideas for reform that would return power to Congress and provide a check on presidential power.

REFORMS TO THE NATIONAL EMERGENCY STRUCTURE AND BEYOND

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.”¹⁵

Sen. Biden actually proposed a reform that sunset certain authorities in S.2384, the Arms Export Reform Act of 1986.¹⁶ 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.¹⁷ 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 de-

⁹Declaring a National Emergency Concerning the Southern Border of the United States. 84 Fed. Reg. 4949 (Feb. 20, 2019). <https://tinyurl.com/56h8w5nu>.

¹⁰Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction. 86 Fed. Reg. 7225 (Jan. 27, 2021). <https://tinyurl.com/bdf5yfva>.

¹¹Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak. 85 Fed. Reg. 15337 (Mar. 18, 2020). <https://tinyurl.com/3pj39tev>.

¹²Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic. 86 Fed. Reg. 11599 (Feb. 26, 2021). <https://tinyurl.com/y2wz3uvz>.

¹³Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic. 87 Fed. Reg. 10289 (Feb. 23, 2022). <https://tinyurl.com/3b47549w>.

¹⁴Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic. 88 Fed. Reg. 9385 (Feb. 14, 2023). <https://tinyurl.com/4t6sen93>.

¹⁵Sen. Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 Syracuse L. Rev. 685, 690–91 (1984), <https://tinyurl.com/2p879wj2>.

¹⁶Arms Export Reform Act of 1986, S. 2834, 99th Cong. (1986), <https://tinyurl.com/4xbnb7py>.

¹⁷Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785, 793 (1984), <https://tinyurl.com/2p93vdva>.

tailed procedures for the legislative and executive branches around war powers.¹⁸ 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 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, a House Judiciary Subcommittee held a hearing on this subject and showed the urgent need for reforms.¹⁹
- 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),²⁰ 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.²¹ 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.²²
- In early 2020, House and Senate Democratic members of the Budget and Appropriations Committees introduced the Congressional Power of the Purse Act (CPPA).²³ This legislation included the NEA reforms that had been approved

¹⁸ John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1993).

¹⁹ *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>.

²⁰ Guarding Cong. Authority Act, H.R. 1410, 116th Cong. (2019), <https://tinyurl.com/2p8aw3md>.

²¹ S. Rep. No. 116–159, at 5–6 (2019), <https://tinyurl.com/2ec9fbcb>.

²² Press Release, Sen. Mike Lee, Bipartisan Letter Urges Leadership to Have Full Senate Consider ARTICLE ONE Act (Oct. 18, 2019), <https://tinyurl.com/ye2a4esn>.

²³ 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

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.²⁴)

- 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.²⁵ 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)²⁶ 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).²⁷
- The Protecting Our Democracy Act was re-introduced in October 2021²⁸ 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.²⁹
- In 2022, a House Judiciary Subcommittee held another hearing.³⁰

It's clear that there is a strong bipartisan consensus on this important issue. Thank you Chairman Perry and Ranking Member Titus 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. PERRY. The Chair thanks Mr. Dayton.

The Chair now recognizes Mr. Thallam for 5 minutes for your testimony.

TESTIMONY OF SATYA THALLAM, POLICY ADVISOR, ARNOLD & PORTER

Mr. THALLAM. Chairman Perry, Ranking Member Titus, members of the committee, thank you so much for inviting me here.

My name is Satya Thallam. I am currently a policy advisor at the law firm of Arnold & Porter and a senior fellow with the Foundation for American Innovation. I should note that I am here representing my own views and not those of any employer or client.

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.”).

²⁴ Protecting Our Democracy Act, H.R. 8363, 116th Cong., tit. V (2019), <https://tinyurl.com/ykvr58f>.

²⁵ 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>.

²⁶ 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”).

²⁷ 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>.

²⁸ 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”).

²⁹ H.Amdt. 146, subtitle c to the Protecting Our Democracy Act, H.R.5314, 117th Cong. (2021), <https://tinyurl.com/3cmrffbd>.

³⁰ *Examining Potential Reforms of Emergency Powers: Hearing Before the Subcomm. on the Const., Civ. Rts., and Civ. Liberties of the H. Comm. on the Judiciary*, 117th Cong. (2022), <https://tinyurl.com/muz4s3y9>.

I will forgo restating much of what is in my written testimony and what has and will be said by my esteemed copanelists and just emphasize some remarks on a couple of points.

First, the National Emergencies Act basically itself is a fairly thoughtful solution contemplated to resolve a problem of Congress' own making. Like many things in both executive and congressional practice, individual, sometimes one-time, circumstances prompted one-time responses. But over time, those policy responses build up without any systematic reconsideration of their total effect.

Indeed, powers meant to be exercised only in the case of an emergency have been observed since before the country's founding. Indeed, Hamilton in "The Federalist Papers" speaks of powers needed to address, quote, "national exigencies." Of course, the word "emergency" does not appear in the Constitution, and yet Congress, as the sole lawmaking branch, has deemed it necessary to grant emergency powers across hundreds of duly enacted statutes going back decades.

The conceit being that the executive, an execution of the law in the public interest, will need to respond to uniquely emergency situations, though that delegation should be cabined by congressional say.

So, I would note, although the NEA is badly in need of an update owing to the unforeseen judicial decision, its basic underlying structure is sound, and it is appropriate for Congress to reexamine it to better assert its Article I prerogative.

Second, a conceptual note. And if you will bear with me, a kind of extended and tortured metaphor. But think of the National Emergencies Act not as the direct grant of the emergency power itself, but as a key which unlocks the vault in which is enclosed the actual instruments of emergency response. That is, Congress, when it authorizes through other statutes emergency powers, adds to the tools in that vault, and by declaring an emergency, the President is then able to access these powers.

The problem, then, is that there is no timer on this vault, and there is no plausible way to take back the key.

My recommendation for this committee and your colleagues is to consider how to reestablish workable limits on both the duration and scope of declared emergencies.

Another central conceit. Emergencies are, by definition, unpredictable. But they should also be, by definition, time-limited and fairly self-evident. Therefore, Congress does not need to run down the impossible task of proscribing every possible emergency, but rather, ensure it has the means to have its say, with respect to emergency declarations and the intended emergency powers, based on those generalized aspects.

Finally, although I don't see it as my role here today to endorse or discourage any specific proposal that may be pending, I will leave you with this: In my time at a Senate committee leading the effort to pass a particular proposal that was on the table at the time, a proposal that passed out of committee nearly unanimously, Democrats and Republicans on that committee were actually motivated by different emergency powers and their use and found different emergency uses distasteful, but they came together to support a single bill which addressed them all. That is as it should be.

And the sweet spot for any reform is one that is, on its face, policy-neutral and designed to service only the interests of Congress' lawmaking role vis-a-vis the President rather than any particular political agenda.

Thank you for your time, and I look forward to your questions.
[Mr. Thallam's prepared statement follows:]

Prepared Statement of Satya Thallam,[†] Policy Advisor, Arnold & Porter

INTRODUCTION

Chairman Perry, Ranking Member Titus, and members of the committee, thank you for the opportunity to discuss the issue of national emergencies and the National Emergencies Act.¹ In this testimony, I hope to briefly cover three topics:

- The basic structure of the National Emergencies Act.
- The origins of the law.
- Some thoughts on renewed interest in the subject.

Let me discuss each of these briefly in greater detail.

THE CONCEPTUAL STRUCTURE

*This dangerous state of affairs is a direct result of Congress's failure to establish effective means for the handling of emergencies.... Congress, through its own actions, has transferred awesome magnitudes of power to the Executive without ever examining the cumulative effect of that delegation of responsibility.*²

Though legislative authority is solely granted to Congress in Article I of the Constitution, from the very founding of the Republic itself, the consideration and use of emergency authorities which occupy a somewhat liminal policymaking space were taken as granted.³ Although early exercises of emergency authority did not begin to take a more formal shape until the 20th century, the existence of circumstances that "have not attained enough of stability or recurrency to admit of their being dealt with according to rule"⁴ was generally accepted as meriting exercise of extraordinary authorities when such circumstances presented a significant threat to the republic—when "the existence of conditions [present] danger to life or well-being beyond that which is accepted as normal."⁵

The fundamental problem is that emergencies are, by their nature, impossible to define *ex ante* with any precision or temporal certainty. Therefore Congress is faced with the impossible task of delineating suitable responses to exigent and often unforeseeable circumstances to which it can delegate effective but limited powers to the Executive Branch. Emergencies can broadly be thought of as a "I know it when I see it," but not before, category of events.

Nonetheless, over time, Congress has attempted to anticipate categories of emergencies and grant specific authorities therein. For example, during a time of war, a pandemic or outbreak, or a natural disaster, the President has been granted certain powers which they otherwise are not entitled in order to respond specifically to that type of emergency. The valid exercise of these powers are laid out in specific statutes, often in response to a recent emergency. However Congress has only infrequently at best considered these statutes holistically—a particular committee or member of Congress may pursue passage of a statute in the narrow area in which they have jurisdiction or particular interest.

[†]The views expressed here are my own and not those of Arnold & Porter Kaye Scholer LLP.
¹National Emergencies Act, 50 U.S.C. § 1601–1651 (1976).

²Patrick A. Thronson, *Note: Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. Mich. J. L. Reform 745 (Winter 2013) (quoting S. Rep. No. 94–922, at 1 (1974)).

³See J. Reuben Clark Jr., comp., *Emergency Legislation Passed Prior to December 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare, Presidential Proclamations and Executive Orders Thereunder, to and Including January 31, 1918, to Which Is Added a Reprint of Analogous Legislation Since 1775* (Washington: Government Publishing Office [GPO], 1918), pp. 201–228.

⁴Edward S. Corwin, *The President: Office and Powers, 1787–1957*, p. 3.

⁵U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, hearings, 93rd Cong., 1st sess., April 11–12, 1973 (Washington: GPO, 1973), p. 279.

The National Emergencies Act (NEA) was an attempt to overlay a workable structure which both acknowledged the often *sui generis* and undefinable nature of emergencies to which Congress at various points has seen fit to empower the President to respond, but cabin their use through a mechanism of control. Conceptually, think of the various individual “statutory powers that may become available to the president”⁶ in a national emergency (nearly 150 of them)⁷ as a set of tools contained in a vault. Prior to the National Emergencies Act, the vault door remained unlocked and so the President could access it at will. After the Act, the door was locked, and though the President had access to the key, Congress had a mechanism to easily take the key away and the door was subject to a timer. The NEA is not *per se* the grant of authority, but the key which unlocks those authorities. The NEA was an attempt to regulate use of the key, but largely did not address which authorities in the emergency vault were appropriate or not.

This approach was a reasonable compromise of the inherently unpredictable nature of emergencies, the frequent need for the President to act quickly, but ensure Congress as the sole lawmaking branch of government exercised appropriate control, and also ensured emergencies do not become “never ending” by default. Unfortunately a Supreme Court case several years after passage rendered the NEA’s disapproval mechanism unconstitutional, which required Congress undertake the same procedure as an entirely new statute in order to terminate an emergency, effectively making the NEA’s mechanism moot.⁸

THE NEA’S ORIGIN

It is worth considering how the National Emergency Act came to be. The special bipartisan committee which ended up proposing the idea started with much more modest intentions. The 1972 committee, which “was the only congressional committee of its time to have membership comprised of an equal number of Republicans and Democrats,”⁹ was intended only to “assess the consequences of terminating” a specific emergency, that which was “initially declared by President Truman on the eve of the Korean War in 1950.”¹⁰

*During the course of its work, the Special Committee realized the breadth of the emergency authorities that Congress had ceded to the President: “The President has had extraordinary powers—powers to seize property and commodities, seize control of transportation and communications, organize and control the means of production, assign military forces abroad, and restrict travel.”*¹¹

Having identified 470 duly enacted statutory provisions granting emergency authorities, it directly pointed the finger back at itself as having created this “dangerous state of affairs,” failing to have “establish[ed] effective means for the handling of emergencies” and having “transferred awesome magnitudes of power to the Executive without ever examining the cumulative effect of that delegation of responsibility.”¹²

Among other things, the NEA established “finely wrought procedures designed to ensure prompt and effective congressional oversight of emergency declarations.”¹³ But as discussed earlier, a court case made those procedures in the end subject to Presidential veto which made terminating emergency declarations subject only to the Executive’s wishes in the absence of veto-proof majorities in both houses.

The NEA was a reasonable and at the time effective meta-structure for the dealing with national emergencies, cabining Presidential exercise of powers, and reclaiming Congress’s rightful policymaking prerogative, that was unfortunately undone through judicial review. With that in mind, I would recommend Congress work to improve (and Constitutionally conform) the basic structure, rather than begin anew with an entirely *de novo* mechanism.

⁶See Brennan Ctr. For Justice, A Guide to Emergency Powers and Their Use (Feb. 13, 2019), https://www.brennancenter.org/sites/default/files/legislation/AGuideToEmergencyPowersAndTheirUse_2.13.19.pdf.

⁷*Ibid.*

⁸*Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

⁹Patrick A. Thronson, *Note: Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. Mich. J.L. Reform 737, 744 (Winter 2013).

¹⁰*Ibid.*

¹¹S. Rep. 116–159, at 2 (2019) (quoting Patrick A. Thronson, *Note: Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. Mich. J.L. Reform 737, 744 (Winter 2013) and S. Rep. No. 94–922, at 3 (1974)).

¹²S. Rep. No. 94–922, at 1 (1974).

¹³*Supra*, note 11, at 3.

RECENT INTEREST

While I consider it beyond my role in this hearing to endorse or disapprove of any specific NEA reform proposals which may be under consideration by the committee, renewed interest in the subject merits some discussion. For obvious reasons, Congress has taken an interest in the workings of national emergency declarations, emergency authorities, and Congress's own prerogatives thereon.

Though the public controversies around recent emergencies tend to focus on the perceived (il)legitimacy around the declaration itself, as alluded to earlier, the declaration is only the means to exercise the policies which affect individuals. The declaration in a way is a statement about the state of the world, and what follows are the actions which are either appropriate or not. That said, because of the unforeseeable nature of emergencies, Congress should focus in the first instance on the declaration of an emergency and how to (1) create a presumption of limitation, premised on the idea that emergencies are by definition time-limited in nature, and (2) reassert Congress's active role in determining whether an emergency merits the exercise of extraordinary powers to which it is claiming necessity.

One recent proposal seeks to address these issues by establishing a default time window after which an emergency declaration is presumed terminated. Further, it reverses the extant NEA resolution mechanism by turning it into an approval resolution, whereby Congress may choose to extend any emergency through streamlined floor procedures and simple majorities. In this way Congress can cabin emergency declarations in a feasible way while permitting immediate but not unlimited executive action.

One might characterize such an approach as *only* limiting the President, but it is more appropriately thought of as also providing political legitimacy and granting an Article I imprimatur to an emergency response. Emergencies should be fairly self-evident and as such be able to garner consent from the people's representatives. Never ending emergencies threaten policy certainty and over time, and policies undertaken pursuant to an emergency can become embedded into the policy firmament, in the end making it more difficult to end it. This should not be how policy decisions are made.

In my own experience working on NEA reforms as a congressional committee staffer, I witnessed bipartisan agreement on these points. Though Democrats and Republicans were ultimately motivated by different specific emergencies they found to be illegitimate, they found common cause in upholding Congress's constitutional responsibility, no matter who occupies the White House. A policy-neutral mechanism, like that established in the NEA, though in need of updating, is the right remedy to decades of disuse of Congress's Article I policy muscles.

I commend the committee for its interest in this important subject. I thank you and I look forward to your questions.

Mr. PERRY. The Chair thanks the gentleman. Next, Ms. Goitein, you are recognized for 5 minutes for your testimony.

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

Ms. GOITEIN. Chairman Perry, Ranking Member Titus, and members of the subcommittee, thank you for this opportunity to testify.

Mr. Dayton explained how Congress lost its power under the National Emergencies Act, and Mr. Thallam previewed how Congress might be able to regain that power. I would like to elaborate on how emergency powers are supposed to work, why this system is not working, and what the stakes are if Congress does not act.

Emergencies, by definition, are sudden, unexpected events that require immediate action. Because they are unforeseeable, Congress cannot address them ahead of time through specific legislation tailored to the circumstances, nor can Congress act with the necessary speed and flexibility to address them once they actually occur.

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 for Congress to respond through the normal legislative process.

For the past century, we have had a system in which the President can declare a national emergency, and that declaration triggers special powers contained in a whole range of statutes, all of which say something like, in a national emergency, the President can do “X.”

For several decades, though, there was no overarching statute governing the system; there was very little transparency about how emergency powers were used; 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 to terminate emergency declarations using a legislative veto, a law that can pass without the President’s signature; and third, it required Congress, every 6 months while an emergency was in effect, to meet and consider a vote on termination.

As Mr. Thallam and Mr. Dayton made very clear, the NEA is not working as Congress intended. Expiration of emergency declarations after a year, which was supposed to be the norm, is the rare exception. There are 41 emergency declarations in effect today, most of which have been in place for over a decade.

In 1983, the Supreme Court held that legislative vetoes are unconstitutional, so now, Congress usually needs to have a supermajority in order to terminate an emergency declaration. And for more than 40 years, Congress literally ignored the requirement to periodically review existing emergencies. This state of affairs is dangerous.

In 2018, the Brennan Center cataloged 123 statutory powers that become available to a President who declares a national emergency. Today, that number has risen to 135. Some of these powers carry enormous potential for abuse.

To give you just one example, there is a law that allows the President to take over or shut down wire or communications facilities. This provision was last invoked during World War II when wire communications meant telephone calls and telegrams, and most American households didn’t even have a telephone. Today, it could arguably be used to assert control over U.S.-based internet traffic.

It is not hard to see how laws like that could be abused to consolidate power or undermine democracy. But there is a softer form of abuse, and that is the use of emergency powers to get around Congress when Congress doesn’t support the President’s policy goals.

In recent years, we have seen that type of misuse by Presidents of both parties. While that may not sound as alarming as shutting down communications facilities, it undermines the constitutional separation of powers, and in the long run, the separation of powers is perhaps the most critical protection for democracy that we have.

Fortunately, there is a legislative solution that has broad support on both sides of the aisle. The central aspect, the central piece of this solution is a requirement that Presidential emergency declarations would terminate after 30 days unless approved by Congress using expedited procedures that would allow any Member to force a vote and would prohibit filibustering in the Senate. If approved, a declaration could last up to a year, but if the President wanted to renew it, he would, again, have to get congressional approval.

This commonsense solution gives the President flexibility when it is most needed in the immediate aftermath of a crisis, but allows Congress to step in and act as a backstop against abuse or overreach.

Thank you very much, and I look forward to your questions.
[Ms. Goitein's prepared statement follows:]

Prepared Statement of Elizabeth Goitein, Senior Director, Liberty and National Security Program, Brennan Center for Justice at New York University School of Law

INTRODUCTION

Chairman Perry, Ranking Member Titus, 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 online³ 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

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, October 31, 2018, <https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism>; Faiza Patel and Meghan Koushik, *Countering Violent Extremism*, Brennan Center for Justice, March 16, 2017, <https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism>; Elizabeth Goitein, *The New Era of Secret Law*, Brennan Center for Justice, October 18, 2016, <https://www.brennancenter.org/our-work/research-reports/new-era-secret-law>; Michael German, *Strengthening Intelligence Oversight*, Brennan Center for Justice, January 27, 2015, <https://www.brennancenter.org/our-work/policy-solutions/strengthening-intelligence-oversight>; Elizabeth Goitein and Faiza Patel, *What Went Wrong with the FISA Court*, Brennan Center for Justice, March 18, 2015, <https://www.brennancenter.org/our-work/research-reports/what-went-wrong-fisa-court>.

³ "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated February 8, 2023, <https://www.brennancenter.org/analysis/emergency-powers>.

⁴ "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 11, 2023, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

⁵ 50 U.S.C. §§ 1701 *et seq.*

into IEEPA’s history and operation—in our June 2021 report, *Checking the President’s Sanctions Powers*.⁶

At the same time, we embarked on a set of research projects to examine the authorities governing domestic deployment of the military in emergency situations. This work led to the publication in 2020 of a report on martial law—i.e., the displacement of civilian government by military authority—in which we concluded that current law would not authorize the imposition of martial law by the president.⁷ In 2022, we followed up with a legislative proposal to reform the Insurrection Act,⁸ a law that gives the president nearly unchecked discretion to deploy federal troops to suppress civil unrest or to enforce the law when it is being obstructed.

We also expanded our research focus to encompass non-statutory sources of emergency authority, examining the little-known phenomenon of “presidential emergency action documents,” or PEADs.⁹ 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 information, however, gives ample reason for concern about these shadowy claims to emergency power.¹⁰

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. They could be misused to undermine our democracy—and they already have been exploited, by presidents of both parties, to implement long-term policy goals in the face of congressional opposition or inaction. 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 unless approved by Congress, and to require congressional approval for any subsequent renewals of the declaration. Lawmakers have introduced several bills 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 law’s 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.

In addition, Congress should reform the Insurrection Act in a manner that preserves the president’s ability to deploy federal forces in crisis situations while establishing safeguards to prevent abusive deployments. The Brennan Center’s proposal would more clearly specify the circumstances under which troops may be deployed and the actions authorized during such deployment. It would also establish mechanisms for both congressional approval and judicial review, ensuring that the other branches of government are able to serve their constitutional role as a check on executive power.

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 congressional oversight committees.

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

⁷Joseph Nunn, *Martial Law in the United States: Its Meaning, Its History, and Why the President Can’t Declare It*, Brennan Center for Justice, August 20, 2020, <https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant>.

⁸Elizabeth Goitein and Joseph Nunn, *Statement to the January 6th Committee on Reforming the Insurrection Act*, Brennan Center for Justice, September 20, 2022, <https://www.brennancenter.org/our-work/research-reports/statement-january-6th-committee-reforming-insurrection-act>.

⁹See 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>.

¹⁰See “Presidential Emergency Action Documents,” Brennan Center for Justice, last updated May 26, 2022, <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents>.

I. EMERGENCY POWERS IN THE UNITED STATES: 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: Because emergencies are, by definition, unforeseeable and unforeseen, existing laws might not be sufficient to respond to them, 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.¹¹

Unlike the modern constitutions of most countries,¹² 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,”¹³ and Congress has the power “to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions.”¹⁴

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,¹⁵ 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,”¹⁶ 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.”¹⁷

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.¹⁸ 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 Act¹⁹ and the Stafford Act.²⁰ 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 emergency, which then unlocks more than 130 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

¹¹ 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.

¹² A review of current constitutions reveals that at least 172 countries’ constitutions have provisions for emergency rule. See Constitute, s.v. “emergency,” accessed May 18, 2023, https://www.constituteproject.org/constitutions?lang=en&q=emergency&status=in_force&status=is_draft.

¹³ U.S. Const. art. 1, § 9, cl. 2.

¹⁴ U.S. Const. art. 1, § 8, cl. 15.

¹⁵ See Louis Fisher, *Presidential War Power*, 2nd rev. ed. (Lawrence: University Press of Kansas, 2004), 8–10.

¹⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring) (emphasis in original).

¹⁸ See Harold C. Relyea, Congressional Research Service, *National Emergency Powers*, report no. 98–505 (2007), 5, <https://fas.org/sgp/crs/natsec/98-505.pdf>.

¹⁹ Pub. L. 78–410 (1944) (codified at 42 U.S.C. ch. 6A §§ 201 *et seq.*).

²⁰ Pub. L. 100–707 (1988) (codified at 42 U.S.C. ch. 68 §§ 5121 *et seq.*).

type of “pseudo-emergency power” is the Insurrection Act,²¹ 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.²² Similarly, multiple statutes allow the president to take certain actions—or set aside otherwise applicable limits on presidential action—when necessary for “national security.”²³

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. 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.²⁴

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.²⁵ 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 role as a coequal branch of government and a check on executive authority.²⁶ 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.”²⁷

The committee’s work culminated in the introduction and passage of the National Emergencies Act of 1976.²⁸ 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

²¹ 10 U.S.C. §251–55 (2018). 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>.

²² 10 U.S.C. §253 (2018).

²³ 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.

²⁴ See, e.g., Constitution of the Republic of Ecuador, 2015, ch. 3, § 1, art. 148.

²⁵ See Relyea, *National Emergency Powers*, 7.

²⁶ See generally Thomas E. Cronin, “A Resurgent Congress and the Imperial Presidency,” *Political Science Quarterly* 95, no. 2 (1980): 209–37.

²⁷ 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 20 (1976)* (hereinafter “Spec. Comm. On National Emergencies Source Book”).

²⁸ National Emergencies Act, Pub. L. No. 94–412, 90 Stat. 1255 (1976).

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.²⁹

The law employed several mechanisms to this end. It required the president to publish declarations of national emergency in the Federal Register;³⁰ to specify the powers he intended to invoke;³¹ and to report to Congress every six months on expenditures related to emergency powers.³² It provided that states of emergency would terminate after a year unless renewed by the president.³³ 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 president’s signature),³⁴ 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.³⁵

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.”³⁶ 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.”³⁷

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.³⁸

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.

²⁹ Spec. Comm. On National Emergencies Source Book, 50.

³⁰ National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621).

³¹ *Id.* § 301 (codified at 50 U.S.C. § 1631).

³² *Id.* § 401(c) (codified at 50 U.S.C. § 1641(c)).

³³ *Id.* § 202(d) (codified at 50 U.S.C. § 1622(d)).

³⁴ *Id.* § 202 (codified as amended at 50 U.S.C. § 1622).

³⁵ *Id.* § 202(b) (codified at 50 U.S.C. § 1622(b)).

³⁶ S. 977, 94th Cong. § 201(a) (1975).

³⁷ Spec. Comm. On National Emergencies Source Book, 96.

³⁸ S. Comm. On Gov. Operations, *Report to Accompany H.R. 3884*, S. Rep. No. 94-1168, 3 (1976) (reprinted in Spec. Comm. On National Emergencies Source Book, 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. It appears, however, that the executive branch stopped submitting the required expenditure reports for emergency declarations (other than those that rely solely on IEEPA) twenty years ago.³⁹ And other key provisions of the law 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.⁴⁰

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.⁴¹ Congress’s solution was to substitute a joint resolution as the mechanism for terminating emergencies.⁴² 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 45 years the law has been in effect, which means Congress should have met 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.⁴³

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 declaration.⁴⁴ President Trump vetoed the resolution both times,⁴⁵ however, and Congress was unable to muster the two-thirds majority necessary to override the veto.⁴⁶ In March of this year, Congress voted to terminate the national emergency declaration regarding the COVID-19 pandemic.⁴⁷ President Biden, who had already pledged to end the declaration in May, signed the bill into law;⁴⁸ had he issued a veto, it is unlikely the House would have voted to override it.⁴⁹

³⁹ See Gregory Korte, “A permanent emergency: Trump becomes third president to renew extraordinary post-9/11 powers,” *USA Today*, September 14, 2017, <https://www.usatoday.com/story/news/politics/2017/09/14/permanent-emergency-trump-becomes-third-president-renew-extraordinary-post-9-11-powers/661966001/>.

⁴⁰ See “Declared National Emergencies Under the National Emergencies Act,” Brennan Center for Justice, last updated May 11, 2023, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

⁴¹ See *INS v. Chadha*, 462 U.S. 919, 954–55 (1983).

⁴² See 50 U.S.C. § 1622(a)(1).

⁴³ 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>.

⁴⁴ H.J. Res. 46, 116th Cong. (Mar. 2019); S.J. Res. 54, 116th Cong. (Sep. 2019).

⁴⁵ 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/>.

⁴⁶ 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).

⁴⁷ H.J. Res. 7, 118th Cong. (2023).

⁴⁸ White House, “Bill Signed: H.J. Res. 7,” April 10, 2023, <https://www.whitehouse.gov/briefing-room/legislation/2023/04/10/bill-signed-h-j-res-7/>.

⁴⁹ The vote in the House was 220–210, which falls well short of the two-thirds majority necessary to override a veto. See Ben Leonard, “House votes to end Covid public health emergency,” *Politico*, January 31, 2023, <https://www.politico.com/news/2023/01/31/house-end-covid-public-health-emergency-00080507>.

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 76 states of national emergency have been declared in a 45-year period, 41 of which are in effect today. Sixty-nine 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.⁵⁰ 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,⁵¹ 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.⁵² 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."⁵³ 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 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."⁵⁴ 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.⁵⁵

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,"⁵⁶ 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."⁵⁷ State Department spokesperson Jen Psaki echoed his remarks: "This is how we describe the

⁵⁰The numbers in this paragraph are derived from review of the emergency proclamations compiled by the Brennan Center and listed at "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 11, 2023, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

⁵¹Trading 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)).

⁵²See Laura K. Donohue, "Constitutional and Legal Challenges to the Anti-Terrorist Financing Regime," *Wake Forest Law Review* 43 (2008): 643, 647–48.

⁵³International Emergency Economic Powers Act, Pub. L. 95–223, title II, § 202, 91 Stat. 1626 (1977) (codified at 50 U.S.C. 1701(b)).

⁵⁴See Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven: Yale University Press, 1990), 47.

⁵⁵See "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 11, 2023, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

⁵⁶Exec. Order No. 13692, 80 Fed. Reg. 127467 (Mar. 8, 2015).

⁵⁷Gregory 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/>.

process of naming sanctions, and there are 20 to 30 other sanctions programs we have.”⁵⁸

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.⁵⁹ (That is, in fact, exactly what happened in 1983.⁶⁰)

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:

- 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)⁶¹—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—and ultimately forgive—student loans to mitigate 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).

This is not to say that no misuses have occurred. Setting aside the border wall declaration and the use of emergency powers to forgive student loan debt, which are discussed in Part IV of this testimony, it is questionable whether Iraq’s invasion of Kuwait constituted an emergency for the United States that justified invoking emer-

⁵⁸ Korte, “White House: States of emergency are just formalities.”

⁵⁹ 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.

⁶⁰ Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983).

⁶¹ 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.

gency 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.⁶²

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.⁶³ In 2017, President Trump relied on the 9/11 declaration to invoke emergency powers to fill a chronic shortage in Air Force pilots.⁶⁴

Still, what is most notable about the record of presidential use of emergency powers (outside the unique context of IEEPA⁶⁵) 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 for the most part have not exploited that license. The Brennan Center’s research indicates that nearly 70% of the powers available to the president when he invokes a national emergency have never been invoked.⁶⁶

IV. RECENT MISUSES OF EMERGENCY POWERS

Despite the norm of presidential reticence when it comes to statutory emergency powers, recent years have seen misuses by presidents of both parties. In particular, and as discussed below, President Trump abused the NEA when he declared a national emergency to secure funding for the border wall, while President Biden improperly deployed emergency powers to implement student loan debt forgiveness.

A. *The Border Wall “Emergency”*

President Trump’s emergency declaration in 2019 was an unprecedented abuse of emergency powers for at least two reasons.

First, the conditions at the border in February 2019 did not meet any common-sense definition of an emergency. Although Congress did not include a definition of “national emergency” in the National Emergencies Act, 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 imme-

⁶² See 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, 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, 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 . . .”).

⁶³ 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).

⁶⁴ 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.cnn.com/2017/10/21/trump-executive-order-lets-air-force-recall-up-to-1000-retired-pilots.html>.

⁶⁵ Even with respect to IEEPA, presidents have shown some restraint. As discussed below (*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, see Boyle, *Checking the President’s Sanctions Powers*, 12–14, IEEPA generally has been used to target foreign actors, including foreign governments, officials, factions, and suspected narcotics traffickers and terrorist groups.

⁶⁶ 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 February 8, 2023, <https://www.brennancenter.org/analysis/emergency-powers>.

diate action”⁶⁷; the Oxford-English dictionary similarly defines it as “[a] serious, unexpected, and often dangerous situation requiring immediate action.”⁶⁸

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 unlawful 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 preceding several years, in 2018.⁶⁹ 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.⁷⁰ 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.

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 2019.⁷¹ 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.”⁷²

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.⁷³ 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.⁷⁴

⁶⁷ Merriam-Webster, s.v. “emergency,” accessed May 18, 2023, <https://www.merriam-webster.com/dictionary/emergency?src=search-dict-hed>.

⁶⁸ *Oxford English Dictionary*, s.v. “emergency,” accessed May 18, 2023, <https://en.oxforddictionaries.com/definition/emergency>.

⁶⁹ 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 18, 2023, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf>.

⁷⁰ See Proclamation No. 9844, 84 Fed. Reg. 4949 (February 15, 2019).

⁷¹ 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>.

⁷² 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/>.

⁷³ 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).

⁷⁴ 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->

Although President Trump was the first president to declare a non-existent emergency to evade Congress's express will,⁷⁵ 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.⁷⁶

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 Congress *does* have 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 control. Relying on emergency powers to move forward in such a case is like a doctor relying on advance medical directive to withhold

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/>.

⁷⁵ 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.

⁷⁶ 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, Congressional Research Service, *Military Construction Funding in the Event of a National Emergency* (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.

life-sustaining treatment when the patient is conscious and clearly asking to be saved.⁷⁷

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.”⁷⁸ 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.⁷⁹ Judges who sided with the plaintiffs stayed their own rulings (or had their rulings stayed by appellate courts) pending appeal.⁸⁰ 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.⁸¹ And the Supreme Court vacated the rulings against the Trump administration after President Biden terminated the emergency declaration and stopped construction of the border wall.⁸²

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.⁸³ The resolution passed both chambers, with twelve Republican senators crossing party lines to vote for it.⁸⁴ President Trump vetoed the resolution, however, and Congress was unable to muster the two-thirds supermajority necessary to override his veto.⁸⁵ Six months later, the process repeated itself; a majority of Congress rejected the emergency declaration, yet it stayed in place.⁸⁶

B. Student Loan Debt Forgiveness

Although materially different from the border wall declaration, President Biden’s use of emergency powers to forgive student loan debt was also problematic. Aiming to “address the burden of growing college costs,” President Biden announced in August 2022 that each borrower with an income lower than \$125,000 would be eligible to receive up to \$20,000 in loan forgiveness.⁸⁷ The administration relied on the March 2020 COVID–19 emergency declaration, invoking a statute—the HEROES Act of 2003—that permits the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to” student financial aid programs “as the Secretary deems necessary” to mitigate the impacts of a national emergency.⁸⁸

Unlike immigration patterns at the southern border in 2019, there can be no question that the onset of the COVID–19 pandemic was a sudden, unforeseen event that justified a declaration of national emergency. President Biden did not issue a national emergency declaration where no emergency existed; indeed, the COVID–19 emergency declaration was issued by President Trump. The crushing burden of stu-

⁷⁷ See Elizabeth Goitein, “Trump Is Destroying His Own Case for a National Emergency,” *Atlantic*, January 28, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/trump-has-no-case-national-emergency/581356/>.

⁷⁸ U.S. Const. art. I, § 9, cl. 7.

⁷⁹ See, e.g., *U.S. House of Representatives v. Mnuchin*, 379 F.Supp. 3d 8 (D.D.C. 2019).

⁸⁰ 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).

⁸¹ See Pub. L. No. 116–6, div. D, § 739.

⁸² See Petitioners’ Motion to Vacate and Remand, *Biden v. Sierra Club*, S. Ct. No. 20–138 (2021), *granted*, 594 U.S. _____ (Jul. 2, 2021); Petition for a Writ of Certiorari, *Yellen v. House of Representatives*, S. Ct. No. 20–1738 (2021), *granted*, 595 U.S. _____ (Oct. 12, 2021) (vacating the lower court’s judgment and remanding with instructions to dismiss as moot).

⁸³ See *supra* note 44 and accompanying text.

⁸⁴ 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>.

⁸⁵ See *supra* notes 44–6.

⁸⁶ See *supra* notes 44–6.

⁸⁷ White House, “Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most,” August 24, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/>.

⁸⁸ 22 U.S.C. § 1098bb.

dent loan debt, however, has been a serious problem for years. Long before COVID-19 struck, Biden had spoken about this issue and his intent to find a solution. In 2015, he advocated for making public colleges free;⁸⁹ as a presidential candidate, he unveiled proposals to reform the byzantine system of student-loan repayment and to forgive \$10,000 in student loan debt for graduates who devoted five years to national or community service.⁹⁰

To be sure, the pandemic might well have made the problem of student loan debt abruptly and unexpectedly worse, creating a true emergency that required short-term adjustments in loan repayments. Both President Trump and President Biden had previously used the HEROES Act for that more limited purpose. President Trump first deployed the law to eliminate interest accrual and suspend repayments on student loans in March 2020.⁹¹ Congress ratified President Trump’s suspension of repayments in its flagship pandemic legislation,⁹² and both President Trump and President Biden later extended the moratorium.⁹³

At the time President Biden announced his plan to cancel student loan debt, however, the emergency declaration had been in place for nearly two and a half years. COVID was no longer a sudden and unexpected circumstance—indeed, there was every indication that it was a “new normal.” Moreover, in contrast to the previous moratoriums and postponements, the cancellation of loan balances represented a permanent solution, not a stopgap measure to address the immediate impact of the crisis.

As for Congress, lawmakers had ample time over those two and a half years to consider the interplay between the pandemic and student financial assistance—and they repeatedly did so. One outcome was a law that exempted discharges of student loan debt from federal income tax liability, suggesting a receptiveness to debt cancellation.⁹⁴ But when Congress directly considered whether to forgive student debt, it declined to take that step. Lawmakers weighed proposals to cancel \$10,000, \$25,000, or \$30,000 in debt for certain borrowers; only one of the bills made it out of committee, and none was enacted.⁹⁵

In short, student loan debt is a longstanding problem that Biden had pledged to tackle long before COVID, and his solution was a permanent measure enacted more than two years after the onset of the pandemic—and after Congress had declined to pass legislation implementing loan forgiveness. Against this backdrop, President Biden’s action looks less like a temporary exercise of power to address a sudden, fast-moving crisis and more like more like a workaround to implement a long-term policy that lacked the necessary support in Congress.

Like the border wall declaration, President Biden’s use of emergency powers generated several lawsuits. While these lawsuits appear to be headed for a more definitive resolution—two are currently pending before the Supreme Court⁹⁶—the outcome is unlikely to shed much light on the appropriate exercise of emergency authority. The main issues before the Court are whether the challengers have standing and whether the so-called “major questions doctrine” precludes the Biden administration’s interpretation of the HEROES Act—an issue not specific to emergency powers.⁹⁷

⁸⁹See Inside Higher Ed, “Biden Backs Free College,” October 21, 2015, <https://www.insidehighered.com/news/2015/10/22/biden-opting-out-2016-run-backs-four-years-free-public-college>.

⁹⁰See Bianca Quilantan, “How Biden would make community college free and fix student loans,” *Politico*, October 8, 2019, <https://www.politico.com/news/2019/10/08/joe-biden-2020-election-community-college-student-loans-plan-041634>.

⁹¹Federal Student Aid, *Fiscal Year 2020 Annual Report*, U.S. Department of Education, November 16, 2020, 38, <https://www2.ed.gov/about/reports/annual/2020report/fsa-report.pdf>

⁹²Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, § 3513 (2020).

⁹³See, e.g., Federal Student Aid Programs, 85 Fed. Reg. 79856 (Dec. 11, 2020); White House, “Statement by President Biden Extending the Pause on Student Loan Repayment Through August 31, 2022,” April 6, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/statement-by-president-biden-extending-the-pause-on-student-loan-repayment-through-august-31st-2022/>.

⁹⁴American Rescue Plan Act, Pub. L. 117–2, § 9675 (2021)

⁹⁵See Heroes Act, H.R. 6800, 116th Cong. (2020); Student Debt Emergency Relief Act, H.R. 6363, 116th Cong. (2020); Financial Protections and Assistance for America’s Consumers, States, Businesses, and Vulnerable Populations Act, H.R. 6321, 116th Cong. (2020); Emergency Relief for Student Borrowers Act, H.R. 6316, 116th Cong. (2020); Opportunities for Heroes Act, H.R. 6699, 116th Cong. (2020).

⁹⁶See *Biden v. Nebraska*, S. Ct. No. 22–506 (2023); *Department of Education v. Brown*, S. Ct. No. 22–535 (2023).

⁹⁷That said, if the Court were to apply the “major questions doctrine” in this case, it could have significant implications for emergency powers in general, which are often deliberately written in broad terms to grant presidents maximal discretion. Many of these laws would presumably fail to pass muster under the “major questions doctrine.” At the same time, given this

In the meantime, in March of this year, the COVID-19 declaration became the first national emergency declaration since the National Emergencies Act was passed to be terminated by Congress. Regardless of one's position on whether that particular declaration should have remained in place, it is encouraging to see Congress reasserting its powers under NEA—limited as they are—after decades of seeming apathy. However, the joint resolution that Congress passed likely would not have become law without President Biden's signature. President Biden had already pledged to rescind the declaration in May, so the vote was more of a symbolic move than an actual reining in of presidential authority.

V. HOW—AND WHY—CONGRESS MUST ACT

President Trump's border wall declaration created a worrisome 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. President Biden opened that door a bit wider through his own questionable use of emergency powers.

This is a dangerous state of affairs. The next time a president decides to declare an emergency for the sake of political convenience, he or she could invoke powers far more potent than the ones President Trump and President Biden invoked. The Brennan Center has catalogued 135 statutory provisions that become available to presidents when they declare a national emergency (up from 123 provisions when the Brennan Center first issued its report in 2018). Ninety-eight of these require nothing more than the president's signature. Twelve contain a *de minimis* restriction, such as a requirement that an agency head certify the necessity of the measure (something the president could simply order the agency head to do). Only twenty-five of these powers contain a more substantive restriction, such as a requirement that the emergency have certain specified effects.⁹⁸

While many of the authorities provided in these 135 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;⁹⁹ 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.¹⁰⁰ Other powers would allow the president or members of his administration to freeze Americans' assets and bank accounts (IEEPA),¹⁰¹ to exercise broad and unspecified powers over domestic transportation,¹⁰² to detail members of the U.S. armed forces to any country,¹⁰³ to prohibit or limit the export of any agricultural commodity¹⁰⁴—even to suspend the prohibition on government testing of chemical or biological agents on unwitting human subjects.¹⁰⁵

Indeed, emergency powers could be deployed to undermine democracy itself. As reported by various outlets in 2022, 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; to invoke the Insurrection Act; and to declare martial law.¹⁰⁶ For reasons the Brennan Center has laid out, none of

Court's extreme deference to the president on matters of national security, it is hard to imagine the Court striking down a president's exercise of emergency powers that expand military or law enforcement authority, no matter how broadly worded the underlying statute. The result could be a system in which emergency powers designed to address the social or economic effects of crises would be neutered while those designed to increase the government's coercive powers would retain their full force.

⁹⁸ See Goitein, "Trump's Hidden Powers," Brennan Center for Justice; "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated February 8, 2023, <https://www.brennancenter.org/analysis/emergency-powers>.

⁹⁹ See 47 U.S.C. § 606(c).

¹⁰⁰ See 47 U.S.C. § 606(d); see also Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *Atlantic*, January/February 2019, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

¹⁰¹ See 50 U.S.C. §§ 1701 *et seq.*

¹⁰² See 49 U.S.C. § 114(g).

¹⁰³ See 10 U.S.C. § 712(a)(3).

¹⁰⁴ See 7 U.S.C. § 5712(c).

¹⁰⁵ See 50 U.S.C. § 1515.

¹⁰⁶ 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://>

these suggestions would have provided a legal basis for overturning the election results.¹⁰⁷ 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 on its own. 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.¹⁰⁸

It is incumbent on Congress to prevent these types of abuse. 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,¹⁰⁹ is more consistent with the core purpose of emergency powers. It would give the president ready access to 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 emergencies¹¹⁰—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 2019.¹¹¹ 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.¹¹² 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 2021,¹¹³ and the Congressional Power of the Purse Act (CPPA)¹¹⁴—as well as

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>.

¹⁰⁷ 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>.

¹⁰⁸ See Elizabeth Goitein, “The Alarming Scope of the President’s Emergency Powers,” *Atlantic*, 46–47, January/February 2019, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

¹⁰⁹ 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.

¹¹⁰ 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.

¹¹¹ S. Rep. No. 116–159, 116th Cong. (Nov. 2019).

¹¹² See Office of Sen. Mike Lee, “Bipartisan Letter Urges Leadership to Have Full Senate Consider ARTICLE ONE Act,” October 18, 2019, <https://www.lee.senate.gov/2019/10/bipartisan-letter-urges-leadership-to-have-full-senate-consider-article-one-act>.

¹¹³ H.R. 5314, 117th Cong. (December 9, 2021); S. 2921, 117th Cong. (2021).

¹¹⁴ H.R. 6628, 116th Cong. (2020); S. 3889, 116th Cong. (2020).

a bipartisan bill to reform national security powers, titled the National Security Powers Act (NSPA) in the Senate¹¹⁵ and the National Security Reforms and Accountability Act (NSRAA) in the House.¹¹⁶ All told, 26 sitting Democratic senators and 15 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 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, and each would honor the original intent behind the National Emergencies Act by allowing Congress to serve as a meaningful check on the executive branch.

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 38 sanctions regimes that rely on IEEPA and that most lawmakers consider uncontroversial.¹¹⁷ 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.¹¹⁸ 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 Inter-

¹¹⁵S. 2391, 117th Cong. (2021).

¹¹⁶H.R. 5410, 117th Cong. (2021).

¹¹⁷See “Declared National Emergencies Under the National Emergencies Act,” Brennan Center for Justice, last updated May 11, 2023, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

¹¹⁸See 50 U.S.C. §§ 1701–02.

national Criminal Court staff in response to the Court's investigations of alleged war crimes committed by U.S. and allied personnel.¹¹⁹

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.¹²⁰

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.¹²¹ There is mounting evidence that U.S. sanctions have significantly exacerbated humanitarian crises in Venezuela,¹²² Afghanistan,¹²³ Iran,¹²⁴ and North Korea.¹²⁵

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.¹²⁶

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.¹²⁷

C. *Insurrection Act Reform*

One particularly dangerous statutory emergency authority falls outside the National Emergencies Act framework: the Insurrection Act. This law—in fact, an amal-

¹¹⁹ See Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

¹²⁰ See Boyle, *Checking the President's Sanctions Powers*, 12–14; Jake Tapper, "A Post-9/11 American Nightmare," *Salon*, September 5, 2002, <https://www.salon.com/2002/09/05/jama/>.

¹²¹ See Boyle, *Checking the President's Sanctions Powers*, 16.

¹²² See, e.g., Washington Office on Latin America, "New Report Documents How U.S. Sanctions Have Directly Aggravated Venezuela's Economic Crisis," October 29, 2020, <https://www.wola.org/2020/10/new-report-us-sanctions-aggravated-venezuelas-economic-crisis/>.

¹²³ 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>.

¹²⁴ 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/>.

¹²⁵ See, e.g., Jessica J. Lee, "It's Time to Reexamine US Sanctions on North Korea," *Diplomat*, March 9, 2021, <https://thediplomat.com/2021/03/its-time-to-reexamine-us-sanctions-on-north-korea/>.

¹²⁶ See Boyle, *Checking the President's Sanctions Powers*, 16–17.

¹²⁷ See Boyle, *Checking the President's Sanctions Powers*, 20–24.

gamation of laws passed between 1792 and 1874¹²⁸—authorizes the president to deploy the U.S. armed forces domestically and use them to quell civil unrest or enforce the law in a crisis. In this way, it operates as an exception to the Posse Comitatus Act,¹²⁹ the law that generally bars federal military personnel from participating in civilian law enforcement.¹³⁰

The use of the military as a domestic police force represents a sharp departure from core constitutional values. The framers understood that military interference in civilian affairs threatens democracy and individual liberty, and they were careful to subordinate the military to civilian authorities. But they also recognized that a true crisis might necessitate military intervention. They left it to Congress to strike a judicious balance between these competing considerations.¹³¹

The Insurrection Act fails utterly in this task. Its text is archaic, vague, and overbroad, granting the president almost limitless discretion to use troops for domestic law enforcement. For instance, one of its provisions permits deployment to suppress any “unlawful combination” or “conspiracy” that “opposes or obstructs the execution of the laws of the United States.”¹³² Taken literally, this would allow the president to deploy federal forces in response to two people conspiring to intimidate a witness in a federal trial. A more realistic (and worrisome) abuse scenario would involve the use of troops to suppress an unpermitted but peaceful protest against a controversial executive order.

In such cases, the Insurrection Act allows the president to respond “by using the militia or the armed forces, or both, *or by any other means*” (emphasis added).¹³³ This alarming delegation of unlimited power explains why the Oath Keepers and similar groups believed that President Trump would draft them into service by invoking the Insurrection Act on January 6.¹³⁴ Congress has defined “militia” to include “all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.”¹³⁵ A substantial portion of white supremacist organizations’ members would likely meet that definition, and at least in theory, the others could be mobilized under the “any other means” language.

Despite this extraordinary delegation of power, the Insurrection Act in its current form contains virtually no checks against abuse. Previous versions of the law required advance judicial sign-off and placed time limits on the use of troops to enforce the law absent congressional approval. But Congress removed those provisions, leaving no role for the other branches of government.¹³⁶ The Supreme Court has held that the statute gives the president complete discretion to decide whether deployment is warranted.¹³⁷

Such a broad and unrestricted delegation of authority was dangerous at any time in our nation’s history. In the modern era, it is also entirely unjustified. Most of the law’s provisions were designed for the Civil War and the terrorist insurgency that followed in the former Confederacy. These threats were extinguished long ago, yet the powers crafted to address them have lingered, virtually unchanged, for 150 years. Furthermore, when the law was last amended, police departments were still in their infancy and federal law enforcement was all but nonexistent.¹³⁸ Many situations that might have required assistance from the military in the 18th and 19th centuries would be well within the capacity of today’s law enforcement to handle. In short, nothing about the Insurrection Act is tailored to the needs of the United States in 2023.

That is not to say that military intervention in domestic crises is never appropriate. In the late 1950s and early 1960s, for instance, Presidents Dwight D. Eisen-

¹²⁸ See Elizabeth Goitein and Joseph Nunn, “An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse,” *Journal of National Security Law and Policy* 13 (2023): 362.

¹²⁹ 18 U.S.C. § 1835.

¹³⁰ See generally Joseph Nunn, “The Posse Comitatus Act Explained,” Brennan Center for Justice, October 14, 2021, <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained>.

¹³¹ See U.S. Const. art. I, § 8, cl. 15 (empowering Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”).

¹³² 10 U.S.C. § 253.

¹³³ *Id.*

¹³⁴ Alan Feuer, “Oath Keepers Leader Sought to Ask Trump to Unleash His Militia,” *New York Times*, May 4, 2022, <https://www.nytimes.com/2022/05/04/us/politics/oath-keepers-jan-6-riot.html>.

¹³⁵ 10 U.S.C. § 246.

¹³⁶ See Goitein and Nunn, “An Army Turned Inward,” 363, 365.

¹³⁷ See *Martin v. Mott*, 25 U.S. 19, 30 (1827).

¹³⁸ See Goitein and Nunn, “An Army Turned Inward,” 372.

hower and John F. Kennedy both invoked the Insurrection Act to enforce federal court orders desegregating schools in the South. Other presidents, however, have used the law to break strikes and subdue labor movements.¹³⁹ And in the weeks leading up to January 6, President Trump's allies urged him to invoke the Insurrection Act as part of a strategy to overturn the election results.¹⁴⁰ Indeed, it would have been frighteningly easy for President Trump to invoke the law on January 6 to shut down Congress, thus delaying or preventing certification of the vote on the pretext of keeping the peace.

In September 2022, the Brennan Center submitted a statement to the House Select Committee to Investigate the January 6th Attack on the United States Capitol addressing the Insurrection Act. The statement included a legislative reform proposal, developed in consultation with numerous experts and several allied organizations, that would meaningfully guard against abuse of the powers conferred by the Act while preserving the ability to deploy troops in a true crisis.¹⁴¹

First, the proposal more specifically and narrowly defines both the criteria for deployment and what the president may do in response. For instance, while an insurrection against federal or state government would always warrant deployment, obstruction of federal law would trigger deployment authority only if it deprived a group or class of people of their constitutional rights—explicitly including the right to vote—or if it created an immediate threat to public safety that could not be handled by state or federal law enforcement. In responding to such crises, the president could deploy active-duty armed services or call the National Guard into federal service, but he could not deputize private citizens to act as soldiers. Moreover, the proposal would clarify that the Insurrection Act does not authorize the suspension of habeas corpus—holding people without trial—or the complete displacement of civilian authority, also known as martial law.¹⁴²

To ensure adherence to these limitations, the proposal includes mechanisms for congressional and judicial oversight. At the time of deployment, the president, secretary of defense, and attorney general would be required to submit a joint certification and report to Congress setting forth certain basic information. The authority provided by the law would expire automatically after seven days unless approved by Congress, using expedited procedures that would prohibit filibustering and allow any member to force a vote. Finally, courts would be authorized to review whether the criteria for deployment were met—employing a deferential “substantial evidence” standard of review to ensure that courts did not simply replace the president’s judgment with their own.

D. 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,¹⁴³ find little support in constitutional history¹⁴⁴ 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 for the president

¹³⁹ See Goitein and Nunn, “An Army Turned Inward,” 367.

¹⁴⁰ See Jacqueline Alemany, Josh Dawsey, and Tom Hamburger, “Talk of martial law, Insurrection Act draws notice of Jan. 6 committee,” *Washington Post*, April 27, 2022, <https://www.washingtonpost.com/politics/2022/04/27/talk-martial-law-insurrection-act-draws-notice-jan-6-committee/>.

¹⁴¹ See Goitein and Nunn, *Statement to the January 6th Committee on Reforming the Insurrection Act*. The proposal was subsequently published as a law review article. See Goitein & Nunn, “An Army Turned Inward.”

¹⁴² See Tim Lau and Joseph Nunn, “Martial Law Explained,” Brennan Center for Justice, September 10, 2020, <https://www.brennancenter.org/our-work/research-reports/martial-law-explained>.

¹⁴³ 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/>.

¹⁴⁴ 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).

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,¹⁴⁵ PEADs have since been expanded for use in other emergency situations where the normal operation of government is impaired.¹⁴⁶ As one government document describes them, they are designed “to implement extraordinary presidential authority in response to extraordinary situations.”¹⁴⁷

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,¹⁴⁸ 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.¹⁴⁹

There is far less 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 process of reviewing them.¹⁵⁰ And last year, the Brennan Center procured the first glimpse into the contents of post-9/11 PEADs when it received 500 pages of records in response to a 2018 Freedom of Information Act request submitted to the George W. Bush Presidential Library. (An additional 6,000 pages of records were withheld in full because they are classified.)

The records pertain to reviews of PEADs that the Bush administration conducted in 2004, 2006, and 2008, with an eye toward refreshing the documents and ensuring that they provided adequate powers to address the threat of terrorism.¹⁵¹ They reveal the existence of at least one PEAD—and the possible adoption of three additional PEADs—designed to implement the Communications Act, a World War II-era statute that grants the president authority to shut down or seize control of wire communications facilities upon proclamation “that there exists a state or threat of war involving the United States.”¹⁵² The Bush administration also appeared to review a preexisting PEAD concerning the suspension of *habeas corpus*, in light of a June 2008 Supreme Court decision recognizing Guantanamo Bay prisoners’ constitutional right to seek judicial review of their detention.¹⁵³ (There is no indication that

¹⁴⁵See Matthew L. Conaty, “The Atomic Midwife: The Eisenhower Administration’s Continuity-of-Government Plans and the Legacy of ‘Constitutional Dictatorship,’” *Rutgers Law Review* 67 (2010): 627.

¹⁴⁶See Federal Emergency Management Agency, “Manual 5400.2,” effective February 29, 2000, 111; see also “Presidential Emergency Action Documents,” Brennan Center for Justice, last updated May 26, 2022, <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents>.

¹⁴⁷Stephen G. Burns, “Update of Presidential Emergency Action Documents,” Nuclear Regulatory Commission, July 23, 2004, https://www.governmentattic.org/18docs/NRCupdtPEADS_2004.pdf.

¹⁴⁸See National Security Act, Pub. L. 102–88, title VI, § 603(a)(2), 105 Stat. 442 (1947) (codified at 50 U.S.C. § 3093).

¹⁴⁹See 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 May 26, 2022, <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents>.

¹⁵⁰See 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).

¹⁵¹See Benjamin Waldman, “New Documents Illuminate the President’s Secret, Unchecked Emergency Powers,” Brennan Center for Justice, May 26, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/new-documents-illuminate-presidents-secret-unchecked-emergency-powers> (setting forth the Brennan Center’s analysis of the records); “Presidential Emergency Action Documents,” Brennan Center for Justice, last updated May 26, 2022, <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents#gwb> (providing links to the records).

¹⁵²Pub. L. 77–413 (1942) (codified as amended at 47 U.S.C. § 606(d)).

¹⁵³See *Boumediene v. Bush*, 553 U.S. 723 (2008).

the administration withdrew or cancelled the PEAD.) And the administration at least considered restricting U.S. passports during a crisis, based on a 1978 law that allows the government to curtail international movement based on “war,” “armed hostilities,” or “imminent danger to the public health or the physical safety of United States travellers.”¹⁵⁴

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 planning¹⁵⁵—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.¹⁵⁶ Versions of the bill were subsequently 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 things, such disclosure would enable Congress to correct, through legislation, any executive branch misinterpretations of statutory law.

* * *

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. Another statutory emergency authority, the Insurrection Act, is devoid of the safeguards that such a potent authority demands. And 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.

¹⁵⁴ 22 U.S.C. § 211a.

¹⁵⁵ 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).

¹⁵⁶ S. 4279, 116th Cong. (2020).

Mr. PERRY. Thank you. The Chair thanks you all for your testimony.

We will now be turning to questions. The Chair recognizes himself for 5 minutes for questions.

Before we get into the specifics of potential reforms to the NEA, I just wanted to make sure we all understand the magnitude of what we are talking about today.

The President has—what did you say, Ms. Goitein, 130—

Ms. GOITEIN [correcting]. 135.

Mr. PERRY [continuing]. 135 emergency powers scattered throughout the code.

I will start with you, Mr. Dayton. Can each of you just tell the subcommittee, in your opinion, what are the top two or three emergency authorities granted to the President that might concern you?

Mr. DAYTON. Well, I think the ones you mentioned initially. The involuntary testing of chemical and biological weapons on American people. And I would say, in today's environment, the internet issue that Ms. Goitein mentioned, given that the internet is central to everything we do and everything in our homes and things like that.

Mr. THALLAM. Yes. Oh, I am sorry.

Mr. PERRY. Go ahead.

Mr. THALLAM. I think you can't answer this question without referencing the same one, the communications, the ability to shut down.

I think, also, there is language kind of scattered throughout that allows the President to reappropriate funds from a congressionally appropriated account into another through declaration of emergency. So, that is not a specific one, but it is kind of a general one that I would be concerned about.

Ms. GOITEIN. I would add to that list the International Emergency Economic Powers Act, which allows the President to essentially freeze Americans' assets without judicial process. I do think that particular law requires its own solution, a separate solution, from some of the other powers, and we can maybe talk about that later.

But I would then add again to the list the power that is given to the director of the Transportation Security Administration to control domestic transportation.

And then, I am just going to throw in one more, which is the President's ability to detail members of the U.S. Armed Forces to any nation of his choosing.

Mr. PERRY. Yes. I noticed that. I noticed the nexus in all these powers between the military and the emergency itself, and many emergencies—I would argue most don't have anything to do with the military at all. And that one in particular—I read that—detail to other countries.

We might have—does any—I am kind of going off my own script here, but that's OK.

Does every single emergency invoke all of the powers across the spectrum for the duration of the emergency? So, as long as one emergency exists, the President has the 135 now powers even though they might be unrelated to the emergency at hand? Is that correct?

Ms. GOITEIN. That is true for most of them. The National Emergencies Act itself does not include any requirement that the powers invoked relate to the nature of the emergency.

Some of the emergency powers, the individual powers, have additional requirements in them, circumstances that have to be met. Most of them do not. So, dozens of emergency powers are available to the President, regardless of whether they relate to the nature of the emergency.

Mr. PERRY. So comforting.

Ms. Goitein, as long as I'm with you, I understand from your testimony that of the 76 national emergencies that have been declared, 41 are still active. Yet accordingly, the required expenditure reports have not been submitted for more than 20 years.

Is there any way of knowing whether they have even been completed? And where are they supposed to be going? Who is supposed to get them?

Ms. GOITEIN. Let me give you a little more detail on that.

The emergency declarations that rely solely on IEEPA, the International Emergency Economic Powers Act, reports for those declarations have been submitted. For the other non-IEEPA emergency declarations, we have been unable to find reports for almost any of those other emergencies. There was a report filed for the Katrina emergency, but we have been unable to find other ones.

And when the IEEPA reports are filed, there is a notation in the Congressional Record so you can see it has been filed, and you can't find that notation for other emergencies.

With respect to the 9/11 emergency, in particular, we have done some digging, speaking to staffers, committees, where they really should be getting these reports, and they appear to be not getting them. There was also a reporter who filed a FOIA request, we filed one as well, several years ago for the reports for the 9/11 emergency declaration going all the way back to 2001, and the Department of Defense—which has been delegated the authority to submit those reports for the 9/11 emergency declaration—basically told the reporter that the reports don't exist.

Mr. PERRY. I am sorry. Say that last part?

Ms. GOITEIN. Told the reporter that they were unable to find them and that they had performed a search thorough enough that if the reports existed, they would have found them.

Mr. PERRY. Also comforting. All right. My time has expired.

The Chair now recognizes the gentlelady from Nevada, Ms. Titus.

Ms. TITUS. Thank you.

You mentioned a solution is for Congress to exert its authority to end an emergency without it going to the President or needing his buy off on it, his signature.

How does the suggestion you made at the end of your talk, Ms. Goitein, get around the *Chadha* legislative veto decision?

Ms. GOITEIN. I am happy to weigh in, and other witnesses might want to as well.

Ms. TITUS. It doesn't matter who. Just you mentioned that solution. That's why—

Ms. GOITEIN [interrupting]. Yes. No, I am happy to explain.

The way that it works is that the—it requires the emergency declaration or provides that the emergency declaration expires auto-

matically after 30 days. And so, if nothing happens, it expires. It doesn't expire because there has been a legislative veto, it expires because Congress said this can last for 30 days.

However, Congress can vote to extend it. And, of course, that is a legitimate act of Congress, one that the President is clearly going to sign because it is the President's emergency declaration, and that then becomes an act of Congress that extends the emergency.

Ms. TITUS. Mr. Dayton, do you want to answer that?

Mr. DAYTON. Yes. Just to extend slightly.

The core concern in *Chadha* is that you have bicameralism and presentment. And what this does is, by having the joint resolution and then the signature, you satisfy the core requirements of *Chadha*, and it becomes just like any other law. So, it is fairly straightforward in that sense.

And this has been discussed, as I note in my written testimony, since the 1980s. Immediately after, within a year, then-Senator Biden wrote a piece on this in a law review essay. And there was a fair amount of discussion at the time.

I think they hadn't worked out the procedural details, unfortunately, and so, there were a series of amendments to a number of statutes—not just the National Emergencies Act—that were impacted by this that just changed the requirement to a joint resolution without the sunset.

Ms. TITUS. I don't think it has been challenged, but some people would argue that the War Powers Act is unconstitutional based on *Chadha*. Is that right?

Mr. DAYTON. Well, the War Powers Resolution has a couple of additional complications. There are some scholars who have argued that *Chadha* doesn't apply. I don't think that would probably stand scrutiny.

And there has been—when the War Powers Resolution was passed in 1973, President Nixon and every President since then has suggested that their compliance with it does not suggest that they think it is legal.

And furthermore, the Senate made changes to the War Powers Resolution, and the House did not. So, there have been two resolutions this Congress, introduced by Mr. Gaetz from Florida, and I think Chairman Perry and, I think, Mr. Huffman voted for those resolutions.

But those actually don't trigger the same processes in the Senate because the Senate procedures were changed but not the House ones. So, it is a complicated mess. And as you move through each set of authorities that use these kinds of procedures, in some cases they were changed; in some cases they weren't. I go through a couple of those in my written testimony.

But it is a complicated mess that is inviting a solution. And I think this is a great opportunity for Congress to sort of reclaim that broader settlement from the 1970s that we saw over a large number of issues and really use this opportunity for bipartisan consensus to get a real win for Congress.

Ms. TITUS. So, would it make sense for us to do a study of all these emergency powers that exist out there and try to bring some standardization to them?

You mentioned the 30-day limitation. What about the number of times it can be renewed, for example? But does that then kind of run contrary to the fact that an emergency is something special and unusual and you need to deal with it on a one-off basis as opposed to something standard that goes across all these?

Mr. THALLAM. If I may.

I mean, I think that is worthy of consideration. I mean, that is what this body is here for, is to deliberate. I mean, there is no way to create a perfect rubric under which every future emergency will fit.

So, the tension is to make it broad enough that it is applicable when it needs to be applied, but not so broad that it is just limitless and that Congress has basically kind of surrendered, in saying, well, in an emergency, it is up to the President, and then our hands are washed of the whole thing.

Ms. GOITEIN. If I could add to that.

An emergency is supposed to be a short-term event. If it lasts for longer than a certain amount of time, it is a new normal, and the way to address it is not through a permanent state of emergency, but through new permanent laws, if necessary, if it becomes a new normal.

The reform that we have been talking about is included in several bills that have been introduced by lawmakers on both sides of the aisle. Some of those bills actually do include a 5-year cap on the total length of time that any emergency declaration can stay in place. I think that is a good provision and one that I think this committee should consider.

Ms. TITUS. Thank you.

Thank you, Mr. Chairman.

Mr. PERRY. The Chair thanks the gentlelady.

The Chair now recognizes the gentleman, Representative Van Orden.

Mr. VAN ORDEN. Mr. Chairman, thank you very much. And I want to thank you so much for coming here today. This is an incredibly important subject. It is phenomenal that you are putting this on.

I wrote an op-ed in April 2020. I revisited it in March of 2021. It is May of 2023 now, and I would just like to share this with you, if you don't mind. It is called "Freedom Over Fear" 1 year on, this one, because those two things cannot exist in the same universe. You are either free or you live in fear. And, again, this was written in March of 2021.

Our Nation is over a year into the COVID lockdowns. What is becoming more apparent every day is that nearly every draconian measure taken by the predominantly Democrat-controlled States and municipalities have not only become counterproductive, but are actually detrimental.

What started as a response to a public emergency morphed into a classic Government overreach and devolved into a series of arbitrary and capricious edicts pronounced by petty tyrants who reveled in their newfound personal political power.

Two weeks to flatten the curve. Six months. Now 3 years. Now 3-foot social distancing. Then 6. Wear a mask. Now two. Total lockdowns. Now open, no lockdowns. You can't dine in a res-

restaurant, but you can eat in an enclosed plastic bubble on a sidewalk in front of the restaurant. You can dine in, but you have to wear a mask at the table and take it off when you sit down and when you go to the bathroom because COVID only exists in an aisle.

Get vaccinated, but you still can't move about freely or be with your family. You must tell people whether or not you are vaccinated. If you say something on ubiquitous social media not in line with the State, you are disappeared by neofascists pretending to be antifascists who zealously ban books and you. Having the audacity to say that someone's job that is putting food on the table for their family is not essential.

By ordering the physical separation of family members and threatening fines and imprisonment for holding church services or other public gatherings, closing schools, and locking our children in their homes, the Government has isolated American citizens and removed the most powerful support mechanisms possible: Faith, family, and friends.

This is by design and is wholly un-American. These measures are clear indications that the COVID pandemic has been weaponized by unscrupulous politicians who have been able to terrify many well-meaning citizens into becoming their enforcers.

This is why the Nation went off the rails. During times of crisis, men and women of faith returned to their eternal sacred text to find comfort, guidance, and peace. And in secular life, we should have returned to our foundational documents—the Declaration of Independence, the Constitution, and “The Federalist Papers”—for the very same reasons. This did not happen. We are now seeing and we have seen the second- and third-order effects of these gross omissions, and they are horrible.

As I said, I penned an op-ed in 2020 centered on the seven words from the Declaration of Independence: Life, liberty, and the pursuit of happiness. The basic thesis being that yesterday, today, and tomorrow—war, depression, virus or not—the meaning of those words do not change. And I paraphrased Hamilton saying that we must either stand for something or we will fall for anything. And that is exactly what our Nation did. I stand by these statements.

The farther we got down the road of creating the dystopian new normal, the more people will come to realize that they did not sell their constitutional freedoms. They willingly gave them away to a series of faceless bureaucrats and politicians who became drunk on power.

It is my sincere hope that my fellow Americans wake up and realize that our Government cannot remove the rights that were endowed by our creator and once again start living their lives as free men and women. The time to do so is growing short.

History will show that the legislative response to SARS COVID-19 is a combination of a series of the worst public policy blunders and the largest excuse for a political power grab in the history of the world. We must hold our elected officials who champion these policies to account and get them as far away from the place of power and influence as possible.

We either believe that our rights are granted by God, and are simply articulated in the Constitution—meaning that they are im-

mutable—or we do not. Because if we believe that we can take a pause on our constitutional rights, they are, by definition, not immutable, which makes them arbitrary and capricious. Those are not the values that our country was founded on. They are not.

I believe that our Constitution must be respected for what it is, and that is the foundational document that this Nation, the greatest Nation that has ever existed in the history of the world, must be respected as such.

So, I want to thank the three of you very much.

And, Mr. Chairman, I want to thank you for holding this committee meeting. I think it is possibly the most powerful thing we can do as Members of Congress. And with that, I yield back.

Mr. PERRY. The Chair thanks the gentleman.

The Chair now recognizes the ranking member of the full committee, Mr. Larsen.

Mr. LARSEN OF WASHINGTON. Thanks.

On December 20, 2020, I got COVID and was released from isolation 10 days later. The same day, my neighbor got COVID, and he was dead 6 days later. COVID is the most random killer that I have lived with in 57 years. And we took actions to prevent those deaths and prevented hundreds of thousands of deaths, and yet, many people still died.

I think there is a reason for the National Emergencies Act. I think there are reasons why elected officials acted out of good faith, given the knowledge we had and the science we knew at the time, and that science changed as we got to know more about COVID and its variants. I think we just need to look at this practically.

And from what I gather—is it Thallam or Tallam?

Mr. THALLAM. Thallam.

Mr. LARSEN OF WASHINGTON. OK. Thanks. You don't have to correct me.

[Laughter].

You mentioned rubrics; which powers, timelines of review of length of emergency, congressional actions we can take, and then, international powers with the IEEPA versus domestic. Those are kind of four categories of things that we can kind of come to a conclusion on. So, maybe there is a start for me.

I see nodding heads, for the record, that at least I have got four of some number in the rubric to make some decisions on.

But, Mr. Dayton, on congressional action, you kind of walked up to the line, and I just want to know, were you arguing we should try to create a constitutionally valid legislative veto?

Mr. DAYTON. I am sorry. Can you say that again?

Mr. LARSEN OF WASHINGTON. You seemed to walk up to the line on legislative veto.

Are you arguing we should try to create a constitutionally valid legislative veto?

Mr. DAYTON. I think with a sunset system, you can create something pretty similar. It doesn't—in the bills that Mr. Thallam and Ms. Goitein mentioned, they are typically a 1-year extension, and under the original NEA, it could have been cut off after 6 months.

And so, there is a design question about how you would do that. And in a certain sense, you could cut off at any time. So, there are still some really challenging issues.

One is—and to use the COVID example—in the COVID emergency, the emergency that was declared by President Trump, and subsequently renewed by President Biden, the only authority it actually claimed specifically was a waiver of Medicaid eligibility.

Mr. LARSEN OF WASHINGTON. Right.

Mr. DAYTON. And so, I think it would be very helpful to also make more explicit the powers that are to be used. Some of that language is in the original NEA. But it has got some language about subsequent Executive orders.

Mr. LARSEN OF WASHINGTON. I need to ask another question on that.

Does the CRA, Congressional Review Act, is that a reasonable replacement, using the CRA? Which we have been using, but I just wonder if that is a reasonable replacement.

Mr. DAYTON. So, the CRA still has the Presidential veto issue, right?

Mr. LARSEN OF WASHINGTON. Right.

Mr. DAYTON. And so, I think if you were to create something similar to the original desire of the NEA that is compliant with *Chadha*, you would need the sunset process and the expiration process, and the CRA doesn't have that.

Mr. THALLAM. Yes. Just let me say that the proposals that have been mentioned, by default, create a sunset for any declared emergency. So, that is in statute. That is in a normally, duly presented statute.

So, what Congress is voting on is only to extend, not to veto. It is sort of vetoed by default after a certain number of days. That is one way of thinking of it.

Mr. LARSEN OF WASHINGTON. Yes.

Ms. GOITEIN. And I was going to say something similar, which is, Congress puts sunsets on Presidential authorities all the time. That is not constitutionally questionable. So, that is all this is. It is a sunset on the President's authority. And then if Congress wants to extend that authority, it does so through a law that the President signs, so there is no *Chadha* problem there either. So, it is constitutionally quite sound, this mechanism.

Mr. LARSEN OF WASHINGTON. Yes. Yes. And the constitutional soundness is important. The Founders argued legislative vetoes and made a choice not to include it for whatever reason, and we are sort of hanging our hat on that and stuck with it, I guess, which is fine. I think legislative vetoes are unconstitutional, in my view.

On the international versus domestic—and I noted that most—in the Brennan Center for Justice—in your document, most of these emergencies are probably foreign policy/international-related as opposed to domestic-related. Is that relatively accurate?

Ms. GOITEIN. I would say it is about half and half—

Mr. LARSEN OF WASHINGTON [interposing]. Is that right?

Ms. GOITEIN [continuing]. Actually. Yes, I think so.

Mr. LARSEN OF WASHINGTON. Yes. So, as a review—sorry. I will just—quickly.

Would review be here, or should that be in the Foreign Affairs Committee? Have you thought through the wonderful jurisdictional fights that we would have to—

Ms. GOITEIN [interrupting]. It is such a good question. I think the National Emergencies Act, as a statute, spans the jurisdiction of almost every committee. In the House, the jurisdiction over NEA has been given to the Transportation and Infrastructure Committee.

I do think, if you bite off a very significant authority that is in another committee's jurisdiction, you start to run into problems, and that is one of the issues with IEEPA. It is one of the reasons I feel like IEEPA—there are many reasons why I feel like IEEPA is its own beast and needs to be dealt with separately.

Mr. LARSEN OF WASHINGTON. In conclusion, I think this is one issue that I think if we bit it off, most committees would say, thank God, right? Most committees would say thank you for taking this because no one wants it. All right.

Mr. PERRY. The Chair thanks the gentleman.

The Chair now recognizes Representative Ezell.

Mr. EZELL. Thank you, Mr. Chairman.

And I want to thank each and every one of you today for being here and sharing this information with us because I think it is going to be very good for all of us.

I spent 42 years in police service as a police chief, a sheriff, and many other leadership roles, and during—where I live on the Mississippi gulf coast—Hurricane Katrina, I had 4 feet of mud and water in my house, and so did just about the entire town that I live in.

And one of the things that, as a sheriff or police chief, is that I was always—we knew these storms were coming, and we had some emergency preparedness, and I was given—as chief or sheriff, I had some authorities kind of along the lines that we are talking about here today. But just as soon as things cleared up, we went back to normal operations. And so, I think this is very good.

And one of the things that I would like to say today is that after every major storm or event, as the sheriff or police chief, we had reports that we had to do. They were mandatory to do. And to hear that our Government can't even find a report is—I guess I should be shocked, but in the short few months that I have been here, I am not.

So, I think that is something that should be a mechanism that would be required from any agency head, or any department in this Government. But if we do a study on this, can we also put a timeline on this study as to how we can better, as Congress, do our job so that we can get some good policy and procedure in place?

Are there some areas of disagreement that are out there that we could work on that any of you could discuss today?

Mr. THALLAM. I am tempted to say no just so we can all be friends and move on.

I mean, those—I think Congressman Larsen was repeating this idea of kind of the buckets of questions we have to address. What is an appropriate time limit? What is an appropriate scope? There is very reasonable disagreement within those. Is 30 days too short? Should an emergency be considered something that lasts for 6 months?

I would like to point out something I wrote, included in my written testimony. It is useful to think of Congress' role under reformed

NEA as not just the President pulling this way, Congress pulling this way, and Congress ultimately having its say because Congress is the lawmaking branch, but Congress having its say also provides political legitimacy, right?

So, if an emergency is, in fact, self-evident, and we are all kind of viewing it and it really constitutes an emergency, having Congress be able to say yes or no to extend it actually bolsters the case that, yes, this is a thing that needs to be—there is a flood, there is a hurricane. This is something that needs to be responded to, and maybe after 30 days, it hasn't been totally addressed before going back to, as you said, kind of normal operating procedures.

Ms. GOITEIN. If I could add, I have never worked on an issue that had this much agreement. An agreement on both sides of the aisle. And when—the first bill that was introduced that included this 30-day termination reform was the ARTICLE ONE Act, and that was a bill offered by Senator Mike Lee with 18 Republican cosponsors. But every Democrat in the Senate Homeland Security and Governmental Affairs Committee voted for it, and several Democrats joined a letter to leadership asking for it to come to the floor.

And as of last year, I think there were 30 Democrats in the Senate and 20 Republicans who had sponsored or cosponsored some version of that reform. So, there is really widespread agreement.

I think the one aspect that was controversial in the original bill was that the original bill did cover IEEPA, and there was an amendment in the committee to strip it, and that amendment was widely supported. Other than that, I think there has been extremely little substantive disagreement as variations of this bill—this bill was then picked up and put into certain Democratic and bipartisan reform packages, again, with very broad support.

Mr. EZELL. I think this is something we might get done in a timely manner.

So, with that, Mr. Chairman, I yield back.

Mr. PERRY. The Chair thanks the gentleman.

The Chair now recognizes the gentlelady, Ms. Holmes Norton.

Ms. NORTON. Thank you, Mr. Chairman. This is an enlightening and sometimes frightening hearing.

Ms. Goitein and Mr. Dayton, the President controls the District of Columbia National Guard, while the Governors of the States and Territories control their National Guards.

Do you think Congress should pass legislation to give the DC mayor control of the DC National Guard, and if so, why?

Ms. GOITEIN. I would be happy to answer that question.

The answer is yes. It is not only the States in this country, but also the Territories where there is local control over the National Guard: Puerto Rico, Guam. The only exception is Washington, DC.

What this creates is, first of all, a situation in which where there is an emergency that threatens the residents of DC, the mayor has to go through a bureaucratic process to get Federal approval to deploy troops, and we saw the effect of that on January 6.

But the other problem is that the Department of Justice has adopted a sort of legal fiction in which the DC National Guard can operate in non-Federal status even though at all times, it is under

the command and control of the President. And for that reason, it is not subject to the Posse Comitatus Act.

That means that the President can deploy the DC National Guard to act as a domestic police force pretty much at will. And that is a tremendous problem. It is another problem that could be fixed by having the mayor assume command and control over the DC National Guard.

Mr. DAYTON. And I share Ms. Goitein's concerns.

I would add that the DC National Guard was actually created in 1802 by President Jefferson to provide security for the White House, which is a natural need. We now have the Marine Barracks, right? The Marines are all over the White House and provide that function.

So, at least the original understanding of what the DC Guard was for and why it reported to a Federal entity just doesn't make sense anymore. You can all go over to 8th and G Southeast and see the National Guard Barracks.

So, it seems like that is a place where you just could clean up and treat DC like other Territories and still have the full power of the President to use, to federalize guards from any State to provide core services.

So, I don't think you run into problems in that way. And frankly, if there are problems in DC that might need mobilization of resources that—I don't see why the President—why it should flow through the White House. That doesn't make sense.

Ms. GOITEIN. And to quickly elaborate on what Mr. Dayton said, the reason why Congress gave command and control to the President was not some considered judgment about who was better suited, the DC mayor or the President. It was that there was no DC mayor. When that assignment occurred, there was no local DC government and no DC mayor. The President was the only game in town. So, this is an archaic artifact of history, and it should be updated and changed.

Ms. NORTON. Well, thank you.

Ms. Goitein, your testimony highlights a number of really shockingly authoritarian powers enabled by national declarations: assuming control over the U.S.-based internet traffic during war times, suspending the prohibition on Government testing of chemical and biological agents on unwitting human subjects. Most of the reforms we discussed here today are geared toward facilitating or expediting the termination of emergencies.

Do you believe there is merit in imposing certain substantive limits on emergency powers in accordance with basic human rights principles?

Ms. GOITEIN. Absolutely. And I think the reform we have been talking about, the congressional approval requirement, is something that can be done immediately. It gives you the most bang for your buck, because it curtails the abuse potential in more than 100 different statutes.

But I do believe Congress should also review some of these individual emergency powers that are available under the NEA, and in some cases, absolutely impose some—establish some new parameters that will ensure that these powers are used consistently with principles of democracy and liberty.

Ms. NORTON. Mr. Dayton, the National Emergencies Act requires the President to disclose which authorities they intend to use when declaring national emergencies and a national emergency.

Mr. Dayton, have Presidents complied with this requirement?

Mr. DAYTON. Not always, and it has been complicated. To use the COVID emergency as an example, I mentioned earlier that the emergency declaration only mentioned Medicaid waivers. However, the deferment of student loan payments was announced by press release by the Department of Education in late March of 2020, early April, and there was no legal authority provided until January of 2021.

Was that legal? Facially, it is plausible. It certainly wasn't—there wasn't a political outcry to stop it. In fact, Congress actually included some of those provisions or included similar actions. But I think this is an area where we need a healthier system, where the President is being very clear about what authorities they want to use, and if they want to use new authorities, maybe amend the declaration and get a subsequent confirmatory action by Congress.

But I think you could set up something that increases the accountability, and frankly, as Mr. Thallam said, gives political cover to everyone. I think it would have made—if there had been more of a political conversation at a higher level earlier, we might have addressed some of the concerns that came up in court at a later date.

Mr. PERRY. The gentlelady's time has expired.

The Chair now recognizes Representative Carter.

Mr. CARTER OF LOUISIANA. Thank you, Mr. Chairman.

Mr. Thallam, how might the invocation of congressional approval or disapproval on the disaster declaration undermine efforts of State and local government in aiding recovery?

Mr. THALLAM. Thank you. I think—well, again, I mean, this is part of the consideration for how do we scope, what is the appropriate scope for this National Emergencies Act potential reform. The idea is that it is policy neutral. And I think the question you are asking goes more to the specific authorities that are unlocked, right. So, there is the declaration of an emergency, but those don't actually directly grant any authorities; other statutes do, where they say here is how FEMA will respond in a natural disaster emergency or so on.

So, I think that is where you want to look if you feel that there is a deficiency or there is an opportunity for, I think a word the chairman used was "chicanery" in another context. If there is a missing piece there, that other statute, I think, is the appropriate place to look.

Mr. CARTER OF LOUISIANA. So, you agree we should be careful in watching that because there is room for chicanery or whatever the—

Mr. THALLAM [interrupting]. Well, yes, and I think all of three of us—

Mr. CARTER OF LOUISIANA [interrupting]. Obviously, making sure that we don't have the ability to slow or damage the recovery efforts. Obviously, in legislative bodies we use this term all the time, "unintended consequences," and so, we should be mindful that in

our effort to do something good, we don't end up doing something that could be detrimental.

Mr. THALLAM. Yes, and—I am sorry.

Mr. CARTER OF LOUISIANA. It looks like you have a comment.

Ms. GOITEIN. Well, I was just going to say, reforming the National Emergencies Act in the way that we talked about would not have any effect on the Stafford Act, which is the primary source of authority for dealing with these kinds of on-the-ground emergencies, natural disasters, that sort of thing, nor would it affect the Public Health Service Act, which is the primary source of authority for dealing with pandemics.

And most of the authority, certainly to deal with COVID, for example, was exercised at the State level, through State laws and State constitutional authorities that also would not be affected by NEA reform. So, I don't think there is too much of a concern that reforming the National Emergencies Act would tread on either the resources or authorities available to State and local governments in emergencies.

Mr. CARTER OF LOUISIANA. There may not be a more vulnerable stretch of America to natural disasters than the gulf coast. In my district, and in the surrounding areas of southeast Louisiana, people have been preparing for and rebuilding from storms since long before I have been alive. I was born in the wake of Hurricane Betsy. I have lived through Katrina, and served my community in our time of need.

And I was elected to Congress just in time to help lead the disaster recovery after the devastation of Ida with our Governor and my colleagues in the Louisiana delegation. After Hurricane Ida, we all stood together. I know disasters. I have lived with them my entire life.

I was born knowing to always have canned goods, water, extra batteries, and supplies because this is something that we know comes. We don't know how fast, we don't know how long, but we know they are coming, and we know they tend to come faster and stronger, and we know that they don't discriminate against party, race, color, or socioeconomic backgrounds. So, we know the significance of the NEA.

If the NEA is amended, do you believe that the Stafford Act should also be considered for amendment?

Ms. GOITEIN. I do not think that the Stafford Act raises the same concerns, or necessarily requires the same approach, and I say that because the Stafford Act is much more limited in its definition of what an emergency or a major disaster is. And it doesn't generally provide a lot of open-ended authorities; rather, it just frees up resources for State and local government. So, I think it just presents a whole different set of considerations, and I would not advocate taking the same approach.

Mr. CARTER OF LOUISIANA. And I am not suggesting the same approach, but my question is, do you believe that the Stafford Act should be reviewed as well as a document that may have lived out its usefulness and perhaps needs to review in a 2023 scope?

Ms. GOITEIN. I am not sure that I have the necessary expertise to answer that question.

Mr. CARTER OF LOUISIANA. That's fair.

Ms. GOITEIN. The concerns that I have are concerns about separation of powers and civil liberties. I, at this point, have not seen those concerns raised in the Stafford Act context. Whether it contains the——

Mr. CARTER OF LOUISIANA [interrupting]. That is fair. I have got 5 seconds. Do either of you see a necessity or a, from your vantage point, and I understand that may be above your pay grade or in an area that you are not necessarily zeroed in on, but the Stafford Act, as we look at possibly modifying the NEA, do you think we should, likewise, look at modifications to Stafford, not necessarily in the same frame, but because of the vintage of——

Mr. THALLAM [interrupting]. Not necessarily in the same frame, but, yes, I think exactly. I actually worked in the Senate Homeland Security Committee, so, I think it is outside the scope of my role here, but there is always room for improvement, and there is always unintended consequences, as you say, in how things sort of develop over time and they always merit review and additional consideration.

Mr. DAYTON. First——

Mr. CARTER OF LOUISIANA [interrupting]. Very quickly, my time is up, so——

Mr. DAYTON [continuing]. My wife's family is from Baton Rouge, so, I understand what you all had to go through in Louisiana. Second, I believe the Stafford Act has been looked at a number of times. It is not like the NEA, which is essentially one and done in 1976. It was never touched again except to change the word "concurrent" to "joint."

I think every couple of years there has been some going back and tweaking the Stafford Act, because there are a lot of hurricanes and a lot of tornadoes that people need to respond to, and we learn things.

So, I think there is probably less of a fundamental problem, and I don't think the need for congressional review in the same way is necessary, because it is really about unlocking funds and, as I believe Mr. Ezell said, that there has been a good deal of reporting out of FEMA, unlike in this case.

Mr. PERRY. The gentleman's time has expired.

The Chair now recognizes Representative Huffman.

Mr. HUFFMAN. Thank you, Mr. Chairman.

And I want to thank the witnesses, all of the witnesses. Your testimony has given us a lot of food for thought and has been excellent.

Clearly, Congress needs to engage and bring some scrutiny to these open-ended emergency authorities. It is long overdue that we do that. But I think anyone who is following this hearing probably also understands that we are going to be challenged to do that. We just heard a member of this committee suggest that the temporary emergency authorities invoked in response to a global pandemic that killed over 1 million Americans, temporary authorities that have now expired, that that was literally the worst abuse of authority in the history of the world. We heard that in this conversation here today. Hitler is rolling in his grave because here's been rendered a footnote in history eclipsed by the evil Dr. Fauci who dared to save millions of lives potentially.

So, we have got a credibility problem as we weighed into this difficult issue, and that is going to challenge us. This can be a little bit of a Rorschach test looking through partisan lenses at which authorities we think are being abused, or maybe which authorities we think should be invoked. So, that contributes to our challenge as well.

Ms. Goitein, we have heard about the incredible scope of some of these authorities, that should give us all pause, the ability to cut off wire communications such as cellular internet capabilities, shut down domestic transportation, deploy troops, even perform biological or chemical testing on humans. So many things about this subject matter should give us all pause, but one thing you pointed out in your testimony I think is also a bit shocking, that the only limitation on a President to execute many of these powers is precedent and political norms, a sense of decency, if you will.

And we saw from the previous administration the limits of relying on that. We saw attacking peaceful protesters at Farragut Square, inciting an insurrection. Now, the chairman may not be troubled by that abuse of authority because he was very much in cahoots with the President and reportedly had to seek a pardon for his role in that illegal scheme to overturn the election.

But, Ms. Goitein, can you go into a little more detail on the vulnerability we have when we rely on norms and a sense of decency as the backstop to the abuse of authority.

Ms. GOITEIN. The Framers set up the Constitution the way they did with checks and balances, precisely because they knew that we could not rely on any President of any party to restrain himself or herself. Probably the Framers weren't thinking "herself," but you get my point. And checks and balances are not an optional feature of the Constitution that can be toggled on or off depending on who occupies the White House.

It is a core protection for our democracy, as I said earlier, and it was because the Framers knew that eventually the temptation to abuse power, to consolidate power, to get around Congress, whatever it might be, would be too great. We shouldn't be surprised that we have seen that borne out. That is why checks and balances are there.

And in the context of the National Emergencies Act, right now they are not working. And so, the idea is to find a way through law, not through norms, not through expectations of self-restraint, to shore them up, to prevent that from happening. And if you wait until a President you don't like is in the White House to try to do that, by definition it will be too late. The time to do it is now as a systemic protection for our democracy, not as a partisan measure directed against any particular President.

Mr. HUFFMAN. Very well said. And are there some authorities that Congress could use right now without a new act of Congress, some checks that maybe Congress has hesitated to utilize in the past?

Ms. GOITEIN. Well, I do worry that when President Trump declared a national emergency to secure funding for a border wall, he did break a certain norm of self-restraint in terms of using emergency powers to put in place long-term policy preferences that Con-

gress didn't support. I believe President Biden accepted that invitation when he used emergency powers to forgive student loan debt.

So, I think we have now broken the seal. We have seen it done by Presidents with both parties. I do expect to see that in the future, that softer form of abuse that I was mentioning earlier. And as we have discussed, any of the powers, almost all of the powers that exist for the President to use in a national emergency, can be used under any emergency declaration, and we have 41 of them in place.

So, really, right now, we are highly, highly dependent on norms of self-restraint, and those norms have been badly shaken.

Mr. HUFFMAN. All right. Thank you. Yield back.

Mr. PERRY. The gentleman's time has expired.

The Chair now wishes happy birthday to the gentleman from Tennessee, and recognizes Mr. Cohen for 5 minutes of questions.

Mr. COHEN. Thank you for the greetings. Appreciate it. 74 and some more. And thank you for the recognition.

I waived on to this subcommittee because I have had this issue as one of mine when I was the chair of the Constitution, Civil Rights, and Civil Liberties Subcommittee for the last three general assemblies, I think, or three legislative sessions—2019 to 2022—we had hearings on these issues. And we found out that the Transportation and Infrastructure Committee was the proper committee, which makes no sense whatsoever. It made no sense then, and it makes no sense now. Maybe that is one of the reasons why we haven't gotten anywhere with it. Mr. DeFazio didn't have any interest in pursuing it.

But it is in this committee. We had good hearings. Ms. Goitein was a valuable witness on each occasion. Chip Roy and I have worked together on it. Mr. Mike Johnson had some interest in it as well. There was bipartisan interest in doing something with this bill. We just didn't have—we were not the committee of jurisdiction. So, I would hope that the chair would take this up as an issue that can get passed.

Ms. Goitein, is there anything that—the bills that have been introduced this year, and Chip Roy has one that I have joined with him on, is that the best vehicle that you have seen so far, and are there any changes that you would recommend or adjustments to that bill?

Ms. GOITEIN. There have been so many versions that have come together over the course of the last few years. But I would say that there was a version of the legislation that was the process of a long series of negotiations with all of the relevant stakeholders that became an amendment to the omnibus at the end of last year that basically had been through a negotiation process and had the buy-in of pretty much all of the relevant stakeholders.

Right now, that particular language isn't in any bill, but that is largely because the bills that we have been talking about, for the most part, have not yet been reintroduced, right.

So, with the ARTICLE ONE Act, the Protecting Our Democracy Act, the Congressional Power of the Purse Act, the National Security Reforms and Accountability Act, all of these bills had some version of the reform in them, but they had not yet been reintroduced. So, unfortunately, I can't point you to an existing bill that

has the ideal language, but I expect we will see one very, very soon.

Mr. COHEN. But the language that was in the final act last year is something you would support?

Ms. GOITEIN. I would support all of them. I actually believe that all of them are a substantial improvement over the status quo, but I think it makes sense to go with a bill that has been through a negotiation process and has the buy-in of all the stakeholders.

Mr. COHEN. Thank you. Thank you. We will look at getting that in legislative form and introducing it, Chip Roy to cosponsor it, and Mr. Chairman, in particular, would be most important.

This is an important area, and you are right, it should happen when you have got a President who you like, or some people don't like him. It goes both ways. But I introduced it when Trump was President. I introduced it when Biden was President. It is the issue. The President could get away with all kinds of things that he shouldn't, and the Congress is surrendering its power.

And I did the same thing with pardons. I had a bill for the whole time that President Trump was in about pardons. I have reentered it now. I don't care if it is Hunter Biden or if it is Donald Trump, Jr. The President shouldn't be pardoned, and his family members shouldn't be pardoned, campaign people, et cetera, et cetera. It goes for either party. And I would hope it would catch traction now and become law, because it is the principle that's important, not the individual, because it lives way after us. No matter how long we live, how many birthdays we have, the law would go on, and that is what we need to be looking at.

And either of you all have anything you would like to add or a little cleanup?

Mr. DAYTON. The one thing I would say is, I have been, as I said in my oral testimony, inspired by how Congress has worked together on this issue. And I haven't seen people fall away when the parties switch. So, I know you had interest in this issue during the Trump administration, and you still have interest in the Biden administration. I know the initial bills that I think we are working off of were introduced during the Trump administration by Mike Lee and Chip Roy, right, people who have unimpeachable, conservative credentials, and they have continued to push on those issues. And so, I think we have seen a lot of principled action. And I should say, Chairman Perry joined Chip Roy's bill last Congress.

So, while this committee has not held hearings, and partially because you did in the last couple of Congresses, I hope we can see through to closing that process relatively quickly.

Mr. COHEN. Thank you. And Joel McCleary was one of our champions, and he put together a group, Mr. Chair, of about 40 folks one night for dinner to talk only about emergency powers. He was a man that was involved in the Carter administration, but he is very interested in this issue. And I think the former leader from Missouri, Mr. Gephardt, was involved, so, there is a groundwork of people out there interested in a bipartisan fashion.

Mr. GOITEIN. And I just want to thank you—

Mr. PERRY [interrupting]. The Chair thanks the gentleman—oh.

Ms. GOITEIN [continuing]. Very, very quickly, I just wanted to thank you for your leadership on this issue and for your bipartisan

approach. And there is clearly room for—there is a lot of agreement in this hearing room on both sides of the aisle, so, it is very promising.

Mr. COHEN. Yes, ma'am. I yield back.

Mr. PERRY. The Chair thanks the gentleman.

The Chair recognizes the gentleman from California, Representative Garamendi.

Mr. GARAMENDI. Mr. Perry, thank you. Thank you for holding the hearing, necessary, and we need to continue this.

It appears as though when we deal with the national emergencies, we are usually dealing with an issue that is red hot at the time—student loans, pandemics, whatever—and then we try to address the national emergency law based upon that particular problem, and it becomes politically difficult.

So, Mr. Perry, given your tenure as chairman of this subcommittee, if we could spend the next 18 months looking at this issue and coming with a proposal that is not based upon the most recent hot button emergency, which undoubtedly there will be one, I don't know, forest fires and I don't know, whatever, there will be some sort of a national emergency, and just divorce ourselves from the current hot button emergency and come with a specific set of proposals to amend the act itself. And I would like to hear from each of the witnesses what that would be, not associated with today's hot emergency, but beyond. Mr. Dayton, what would you do?

Mr. DAYTON. In my testimony, I list three components, and there have been a couple more that have been discussed here: One, automatic sunset after 30 days and after a year. That would create the forcing function for Congress to act.

Mr. GARAMENDI. Short version. Assume that I know what a sunset is. Keep going.

Mr. DAYTON. Oh, so, the President would have—when the President declares an emergency, it would only last for, say, 30 days—

Mr. GARAMENDI [interposing]. I understand.

Mr. DAYTON [continuing]. Until Congress acts; two, the expedited procedures to allow quick consideration by Congress, right, these are by congressional rules; three, clear reporting and factual declarations and justifications. And, frankly, I think part of the reason the reporting hasn't happened is that Congress hasn't acted. So, why send reports if Congress doesn't care, is, I suspect, some of the insight in the administrations going back 20 years.

And then fourth, I would make specific that the powers used in the emergency are, one, related to the underlying emergency, and if new powers are going to be added, it probably needs to reopen the process.

Mr. GARAMENDI. Thank you.

Mr. DAYTON. Thank you.

Mr. GARAMENDI. Thank you for the ideas.

Mr. Thallam.

Mr. THALLAM. Yes, I think in our written testimonies there are some. I think in the legislation that Congressman Cohen and others have worked on. I would just note that directly to your point, the original National Emergencies Act is policy neutral. It does not speak to whether certain emergency declarations are good or bad

or politically fraught. It is policy neutral. It was just rendered ineffective by a court case that the authors didn't anticipate.

So, any proposal can keep the basic structure that does not mention public health, does not mention forest fires, does not mention anything. It is about a metastructure for how emergencies are run, kind of like the Administrative Procedure—

Mr. GARAMENDI [interrupting]. I got it. And your proposal reform is what?

Mr. THALLAM. I mean, it is along those lines, set a default sunset of something like 30 to 60 days.

Mr. GARAMENDI. But you would agree with Mr. Dayton? I am just hustling along here.

Mr. THALLAM. Yes. I mean, I concur with my colleagues.

Mr. GARAMENDI. OK. Very good.

Ms. GOITEIN. I also concur. There is legislation that was introduced in the last Congress and the Congress before that really, I think, hits a lot of the important reforms that we are talking about that Mr. Thallam and Mr. Dayton just mentioned, and I think now is actually a very opportune time because the COVID emergency has expired. We are in a situation right now where I think calmer heads can prevail.

Mr. GARAMENDI. So, you would agree with the four points that Mr. Dayton—

Ms. GOITEIN [interrupting]. I am sorry, I didn't hear that.

Mr. GARAMENDI. Do you agree with the four points that Mr. Dayton laid out, or would you add to it?

Ms. GOITEIN. Yes, I do.

Mr. GARAMENDI. Would you add anything to it?

Ms. GOITEIN. I can't remember if you mentioned the 5-year total limit. Again, some of the bills that have included this core reform of congressional approval have also included a 5-year total limit on how long any emergency declaration can stay in place. I think that is a good idea.

Mr. GARAMENDI. So, an additional sunset.

Thank you. Mr. Perry, I am going to yield back in 8 seconds, but I think we need to work—I know we must work on this.

Mr. PERRY. Without a doubt.

Mr. GARAMENDI. And if we could keep it away from the current issue of the day and look at the underlying law and specific reforms to it, I think there is a need, and I think there is an opportunity. Thank you for the hearing.

Mr. PERRY. The Chair thanks the gentleman.

We are going to do a second round here, assuming the witnesses are OK with that. I suspect that it might be a little shorter than the first round, because, as you can see, people have other things to do, not that interest has dropped off, there is just a lot of competing interest.

And so, the Chair will recognize himself for some questions. I want to get a little more granular. There has been a lot of apt complaining, totally valid and some collaboration here in discussion. But do you know, is there a definition, in the current code, of an emergency?

Ms. GOITEIN. There isn't. That is—

Mr. PERRY [interrupting]. So, do you propose—has there been one proposed?

Ms. GOITEIN. I have proposed one myself. There isn't a definition of national emergency included in the bills that have been offered over the last few years to reform the National Emergencies Act.

Mr. PERRY. Why do you suppose that is, because it is too intractable, that is the point of division between the left and the right?

Ms. GOITEIN. Yes. Honestly, it is very, very hard to get agreement on a definition because it is going to be perceived as either too granular, too micromanaging, or not doing enough. And so, to some degree I think—and rather than try different versions and have them all sort of stripped out and rejected and create this bad legislative history that suggests that no one wants to define it, I think the consensus has been to move in the direction of having these procedural checks rather than try to get at this elusive definition.

Now, as I said, I did propose a definition in the testimony that I gave in 2019 before the House Judiciary subcommittee. I do think it is definable, but it is very, very hard to get consensus on the definition.

Mr. PERRY. Mr. Thallam, it seems like you might have some thoughts on this.

Mr. THALLAM. I just—at least on one aspect of a definition. If you start going down the road of providing categorical definitions, it is just—it is an impossible task. I mean, you would have to anticipate an asteroid strike. You would have to—so, there are the obvious things, the things that have happened in the past, but you have to allow for things that we just haven't conceived of.

So, I think that is another reason to think of the proper way to address it as no matter what the emergency is, there is a very clear timeline, it is very time limited, it ends by default unless Congress speaks to it, and the President has to be very explicit about, in that time period, here are the powers that I am being—and you can still further reform those other emergency powers, right, go through those statutes and say, hey, those are not appropriate, or, those have been abused, we need to pull those back.

Mr. PERRY. So, while I agree with everything you have said, each of you, and I know you are champing there, Mr. Dayton, just to engage in a little bit of a colloquy here with you, it seems to me like this is Congress, right. We work on definitions in the law, and there has to be a beginning and an end or somebody is—look, it is the avarice of mankind, right. That is what we are trying to avoid here and rein in.

And so, to acknowledge that is to say, maybe we don't provide a definition, but maybe—because of the issues so stated, the reason so stated, but maybe it should be that if the President is going to declare an emergency, that we require the President to define exactly what the emergency is and why it is an emergency, as opposed to defining it, because I do think that there is an emergency at the border.

Now, it has been going on for a long time, which probably wouldn't fit your definition, right. It is an emergency that happens every day that Congress just can't seem to—and we can't all seem to get it together and agree to something. But it doesn't mean it

is not an emergency problem that ebbs and flows in the state of the emergency.

At the same time, I don't necessarily see student loan debt as an emergency that has some kind of existential threat to our country or the people that have the loan or the people that it—so, I think maybe we are looking at it the wrong way, but I don't think we can just disregard the emergency itself.

Before I go to you, Mr. Dayton, because I am going to run out of time here, because I could spend probably all day here on this, and I imagine you could, too. I have a lot of concern and angst about the fact that there is no reporting, there is no accountability, there is no record of the money spent, and that is a phenomenal thing to me.

I can't even begin to fathom, and can any of you—has there been any start to an accounting—like just a conglomeration of the total number of dollars that have been spent on the emergencies over time that we know of, not how they were spent, just like, how much money was spent that we don't know where it is? Has there been any attempt at even doing that? And I will start with Mr. Dayton.

Mr. DAYTON. I am not aware of one. I will say on the reporting issue, if the President actually needed your vote to confirm the emergency, I think you might get the reports, right. I mean, I think we have seen in cases where powers of sunset, I know there is a current debate about section 702 surveillance authorities that I am not taking a position one way or the other, but all of a sudden when Congress is about to vote on reauthorizing these authorities, Congress gets a lot of material from the executive branch.

So, I think one thing you can do here is by putting yourself in the driver's seat, by putting Congress in the driver's seat saying, Mr. President, or Mrs. President, if you don't send us this stuff we are not going to approve it, all of a sudden I think you are going to get more compliance from the executive branch.

And I think also going back, and this is also partially response to Mr. Garamendi's point, that if you—there are going to be different definitions of emergencies. And I think the part of the purpose of this structure is to, one, make this a political question that it properly is; and two, we need to ask what purpose a definition serves. Is it to sort of create a norm for the President? Is it for judicial review? Is it to more clearly define the nature of the debate in Congress?

Mr. PERRY. Yes. Yes, to all—I think it is yes to all of it, but that might just be me.

My time has long since expired. The Chair now recognizes the ranking member, Ms. Titus.

Ms. TITUS. Thank you, Mr. Chairman.

No, it is a very interesting discussion. I was just looking here about the difference between an emergency and a problem. An emergency occurs when a problem suddenly gets worse, and then it becomes an emergency. The definition of emergency is kind of like obscenity. I can't define it, but I know it when see it, and that is kind of what we have been using.

It is interesting when you talk about the power of Congress versus the President. The Congress was put first in the Constitu-

tion. It is Article I. It is of the people. It is supposed to be more powerful than the President. But then you can argue that over time the President has become more powerful than Congress, especially in foreign policy.

Now, some of that is systemic. You developed a bureaucracy. You have got more access to information. You are one person, you can act quicker than 435. All of that has occurred over time. But it is also true that Congress is just giving away power to the President, whether it is war powers as we were talking about, budget and impoundment control, AUMFs in specific cases, just giving it away.

Now, you mentioned, Mr. Thallam, that when Congress gets back into the process, it will give credibility or legitimacy to the declaration that the President makes, so, they work hand in hand. But I would argue, sometimes Congress just gives its power away because they want to get the monkey off their back. We don't want to be the one to declare war for whatever reasons. We don't want to be the one to have to step in and solve this hurricane, so, let's just let somebody else take care of it because of politics.

It is very hard to separate those politics from that policy. I just wonder if you would care to comment on that, anybody?

Mr. THALLAM. It is often—I think the line of thinking you are going down, it is not an accident that a lot of this sort of—this practice of Congress has happened. Also, by the way, I use that obscenity definition in my written testimony, so, we were thinking along the same lines. But that is why it is so hard.

I think that is why creating procedural structures that default to it coming to Congress, right, I think that is a necessary condition. It may not be a sufficient condition for Congress—I think I used the phrase “building its policymaking muscle back up”—but it is a necessary condition to kind of force Congress to have to address things, not just in emergencies, in lots of areas.

And I know there are a lot of legal experts in the room, including yourself. I mean, this is kind of like probably better titled the National Emergencies Procedures Act, would be maybe a better way to think of it, because it is the procedure underlying the use of authorities that were granted elsewhere, in the same way the APA is not the grant of authority for regulatory policymaking, but it is an overarching structure, right. But in this case, this Congress takes an active role, and by default, and it forces Congress to have to say, yes or no, and not just kind of say, well, someone will deal with it.

Ms. TITUS. Mr. Dayton?

Mr. DAYTON. I completely agree. I think there are a couple of ways to think about some of these things. One is in terms of “accountability,” a word we have used, but also, you could imagine it is credit. To use the—this is an issue that will probably split the dais, but if you were in favor of President Trump's border wall emergency, then you get to vote for it as a Member of Congress and show your support, right. If you were in favor of President Biden's student loan program, you would get to vote for it.

And people would have concrete actions and sort of shared in the credit and shared in the accountability. And I think that would be very helpful for us as a society to have a situation where Congress shares more in that credit, because right now, in the situation like

where we have now, you are sort of bystanders in some of this process, and that is not healthy for Congress, that is not healthy for our political culture.

Ms. GOITEIN. On this question of definitions, there is a dictionary definition of an emergency, and that includes the element that the event has to be sudden and unexpected. I would say that that is also core to the purpose of emergency powers in our constitutional system. If a problem, however dire, has been around for years and years and years, Congress has had a chance to legislate on that problem; and if Congress has decided that it is better not to legislate on that problem, then it is not appropriate for the President to sort of take over through emergency powers.

A system that allows the President to implement long-term policy through emergency powers not only treads on the prerogative of Congress, it lets Congress off the hook, which is part of, I think, what you were getting at.

Ms. TITUS. All right. Well, thank you, and I yield back.

Mr. PERRY. The Chair thanks the gentlelady.

The Chair now recognizes the gentlelady from Puerto Rico, Mrs. González-Colón.

Mrs. GONZÁLEZ-COLÓN. Thank you, Mr. Chairman. Happy to be here.

I think this is an important discussion. And coming from an island that has a lot of natural disasters, a lot of emergencies, earthquakes, and with the pandemic as well, I mean, it is true that sometimes there is a need to extend the state of emergency due to the scope of the problem. So, yes, there should be some flexibility, but if an emergency declaration keeps renewing 40 years, 24 years, is it really an emergency, or is it just a way to have a continuing policy that for some reason, Congress or the President does not want to submit to the legislative process?

So, one of the issues that we were reviewing here is that there are some emergency declarations that date back to the Carter administration. While some are still relevant, many are clearly outdated and no longer an emergency. One of the questions will be, are there any funds still directed to those outdated emergency declarations?

Ms. GOITEIN. So, the oldest emergencies are the IEEPA emergencies, and one of the things about IEEPA is that it largely displaces the cost on to the private sector. So, the private sector incurs tremendous costs in complying with IEEPA sanctions, and of course, there are economic ramifications in terms of their not being able to do business in certain ways. The cost of the Government is less.

Of course, over time it still builds up, and whatever allocations are made to Treasury, to the Office of Foreign Assets Control, OFAC, then go into sort of oversight of these sanctions regimes. But it is not as if Congress is earmarking funds for particular emergencies or for particular emergency declarations. I think if you were getting the reporting you are supposed to be getting, I mean, you do get it for IEEPA declarations, but for other declarations, you would know what the money that you are sending out there for more general purposes is actually being used for.

Mrs. GONZÁLEZ-COLÓN. We are actually not receiving the reports. So, is there any way to know how much the private sector is paying for those kind of emergency measures of that time?

Ms. GOITEIN. There is no way to know. And you look at something like the 9/11 emergency, which has now been in place for 22 years, and I would expect that that price tag is staggering because that declaration is still being relied on for things that, frankly, have nothing to do with 9/11.

So, as recently as 2017, President Trump relied on the 9/11 emergency declaration to fill a chronic shortage in Air Force pilots. I would like very much to see how much money has been spent in that—

Mrs. GONZÁLEZ-COLÓN [interrupting]. And how do we enforce those reports? What should be the mechanism to enforce those reports?

Ms. GOITEIN. Well, you have the power of the purse, Congress does, generally speaking. You could conduct an oversight hearing. The question is, who you would have in front of you to ask questions of for the 9/11 emergency declaration. It is the Department of Defense that is supposed to be submitting the reports, so, it might not be this committee's jurisdiction.

Maybe some of my witnesses have ideas.

Mr. THALLAM. I mean, this is absolutely appropriate for language that should go into appropriations, like this should be a condition—I don't want to get into the specifics of how that was, but, I mean, these are absolutely appropriate things that Congress has and should ask for and using the power of the purse say, hey, this isn't just a call or an email asking for these, this is Congress saying that this is part of your job, executive branch, and we need this to do our job.

Mrs. GONZÁLEZ-COLÓN. Question: I know that the Presidents have used past emergency declarations to proceed with activities that don't really relate to the initial emergency. How often, or how common is it for Presidents to use prior declarations of emergency to actually proceed with their priorities?

Ms. GOITEIN. I am sorry, I had trouble hearing that.

Mrs. GONZÁLEZ-COLÓN. Yes. How often or how common is it for Presidents to use prior declarations of emergency to proceed with their priorities?

Ms. GOITEIN. Again, it is hard to know without better reporting on how those emergency declarations are being used. But I would say that the best example that I think we have is probably the 9/11 emergency declaration, and that has certainly been used for unrelated purposes.

So, for example, that declaration was used in 2003 to call up reservists and implement "stop-loss" during the Iraq war, which, of course, had nothing to do with 9/11, and that it has been used since then to sort of artificially prop up military strength in ways that would otherwise either run up against limits that Congress has put in place, or require specific congressional authorization, and the declaration is used to do those things without the necessary authorization.

Mrs. GONZÁLEZ-COLÓN. Thank you. My time expired. I yield back.

Mr. PERRY. The gentlelady's time is expired.
The Chair now recognizes Representative Van Orden.
Mr. VAN ORDEN. Thank you, Mr. Chairman.

I want to be very clear, this issue is much more nuanced than it appears to be, and I would like to give you an example, and I will be bragging on the State of Wisconsin. There is a statute, it is 323.10. It says the Governor is capable of declaring a state of emergency, but after 60 days, it will expire automatically unless it is affirmed by a joint resolution, which is awesome. So, I think that is the framework we could use.

However, in the State of Wisconsin, when the Governor declared an emergency for COVID, at the 60-day mark, he tried to kick the can down the road and hand it to a woman named Andrea Palm, who was the health secretary, and tried to extend the ability for him to have our State held in a state of emergency. That was declared unconstitutional by the Wisconsin State Supreme Court.

And here is where I must strongly and vehemently disagree with my colleagues on the other side of the aisle saying that we must forget about the issues of the day and focus on the long term. The reason I say this is now Andrea Palm works for the Department of Health and Human Services under the Biden administration. So, someone who tried to unconstitutionally continue the state of lockdown in the State of Wisconsin was promoted to the Federal Government.

So, in fact, we must hold people accountable directly who are responsible. They took 2 years away from our children, drug and alcohol addiction have skyrocketed, spousal abuse and child abuse are skyrocketing, our kids don't know how to read any longer, they don't know how to socialize because bureaucrats and politicians got drunk on power, and they locked down our country. There are still mobile COVID test sites in Baltimore where you drive up in your car and you wait for someone to approach you to test you for COVID. Why? Because the Government instilled fear in people.

So, we all stopped for 60 days in the State of Wisconsin and said, we are lawful citizens, we are obeying the law. But in 61 days, when the Government acted unconstitutionally, we said no. And what people tried to say is that you can't do both. Well, the same person that adheres to the law strictly is also the same person that stands up when the people who are governing you are not following the law. And that is the nuanced part of what is taking place here, and it is still taking place. So, in fact, I want to hold the people accountable that have been doing this, because they must or it will never change.

And again, I want to thank you so much. I can't believe that this hearing is not—I mean, this should be the showcase for Congress. It is unbelievable. So, let me just—I want to go through each one of you real quick. Do you guys believe that the same person that adheres to these emergencies should be the same person that when they clearly violate the constitutional authority that they are the ones that stand up and say no, that those can exist in the same universe? Mr. Dayton?

Mr. DAYTON. I am sorry, I was having a little bit of trouble hearing you. Can you restate?

Mr. VAN ORDEN. OK. I just want to be clear and I want to ask you, states of emergency should exist during certain periods of time. So, the person that adheres to the law when it is put out lawfully, can they be the same person that says no once those constitutional authorities have expired?

Mr. DAYTON. Oh, I think you can easily imagine a situation where Congress, let's say one of these reforms passed, or like happened in Wisconsin where the legislature would say that is appropriate now, and then, come to a different determination when the facts change, right. I think in many ways we saw that over the COVID national emergency here in Congress where it went from—in the Senate from 49 votes last March to 68 votes this March.

Mr. VAN ORDEN. Excellent.

Mr. THALLAM. Yes, the exact point that the—by creating a default, also an emergency declaration gives time for Congress or a legislature to weigh in where they may not within 24 hours or 48 hours of the onset of an emergency. But now, you are creating a window and it says, Congress or legislature, you have to make this choice, and if this is going to continue then you either say yes, or if you think it is not going to, you say no. And in that case it sounded like it was challenged by the court. A statute could be challenged if a President didn't—

Mr. VAN ORDEN [interposing]. Right.

Mr. THALLAM [continuing]. Follow the structure that was laid out.

Mr. VAN ORDEN. Ma'am?

Mr. Chairman, please indulge me for a second.

Ma'am?

Ms. GOITEIN. Emergency powers deliberately give the President a tremendous amount of discretion, especially when taken together in ways that Congress cannot predict how the President might choose to use them, and Congress can't predict what the circumstances will be.

So, I think it makes a good deal of sense to have that period of time to give the President flexibility in the immediate aftermath of the crisis, but to have that time for Congress to see how the emergency powers are being implemented and come to its own judgment about whether, first of all, they are being implemented as Congress maybe intended, but also, whether emergency powers are the right way to deal with that particular circumstance. So, I think it makes good sense.

Mr. VAN ORDEN. Excellent. Thank you, ma'am.

So, I just want to be clear that these types of things have been used for political purposes. And by painting people as extremists, you are actually attempting to remove their constitutional rights, and that has been proven over and over again.

So, Mr. Chairman, thank you so much.

And thank you for coming here today. I yield back.

Mr. PERRY. The Chairman thanks the gentleman. The gentleman yields back.

There are no other members of the subcommittee that have not been recognized, so, with that, we will conclude the hearing for today. I would like to thank each of our witnesses for coming here, for your time, and your expertise.

I do ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be yet submitted to them in writing.

Without objection, so ordered.

I also ask unanimous consent that the record remain open for 15 days for additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

The subcommittee stands adjourned.

[Whereupon, at 11:51 a.m., the subcommittee was adjourned.]

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