

**STATEMENT OF**  
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**BEFORE THE**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON THE JUDICIARY**  
**SUBCOMMITTEE ON THE CONSTITUTION**

**HEARING ON**  
**THE NATIONAL EMERGENCIES ACT OF 1976**

**FEBRUARY 28, 2019**

## Introduction

Chairman Cohen, Ranking Member Johnson, and members of the subcommittee, thank you for this opportunity to testify on behalf of the Brennan Center for Justice at New York University School of Law.<sup>1</sup> 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.<sup>2</sup> We began our study of emergency powers by researching the history of the National Emergencies Act of 1976. We then catalogued all the statutory powers that become available to the president when a national emergency is declared, and for each such power, we determined when and under what circumstances it had been invoked. We published this compendium online<sup>3</sup> along with a list of national emergency declarations issued since the National Emergencies Act went into effect.<sup>4</sup>

Based on this research, it is my firm opinion that Proclamation 9844<sup>5</sup> is an unprecedented abuse of the laws governing national emergencies. President Donald Trump issued this emergency declaration, not because a sudden change in circumstances necessitated an immediate response, but because Congress rebuffed his efforts to obtain funding for a long-term policy goal. Using emergency powers to get around Congress is inconsistent with Congress's intent in passing the National Emergencies Act and in providing the president with emergency powers to exercise. It is also an affront to the constitutional separation of powers.

If allowed to stand, the declaration will create a precedent that allows presidents to deploy literally dozens of extraordinary statutory powers, including powers that are far more potent than the ones the president has invoked here, as a matter of routine and in the face of express congressional disapproval. This would permanently alter the balance of power between the political branches of government. It would also subvert basic democratic principles by allowing the implementation of government policies opposed by a majority of Congress.

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<sup>1</sup> 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>.

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

<sup>3</sup> "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last modified January 23, 2019, accessed February 25, 2019, <https://www.brennancenter.org/analysis/emergency-powers>.

<sup>4</sup> "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, accessed February 25, 2019, [https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct\\_2.14.19.pdf](https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct_2.14.19.pdf).

<sup>5</sup> Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

Finally, the president's actions have highlighted critical weaknesses in the National Emergencies Act that could invite future abuse. Regardless of the outcome in this instance, Congress should enact common-sense reforms that provide the president with the flexibility he needs in a crisis, while simultaneously ensuring that these extraordinary powers can't be used to undermine our democracy and guarding against the corrosive phenomenon of "permanent emergencies."

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

Emergency powers have existed in countries around the world for hundreds of years. They are based on a simple premise: The laws that hold sway in ordinary times might not be sufficient to respond to an unforeseen crisis, and amending the law to provide greater powers might take too long or do damage to principles held sacrosanct in ordinary times. Emergency powers thus give the government—usually, the head of state—a temporary boost in power until the crisis passes or there is time to change the law through normal legislative processes.<sup>6</sup>

Unlike the modern constitutions of most countries,<sup>7</sup> 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,"<sup>8</sup> and Congress has the power "to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."<sup>9</sup>

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.<sup>10</sup> 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.

Critically, however, none of these powers allows the president to make law in his own right—i.e., to create the alternative set of rules that will govern his actions. Similarly, while some laws specify certain statutory provisions that the president may suspend in an emergency, none allows him to choose for himself which laws he may disregard. Under the statutory emergency powers regime, the president is strictly limited to the powers that Congress has granted to him in

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<sup>6</sup> 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.

<sup>7</sup> A review of current constitutions reveals that at least 178 countries' constitutions have provisions for emergency rule. See *Constitute*, s.v. "emergency provisions," accessed February 25, 2019, [https://www.constituteproject.org/search?lang=en&key=em&status=in\\_force](https://www.constituteproject.org/search?lang=en&key=em&status=in_force).

<sup>8</sup> U.S. Const. art. 1, § 9, cl. 2.

<sup>9</sup> U.S. Const. art. 1, § 8, cl. 15.

<sup>10</sup> Harold C. Relyea, *National Emergency Powers*, Congressional Research Service, 2007, 5, <https://fas.org/sgp/crs/natsec/98-505.pdf>.

advance. The will of Congress thus remains the touchstone during emergencies as in other times.<sup>11</sup> 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.<sup>12</sup>

## 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.<sup>13</sup> 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.<sup>14</sup> 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."<sup>15</sup>

The committee's work culminated in the introduction and passage of the National Emergencies Act of 1976.<sup>16</sup> The clear purpose of the law, evident in every facet of the legislative

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<sup>11</sup> Some scholars believe the Constitution also grants the president "inherent" emergency powers (*see, e.g.*, Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006)), and presidents since Abraham Lincoln have occasionally cited such inherent powers to justify emergency measures that Congress had not authorized or had even prohibited. This is a wholly separate source of emergency power that is not addressed here because it not being claimed or relied upon in this instance.

<sup>12</sup> *See, e.g.*, Constitution of the Republic of Ecuador, 2015, ch. 3, § 1, art. 148.

<sup>13</sup> Relyea, *National Emergency Powers*, 7.

<sup>14</sup> *See generally* Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 *Political Science Quarterly* 209-37 (1980).

<sup>15</sup> S. Comm. on Government Operations and the Spec. Comm. on National Emergencies and Delegated Emergency Powers, *The National Emergencies Act (Public Law 94-412)*, Source Book: Legislative History, Text, and Other Documents, at 20 (1976) [hereinafter Spec. Comm. on National Emergencies Source Book].

<sup>16</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

history, was to place limits on presidential use of emergency powers. As summarized by the committee in urging passage of the Act:

While much work remains, none of it is more important than passage of the National Emergencies Act. Right now, hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process. Revelations of how power has been abused by high government officials must give rise to concern about the potential exercise, unchecked by the Congress or the American people, of this extraordinary power. The National Emergencies Act would end this threat and insure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review.<sup>17</sup>

The law employed several mechanisms to this end. It required the president to publish declarations of national emergency in the Federal Register;<sup>18</sup> to specify the powers he intended to invoke;<sup>19</sup> and to report to Congress every six months on expenditures related to emergency powers.<sup>20</sup> It provided that states of emergency would terminate after a year unless renewed by the president.<sup>21</sup> 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),<sup>22</sup> 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.<sup>23</sup>

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.”<sup>24</sup> 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.”<sup>25</sup>

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

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<sup>17</sup> Spec. Comm. on National Emergencies Source Book at 50.

<sup>18</sup> National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621).

<sup>19</sup> National Emergencies Act, Pub. L. No. 94-412, § 301, 90 Stat. 1255, 1257 (codified at 50 U.S.C. § 1631).

<sup>20</sup> National Emergencies Act, Pub. L. No. 94-412, § 401 (c), 90 Stat. 1255, 1257 (codified at 50 U.S.C. § 1641(c)).

<sup>21</sup> National Emergencies Act, Pub. L. No. 94-412, § 202 (d), 90 Stat. 1255, 1257 (codified at 50 U.S.C. § 1622(d)).

<sup>22</sup> National Emergencies Act, Pub. L. No. 94-412, § 202, 90 Stat. 1255 (codified as amended at 50 U.S.C. § 1622).

<sup>23</sup> National Emergencies Act, Pub. L. No. 94-412, § 202 (b), 90 Stat. 1255, 1256 (codified at 50 U.S.C. § 1622(b)).

<sup>24</sup> See, e.g. S. 977, 94th Cong. § 201 (a) (1975).

<sup>25</sup> Spec. Comm. on National Emergencies Source Book at 96.

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.<sup>26</sup>

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 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.

### **III. National Emergencies from 1979 to the Present**

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

As noted, the decision not to define "national emergency," although intended to ensure the Act did not result in an expansion presidential authority, in practice meant there were no clearly articulated limits on the exercise of the president's discretion. In addition, expiration of emergencies after one year, intended as the default, has become the exception. Most of the emergencies declared since the National Emergencies Act was passed are still in effect. The average length of emergencies has been approximately 10 years, with 25 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.<sup>27</sup>

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<sup>26</sup> S. Comm. on Gov. Operations, Report to Accompany H.R. 3884, S. Rep. No. 94-1168, at 3 (1976) (reprinted in Spec. Comm. on National Emergencies Source Book at 292).

<sup>27</sup> See "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, accessed February 25, 2019, [https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct\\_2.14.19.pdf](https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct_2.14.19.pdf).

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.<sup>28</sup> Congress's solution was to substitute a joint resolution as the mechanism for terminating emergencies.<sup>29</sup> 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, Congress has 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 40-plus years the law has been in effect, which means Congress should have met approximately 80 times to review existing states of emergency. There is no indication, however, that Congress has ever done so.<sup>30</sup> Before now, 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.<sup>31</sup>

National emergencies are thus easy to declare and hard to stop—and they grant access to a rich well of powers, most of which are 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 60 states of national emergency have been declared in a 40-year period, 32 of which are in effect today. Fifty-four 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.<sup>32</sup> These declarations must be considered separately.

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<sup>28</sup> *INS v. Chadha*, 462 U.S. 919, 954-55 (1983).

<sup>29</sup> *See* 50 U.S.C. § 1622(a)(1).

<sup>30</sup> On one occasion in 1980, the Chair of the House Foreign Affairs Committee sent a letter to the Speaker of the House expressing approval over the continuation of an existing state of emergency. *See* Patrick A. Thronson, "Toward Comprehensive Reform of America's Emergency Law Regime," *University of Michigan Journal of Law Reform* 46:2 (2012): 737, 752, 752 n. 108. This, apparently, is the closest Congress has come before now to considering a vote.

<sup>31</sup> 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>.

<sup>32</sup> The numbers in this paragraph are derived from review of the emergency proclamations as compiled by the Brennan Center and comprehensively listed at "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, accessed February 25, 2019, [https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct\\_2.14.19.pdf](https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct_2.14.19.pdf).

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,<sup>33</sup> 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.<sup>34</sup> 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.”<sup>35</sup> 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 basic 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.”<sup>36</sup> 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.<sup>37</sup>

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,”<sup>38</sup> 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.”<sup>39</sup> State Department spokesperson Jen Psaki echoed

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<sup>33</sup> Trading with the Enemy Act of 1917, ch. 106 § 5 (b)(1), 40 Stat. 415 (1917) (codified as amended at 50 U.S.C. § 4305(b)(1)).

<sup>34</sup> See Laura K. Donohue, “Constitutional and Legal Challenges to the Anti-Terrorist Financing Regime,” *Wake Forest Law Review* 43 (2008): 643, 647-48.

<sup>35</sup> International Emergency Economic Powers Act, Pub. L. 95-223, title II, § 202, 91 Stat. 1626 (1977) (codified at 50 U.S.C. 1701 (b)).

<sup>36</sup> See Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale University Press, 1990), 47.

<sup>37</sup> See “Declared National Emergencies Under the National Emergencies Act,” Brennan Center for Justice, accessed February 25, 2019, [https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct\\_2.14.19.pdf](https://www.brennancenter.org/sites/default/files/analysis/DeclaredNationalEmergenciesUndertheNationalEmergenciesAct_2.14.19.pdf).

<sup>38</sup> Exec. Order No. 13692, 80 Fed. Reg. 127467 (Mar. 8, 2015).

<sup>39</sup> Gregory Korte, “White House: States of emergency are just formalities,” *USA Today*, April 9, 2015, <https://www.usatoday.com/story/news/politics/2015/04/09/pro-forma-states-of-national-emergency/25479553/>.



his remarks: “This is how we describe the process of naming sanctions, and there are 20 to 30 other sanctions programs we have.”<sup>40</sup>

Nonetheless, Congress has for decades acquiesced in, and arguably ratified, the use of IEEPA as a substitute for ordinary sanctions legislation.<sup>41</sup> 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.<sup>42</sup> (That is, in fact, exactly what happened in 1983.)<sup>43</sup>

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 prior to President Trump’s Proclamation 9844 includes:

- Executive Order 12722 (1990) – issued in response to the Iraqi invasion of Kuwait. Although the emergency was initially 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)<sup>44</sup> – 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.

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<sup>40</sup> Ibid.

<sup>41</sup> This is not to say that it would be impossible for presidents to abuse IEEPA or to use it in ways Congress has not (tacitly) approved. IEEPA is written broadly enough to permit actions that go far beyond imposing economic sanctions against foreign governments or factions. Indeed, after 9/11, the administration of President George W. Bush invoked IEEPA to effectively shut down several U.S.-based Muslim charities. In two cases, courts held that these actions were unconstitutional. *See Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of the Treasury*, 686 F.3d 965 (9th Cir. 2012); *Kindhearts for Charitable Humanitarian Dev. v. Geithner*, 647 F.Supp.2d 857 (N.D. Ohio 2009).

<sup>42</sup> 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.

<sup>43</sup> Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983).

<sup>44</sup> 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.

- 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.

In all of these cases, the declarations were triggered by sudden, unexpected events. With the exception of Iraq’s invasion of Kuwait, which prompted an emergency declaration for the initial purpose of imposing sanctions under IEEPA, these occurrences directly and significantly affected Americans’ health or safety, and 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. As noted, it is questionable whether Iraq’s invasion of Kuwait constituted an emergency for the U.S. that justified invoking emergency military powers. And while Cuba’s attack on American aircraft and the attacks of 9/11 constituted real emergencies, it is worrisome that those states of emergency remain in place today. Emergencies, of course, can result in 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.<sup>45</sup>

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.<sup>46</sup> In 2017, President Trump relied on the 9/11 declaration to invoke emergency powers to fill a chronic shortage in Air Force pilots.<sup>47</sup>

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<sup>45</sup> See, e.g., Spec. Comm. on National Emergencies and Delegated Emergency Powers, Interim Report, S. Rep. No. 93-1170, at 1 (reprinted in Spec. Comm. on National Emergencies Source Book at 19 (“A majority of Americans alive today have lived their entire lives under emergency rule.”)); 120 Cong. Rec. S15784-86 (daily ed. Aug. 22, 1974) (statement of Sen. Church) (reprinted in Spec. Comm. on National Emergencies Source Book at 73) (“[F]ew, if any, foresaw that the temporary states of emergency declared in 1933, 1939, 1941, 1950, 1970, and 1971, would become what are now regarded collectively as virtually permanent states of emergency . . .”).

<sup>46</sup> 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).

<sup>47</sup> 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>.

Still, what is most notable about the record of presidential use of emergency powers (outside the unique context of IEEPA<sup>48</sup>) is what has *not* happened. Despite the lack of strong limits in National Emergencies Act, presidents have not declared national emergencies simply to grant themselves additional powers when convenient. In most cases, they have not renewed the emergency declarations indefinitely, but revoked them or allowed them to expire when the threat had passed. And while nothing in the National Emergencies Act would prevent presidents from using emergency declarations to access dozens of special powers unrelated to the emergency at hand, presidents have not exploited that license. The Brennan Center’s research indicates that nearly 70% of the powers available to the president when he invokes a national emergency have never been invoked.<sup>49</sup>

Given the permissive nature of the National Emergencies Act, it was perhaps only a matter of time until this record of self-restraint ended, and a president misused the Act to give himself powers Congress never intended for him to have. We are in that position today.

#### **IV. President Trump’s Declaration: An Unprecedented Abuse**

Against this backdrop, President Trump’s emergency declaration is an unprecedented abuse of emergency powers for at least two reasons.

The first reason is the absence of conditions that meet any common-sense definition of an emergency. Congress did not include a definition of “national emergency” in the National Emergencies Act. However, the word “emergency” is not meaningless. A quick sampling of prominent English-language dictionaries reveals some common elements. Merriam-Webster, for instance, defines “emergency” as “an unforeseen combination of circumstances or the resulting state that calls for immediate action”<sup>50</sup>; the Oxford-English dictionary similarly defines it as “[a] serious, unexpected, and often dangerous situation requiring immediate action.”<sup>51</sup>

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, not the better. 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.

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<sup>48</sup> Even with respect to IEEPA, presidents have shown some restraint. As noted above (see footnote 41), 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, IEEPA generally has been used to target foreign actors, including foreign governments, officials, factions, and suspected narcotics traffickers and terrorist groups.

<sup>49</sup> 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 modified January 23, 2019, accessed February 25, 2019, <https://www.brennancenter.org/analysis/emergency-powers>.

<sup>50</sup> *Merriam-Webster*, s.v. “emergency,” accessed February 25, 2019, <https://www.merriam-webster.com/dictionary/emergency?src=search-dict-hed>.

<sup>51</sup> *English Oxford Living Dictionaries*, s.v. “emergency,” <https://en.oxforddictionaries.com/definition/emergency>.

It is possible to view illegal immigration at the southern border as a significant problem and still acknowledge the simple reality that it has not taken an unexpected turn for the worse. Official government data leave no doubt on that point. Illegal border crossings have been steadily declining since reaching a record high of 1.64 million in 2000. In 2017, they reached their lowest point (303,916) in 40 years; they remained close to that historic low (396,579), and well within the fluctuation range for the past several years, in 2018.<sup>52</sup> There have been no significant changes in patterns of crime, either: statistically, immigrants—both documented and undocumented—remain less likely to commit crimes, including violent crimes, than U.S. citizens.<sup>53</sup> Similarly, official reports indicate that the drugs President Trump has identified as posing a threat to the U.S.—methamphetamine, heroin, cocaine, and fentanyl—continue to be smuggled primarily through ports of entry, as they have in the past.<sup>54</sup> Indeed, the only change in circumstances the president was able to identify in his proclamation is a significant increase in families seeking asylum at the border.<sup>55</sup> This change, however, is not evidence of “unlawful migration”—the crisis identified in the proclamation—as these families are seeking admission to the United States through lawful means.

Moreover, it is clear from President Trump’s own words and actions that the situation at the southern border does 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.<sup>56</sup> 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.”<sup>57</sup> Finally, the White House has indicated that the president will not obtain funding from emergency sources until he has exhausted various non-emergency sources of funding,<sup>58</sup> which will presumably take months if not years.

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<sup>52</sup> Lori Robertson, “Illegal Immigration Statistics,” FactCheck.Org, last modified January 9, 2019, accessed February 25, 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 February 25, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf>.

<sup>53</sup> See, e.g., Alex Nowrasteh, “The Murder of Mollie Tibbetts and Illegal Immigrant Crime: The Facts,” *Cato Institute*, August 22, 2018, <https://www.cato.org/blog/murder-mollie-tibbetts-illegal-immigrant-crime-facts> (observing that “[t]he illegal immigrant conviction rate for homicide was 44 percent below that of native-born Americans in 2016 in Texas”) (emphasis in original).

<sup>54</sup> U.S. Customs and Border Protection, “CBP Enforcement Statistics FY2018,” accessed February 25, 2019, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> (showing that, between October 2017 and August 2018, federal agents seized 88 percent of cocaine, 90 percent of heroin, 87 percent of methamphetamine, and 80 percent of fentanyl at ports of entry).

<sup>55</sup> Proclamation No. 9844, 84 Fed. Reg. 4949 (February 15, 2019).

<sup>56</sup> 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>.

<sup>57</sup> 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/>.

<sup>58</sup> Charlie Savage, “Trump to Tap Other Military Money for Wall Before Emergency Funds,” *New York Times*, February 19, 2019, <https://www.nytimes.com/2019/02/19/us/politics/trump-border-wall-emergency-funds.html>.

As noted above, not all the events triggering past declarations of national emergency outside posed a clear threat to the U.S. Outside of the IEEPA context, however, they all constituted significant, unforeseen changes in circumstances, and all but one involved direct and substantial harm to Americans' health or safety. A year in which illegal border crossings continue to occur at historically low rates simply cannot be compared to the Iraqi invasion of Kuwait, Cuban attacks on U.S. aircraft, the attacks of 9/11, major hurricanes, or an outbreak of swine flu. And in all of these cases, presidents acted promptly after the need for emergency measures became apparent.

Moreover, even if illegal border crossings had spiked to an all-time high, President Trump's declaration would be an unprecedented 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.<sup>59</sup> For the first time since the passage of National Emergencies Act, the president is invoking emergency powers to thwart the express will of Congress.

This is not merely an inference. The President has been quite explicit that he is declaring an emergency to get around Congress. In the weeks leading up to the declaration, he repeatedly stated that he would give Congress time to change its mind about funding the wall, and that he would declare an emergency only if Congress refused to give him what he wanted. 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.<sup>60</sup> 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."<sup>61</sup> 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.<sup>62</sup> He

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<sup>59</sup> 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, 2018, 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, 2019, H.R. 268, 115th Cong. (2019).

<sup>60</sup> 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/>.

<sup>61</sup> George Sargent, "Trump: I Have the 'Absolute Right' to Declare a National Emergency if Democrats Defy Me," *Washington Post*, January 9, 2018, [https://www.washingtonpost.com/opinions/2019/01/09/trump-i-have-absolute-right-declare-national-emergency-if-democrats-defy-me/?utm\\_term=.124f57619b33](https://www.washingtonpost.com/opinions/2019/01/09/trump-i-have-absolute-right-declare-national-emergency-if-democrats-defy-me/?utm_term=.124f57619b33).

<sup>62</sup> "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).

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.”<sup>63</sup>

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

If, on the other hand, Congress has time to respond, there is no justification for bypassing the ordinary legislative process. (In this case, 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 life-sustaining treatment when the patient is conscious and clearly asking to be saved.<sup>64</sup>

The abuse is particularly egregious in this case 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.”<sup>65</sup> The president is thus invoking emergency powers, not just to get around the will of Congress in general, but to evade an express limitation in the Constitution.

Since the National Emergencies Act was passed, no other president has used emergency powers to obtain funding Congress has denied. The closest comparison is President Ronald Reagan’s emergency declaration in 1983, which he used to continue certain export controls under IEEPA after a statute authorizing such controls had lapsed.<sup>66</sup> 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 attempted to take.

## **V. How—and Why—Congress Must Act**

Congress can put an end to President Trump’s abuse of emergency powers by passing a joint resolution to terminate the emergency. At time of writing, the House is preparing to vote on such a resolution, which is expected to pass easily. It might well pass in the Senate, too, given that several conservative senators are on record opposing President Trump’s use of emergency

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<sup>63</sup> 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/>.

<sup>64</sup> See Elizabeth Goitein, “Trump Is Destroying His Own Case for a National Emergency,” *The Atlantic*, January 28, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/trump-has-no-case-national-emergency/581356/>.

<sup>65</sup> U.S. Const. art. I, § 9, cl. 7.

<sup>66</sup> Exec. Order No. 12444, 48 Fed. Reg. 48215 (October 14, 1983).

powers to build the border wall.<sup>67</sup> Of course, if Congress passes the resolution, President Trump will likely veto it, and Congress will then have to vote on whether to override the president's veto.

Some lawmakers might choose to vote against the resolution because they believe that illegal immigration at the southern border is a major problem and that building the wall would help to solve it. Voting against the resolution on that basis would be extremely short-sighted. There is far more at stake here than whether a wall is built on the southern border.

For one thing, the direct policy consequences of the president's emergency declaration are not limited to the building of a wall. One reason why even some conservative lawmakers have voted against funding this project is that it would require the government to forcibly commandeer vast stretches of private property. While the administration claims it cannot estimate how many landowners will be affected,<sup>68</sup> the 700 miles of border fencing constructed pursuant to a 2006 law—a much less extensive endeavor—required the government to pay out \$78 million in compensation to landowners for 600 tracts of property.<sup>69</sup> Furthermore, the main emergency power President Trump has invoked here, 10 U.S.C. § 2808, will require the diversion of funds from as-yet unspecified military construction projects. Although President Trump airily announced that the projects that otherwise would have been funded “didn't sound too important to me,”<sup>70</sup> it is likely that they are extremely important to the military servicemen and servicewomen and the communities who would have benefitted from them.

But there is an even more important reason why lawmakers, both conservative and liberal, should vote to end this emergency. If the declaration is allowed to stand, it will establish an extremely dangerous precedent. Future presidents will know that they can declare emergencies to address *any* problem they consider to be serious, and that they can use those emergency declarations to give themselves powers Congress has expressly withheld. This will permanently upset the balance of power between the president and Congress. It will also undermine one of the basic principles of democracy: that the policies pursued by our government are those approved by a majority of Congress, not those that Congress cannot muster a supermajority to reject.

Moreover, the next time a president decides to declare an emergency for the sake of political convenience, he could invoke powers far more potent than the one President Trump has

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<sup>67</sup> Kate Rabinowitz, “What Republican senators are saying about Trump's national emergency declaration,” *Washington Post*, February 20, 2019, [https://www.washingtonpost.com/graphics/2019/politics/natl-emergency-politics/?utm\\_term=.baf77c9d0aad](https://www.washingtonpost.com/graphics/2019/politics/natl-emergency-politics/?utm_term=.baf77c9d0aad).

<sup>68</sup> Ranking Member's Office, S. Comm. on Homeland Security and Government Affairs, “Eminent Domain: Administration Lacks Plans or Cost Estimates for Land Seizures Necessary to Construct Border Wall,” accessed February 25, 2019, <https://www.documentcloud.org/documents/4324179-REPORT-Eminent-Domain-Administration-Lacks-Plans.html>.

<sup>69</sup> Tracy Jan, “Analysis: Trump's border wall will require fight to take private land,” *Chicago Tribune*, March 21, 2017, <https://www.chicagotribune.com/news/nationworld/ct-border-wall-take-private-land-20170321-story.html>.

<sup>70</sup> 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/>.

invoked here.<sup>71</sup> The Brennan Center has catalogued 123 statutory provisions that become available to presidents when they declare a national emergency. Ninety-six of these require nothing more than the president’s signature. Twelve contain a *de minimis* restriction, such as a requirement that an agency head certify the necessity of the measure (something the president could simply order the agency head to do). Only fifteen of these powers contain a more substantive restriction, such as a requirement that the emergency have certain specified effects.<sup>72</sup>

While many of the authorities provided in these 123 provisions are measured and sensible, some seem like the stuff of authoritarian regimes. For example, merely by signing a declaration of national emergency, the president may take over or shut down radio stations;<sup>73</sup> if the president goes further and declares a “threat of war,” he may take over or shut down facilities for wire communication—including, potentially, much of U.S.-based Internet traffic.<sup>74</sup> Other powers would allow the president to freeze Americans’ assets and bank accounts,<sup>75</sup> to detail members of the U.S. armed forces to any country,<sup>76</sup> to prohibit or limit the export of any agricultural commodity,<sup>77</sup> to suspend statutory wage-rate requirements for public contracts,<sup>78</sup> or to “coordinate” domestic transportation.<sup>79</sup>

Some members of Congress might assume that this is a problem for the courts, not the legislature. But when the president oversteps his authority in ways that have broad legal and policy ramifications, both the judiciary *and* Congress have a responsibility to act. It would be shirking its constitutional duties for either branch to shrug its shoulders and assume that the other will handle matters. That is particularly true here, where flaws in the design of the National Emergencies Act—in particular, the lack of a definition of national emergency—present potential obstacles to litigation.

Indeed, no matter what happens with the current emergency declaration, this incident should serve as a wake-up call to Congress to reform the National Emergencies Act. The law has not been the check on executive branch action that Congress intended, and in its current form, it almost invites abuse. It is incumbent on Congress to fix this problem, rather than simply hoping that the courts will provide after-the-fact relief if and when abuses happen. A handful of common-sense reforms would preserve the president’s flexibility in times of crisis while mitigating against the risk of abuse and preventing “permanent emergencies.”

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<sup>71</sup> The president has invoked 10 U.S.C. § 2808, which allows the Secretary of Defense, during national emergencies that require the use of armed forces, to use unobligated funds for military construction projects in support of such required use.

<sup>72</sup> See Goitein, “Trump’s Hidden Powers,” *Brennan Center for Justice*; “A Guide to Emergency Powers and Their Use,” Brennan Center for Justice, last modified January 23, 2019, accessed February 25, 2019, <https://www.brennancenter.org/analysis/emergency-powers>.

<sup>73</sup> See 47 U.S.C. § 606(c).

<sup>74</sup> See 47 U.S.C. § 606(d); see also Elizabeth Goitein, “The Alarming Scope of the President’s Emergency Powers,” *The Atlantic*, January/February 2019, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

<sup>75</sup> See 50 U.S.C. § 1701 *et seq.*

<sup>76</sup> See 10 U.S.C. § 712(a)(3).

<sup>77</sup> See 7 U.S.C. § 5712(c).

<sup>78</sup> See 40 U.S.C. § 3147.

<sup>79</sup> See 49 U.S.C. § 114(g).



First, although the president’s discretion to declare an emergency should be broad, it should not be unlimited. Congress should specify that the president may declare a national emergency only if there exists a significant change in factual circumstances that poses an imminent threat to public health, public safety, or other similarly pressing national interests. These criteria would create a baseline, giving the president ample discretion while ensuring that he cannot declare emergencies to deal with either routine circumstances or new developments that pose little danger.

Second, an emergency declared by the president should end after 30 days (or a similarly short period of time) unless Congress votes to continue it. This approach, versions of which are used by many other countries,<sup>80</sup> 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 emergencies<sup>81</sup>—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.

Third, no state of emergency should be allowed to continue for more than five years. At that point, it cannot fairly be said that the circumstances necessitating action are unexpected or extraordinary; having persisted for several years, 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.

Fourth, 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. Congress should specify that the statutory authorities invoked under a declared emergency must relate to the nature of, and may be used only to address, that emergency.

Fifth, the law should make very clear that emergency powers cannot be used to circumvent Congress. The National Emergencies Act should be amended to state that no statutory authority available to the president during a national emergency may be used to provide

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<sup>80</sup> See, e.g., Spanish Constitution, § 116, [https://www.constituteproject.org/constitution/Spain\\_2011?lang=en](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](https://www.constituteproject.org/constitution/France_2008?lang=en); Constitution of Greece art. 48, [https://www.constituteproject.org/constitution/Greece\\_2008?lang=en](https://www.constituteproject.org/constitution/Greece_2008?lang=en).

<sup>81</sup> 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.

authorization or funding for a specific action if Congress, following the events giving rise to the emergency declaration, has withheld authorization or funding for that action.

Finally, there must be greater 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 this report public. Presidents should be required to detail, not only the expenses incurred, but the activities and programs implemented. These reports should be made public, although classified indexes may be necessary in some cases.

This list of reforms is not exhaustive, nor does it represent the only possible solution to address the weaknesses in the National Emergencies Act. It is critical, however, that Congress take action. The National Emergencies Act framework does not include sufficient protections against abuse—a fact made plain by the recent actions of President Trump. To honor the original intent behind the Act and to safeguard democracy against the threat posed by protracted emergency rule, Congress must amend the law to build in meaningful checks and balances.

Thank you again for this opportunity to testify.