

THE NATIONAL EMERGENCIES ACT OF 1976

HEARING
BEFORE THE
SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTEENTH CONGRESS
FIRST SESSION

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FRIDAY, FEBRUARY 28, 2019

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 12:21 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Scanlon, Dean, Garcia, Escobar, Jackson Lee, Johnson, Gohmert, Jordan, Armstrong, Reschenthaler, and Cline.

Staff Present: James Park, Chief Counsel, Constitution Subcommittee; Susan Jensen, Chief Parliamentarian; David Greengrass, Deputy Chief Counsel; Matt Weisman, Legislative Director; Patrick Bond, Legislative Assistant; Jacqueline Sanchez, Legislative Assistant; Robin Chand, Legislative Assistant; Armita Pedramrazi, Legislative Assistant; Colin Milon, Legislative Assistant; Devon Ombres, Legislative Assistant, Alex Lipow, Legislative Aide; Will Emmons, Professional Staff Member; Madeline Strasser, Chief Clerk; Julian Gerson, Staff Assistant; Brendan Belair, Minority Staff Director; Bobby Parmiter, Minority Deputy Staff Director; Jon Ferro, Minority Parliamentarian; Paul Taylor, Minority Chief Counsel, Constitution Subcommittee; and Andrea Woodard, Minority Professional Staff Member.

Mr. COHEN. It is good to have the gavel. The Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, which is the name it had when the Democrats were in the majority, and it is the Democrats name once again, and forever after, so it shall be, will come to order. Without objection, the chair is authorized to declare recesses of the subcommittee at any time.

Welcome to everyone to today's hearing on the National Emergencies Act of 1976. I will now recognize myself for an opening statement.

I am pleased today to convene the first hearing of this Subcommittee on the Constitution, Civil Rights, and Civil Liberties, for the 116th Congress. I look forward to working with Ranking Member Mike Johnson, and other members of the subcommittee on the many challenging and pressing issues that we will be addressing in the months to come.

It is fitting that our first hearing here will focus on the National Emergencies Act of 1976, and its implications for one of the core tenets of the Constitution's design, a governmental structure defined by checks and balances and the separation of powers, all from the brilliance of James Madison.

The primary function of the Constitution, besides the Congress, under Article 1, is the power to legislate, including the power to appropriate funds. As every grade school student, high school student, law student, is taught, Congress writes the laws, while the President's job is to enforce them.

We are also taught that Congress has the power of the purse. If the President wants to spend money for something, he or she needs to get funding from the legislative branch. That is Article 1. Unfortunately, President Trump has undermined those basic principles. After making a campaign pledge to build a wall along our southern border, 2,000 miles long, and then promising that Mexico would pay for it—which was simply a device that his campaign folks gave him to remember to bring up the issue, and later, it morphed into a policy design—he was met with a dose of reality. That was that Mexico was not going to pay for it, and that neither was Congress.

Polls show that the American people do not want to pay billions of dollars for a vanity project when illegal immigration is historic lows, when a wall would do nothing to stop drugs being smuggled into our country, which come through our ports of entry by about a 90 percent amount, and when families fleeing violence need an orderly and humane system to process asylum claims, not a concrete wall.

And there aren't women being duct taped over their mouths, legs immobilized, sex trafficked into our country. That is pure fantasy.

That is why earlier this year, Congress rejected the President's request for \$5.7 billion to build a border wall. In fact, President Trump did not even seriously pursue those billions of dollars during his first 2 years in office, when his party controlled both Houses of Congress. But the President doesn't not like getting his way. That is why 2 weeks ago, in a petulant action, he invented a so-called emergency to order—to divert billions of dollars in military construction funds to build his wall.

As Elizabeth Goitein—right?

Ms. GOITEIN. Very close, Goitein.

Mr. COHEN. You got it—one of our witnesses, will explain, this is the only time since the passage of the National Emergencies Act, that a President has invoked emergency powers to thwart the express will of Congress.

President Trump's actions undermine the basic separation of powers. It is not up to him to circumvent the funding directives that Congress has passed into law using its exclusive power of the purse. And it certainly is not up to him to use American taxpayer money to seize land from owners of private property for a project that Congress has not authorized him to build. The Supreme Court noted that when Harry Truman tried to take over the steel industries during the Korean War—and that was during a war—that he could not do it. It was illegal use of that power.

Congress, as a co-equal branch, cannot be silent in the face of this power-grab. I was pleased with the House vote, 245 to 182, on

Tuesday to pass a joint resolution to terminate this so-called emergency. And I hope my colleagues in the Senate put constitutional principles above party loyalty and Presidential fealty when they take a vote on this measure in the coming weeks.

While I believe President Trump's emergency declaration is legally and substantively without merit, it also raises a number of broader questions about the National Emergencies Act and Congress's delegation of emergency authority. That is why it is important, even though we have had this vote, to have this hearing, because we need to see what is this act and does it need to be amended?

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

The law hasn't worked as intended. President Trump and his supporters believe that because the NEA, a law setting out a procedural framework only, does not define what an emergency is, then the President is free to invent one whenever he wishes, a la King George. If we accept that view, then not even common sense, or an English dictionary, or the Constitution which we swear to uphold, can act as a constraint.

As to the underlying laws that give the President emergency authorities, a lot of scholars and commentators have pointed out that we, in Congress, have almost lost track of how many authorities we have granted to the President, or whether these grants of emergency authorities remain warranted. Ms.—you are on—

Ms. GOITEIN. Goitein.

Mr. COHEN [continuing]. Goitein will describe some of those laws for us, many of which have never been used. Nonetheless, they remain on the books, and as Justice Robert Jackson put it in a famous dissent on a different emergency claim, they, quote, "lie about a loaded weapon"—"about like a loaded weapon," unquote.

Tellingly, after President Trump began talking in late 2018 about declaring a national emergency, a lot of lawyers and scholars spent weeks spinning their wheels, trying to figure out which laws he was talking about. The President's own Budget Director told the press about how he and his staff combed through the U.S. Code, looking for hidden emergency authorities or other loopholes that allow them to move money around.

The American people deserve better than that. They deserve to know the President cannot rewrite the law or exploit obscure loopholes to raid funds that have been allocated by Congress for different purposes, and particularly, when Congress has acted at the President's request. The President was going to accept what Congress gave him and then said no after he heard from talk show radio hosts.

Then he shut down the government after Congress wouldn't give him his funds. And then after 3 weeks, Congress voted together, in a bipartisan fashion, to give him what funds they thought were appropriate, and then he declared a national emergency. He basically declared Congress null and void.

So I look forward today to hearing from all of our witnesses who bring a range of perspectives about these issues. I hope we can have a productive and fruitful discussion, not only about President Trump's actions, but about whether we, as Congress, need to do more to constrain these type of authorities and amend this law, so they are used only in true emergencies and not as an end-run around our Constitution.

I now recognize the distinguished ranking member, Mr. Johnson, from the "Go Tigers" State, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman. I appreciate you and all of our colleagues and look forward to working with you all on the subcommittee this year. And thank you to our witnesses for being here with us.

Today's hearing on the National Emergencies Act of 1976 takes place at a time in history in which Congress has increasingly abdicated its legislative powers, over many decades. It is like having a hearing on puddles right now in the middle of a hurricane. That is my Louisiana reference for you.

I would like to use my time today to take a step back and explore how the polarization of Congress seems to have drawn both parties, at times, further away from our constitutional core, and namely that is, what has been referenced, Article 1 of the Constitution.

As a former historian of the House of Representatives, Robert Remini, has written, quote, "The Framers of the Constitution were absolutely committed to the belief that a representative body, accountable to its constituents, was the surest means of protecting liberty and individual rights. So anxious were they to affirm legislative supremacy in the new government, that they failed to flesh out the executive and judicial departments in the Constitution, leaving that task to Congress, and thereby assuring that the legislative and the legislature would remain control of the structure and authority of both of those branches," unquote.

But today, the separation of powers, so carefully designed by the Framers of our Constitution, has been greatly obscured.

Let's take a look at more recent history. Just consider the last 5 years. The first section of the first Article of the Constitution provides that, quote, "All legislative powers herein granted shall be vested in a Congress of the United States," unquote. And then the ObamaCare statute, Congress provided for clear statutory guidelines for compliance, including this one regarding the mandates the statute imposes on employers. Quote, "The amendments made by this section shall apply to months beginning after December 31, 2013. Yet, the Obama administration unilaterally sought to rewrite the law, not by working with the people's duly elected representatives, but through things like blog posts, where they removed penalties for employers who could—who would otherwise be required to provide insurance coverage for their employees.

They did it through regulatory fact sheets, which created an entirely new category of businesses and exempted them from their responsibility under the law. They used things like letters, which specifically explain that people would have to have their health insurance terminated under ObamaCare, of course, in violation of President Obama's famous promise that if you like your healthcare plan, you can keep it.

And then they claimed to suspend the law's insurance requirements to a date uncertain. This—this one letter alone referenced there, suspended the application of eight key provisions of the ObamaCare law. And why was this done? To delay the terrible consequences of ObamaCare until after the next election cycle.

The Obama administration also admitted to using Federal taxpayer money to pay subsidies to insurance companies under Section 1402 of the Affordable Care Act, even though appropriation for such payments were never made by Congress, in violation of Article 1, Section 9, Clause 7 of the Constitution, which expressly states, quote, "No money shall be drawn from the Treasury but in consequence of appropriations made by law," unquote.

When it submitted its fiscal year 2014 budget to Congress, the Obama administration correctly recognized it could not make Section 1402 offset program payments to insurers unless and until Congress specifically appropriated funds for that purpose.

In July 2013, the Senate Appropriations Committee declined to approve the administration's request. In fact, neither the House, nor the Senate, ever adopted a bill approving the administration's request, and no bill containing an appropriation to fund that section was presented to the President for his signature or veto.

Congress also didn't appropriate funds for Section 1402 for fiscal year 2015, and yet, the administration went ahead and funded the insurance subsidy program anyway. Notwithstanding the lack of any appropriation for that section, either in ObamaCare, in that law, or in fiscal year 2014 appropriations bill, the Obama administration unilaterally began making such payments to insurers in January 2014 and continued making them thereafter.

One of the witnesses here today, Professor Jonathan Turley, challenged the rank unconstitutionality of those unilateral executive actions on behalf of the House of Representatives, and it led to a Federal District Court ruling that said, quote, Neither the President, nor his officers, can authorize appropriations. The assent of the House of Representatives is required before any public moneys are spent. Congress's power of the purse is the ultimate check on the otherwise unbounded power of the executive.

The genius of our Framers was to limit the executive's power by a valid reservation of congressional control over funds in the Treasury. Disregard for that reservation works a grievous harm on the House which is deprived of its rightful and necessary place under the Constitution.

Judge Collier ultimately ruled in favor of the House on May 12, 2016, and found that the Obama administration violated the Constitution in committing billions of dollars from the U.S. Treasury without the approval of Congress.

The Trump administration subsequently ended that unconstitutional funding program. Then November 2014, President Obama unilaterally and unconstitutionally created a program that would suspend immigration laws for millions of people who are in this country illegally without authorization by Congress.

The President urged Congress to enact a statute to create such a program under law, but Congress did not, even when his party controlled both Houses of Congress. And despite claiming the situation was urgent, he didn't act unilaterally until November 2014.

Whether or not the President delayed action until November 2014 for political reasons, he knew the actions he ultimately did take were unconstitutional.

And we know that from his many public statements in which he himself directly addressed the issue of the lack of legal and constitutional authority to do what he ultimately did, that he recognized it as well. He said, in his own words at one point, he changed the law.

Now, all that happened without any protest from the other side of the aisle, even though both sides of the aisle work together here under the same Capitol dome, and we share the same legislative powers under Article 1. But today, here we are having a hearing on President Trump's exercise of clearly delegated authority under a statute that was duly enacted by Congress. We can debate the policy merits of the authorizing statute, but there is no doubt the National Emergencies Act of 1976, and related Federal statutes, constitute a clear delegation by Congress of parts of its appropriation powers to the President, subject to the President's declaration of a national emergency, which is a term that is left to the President alone to define.

There is a crisis at the border, and everyone at some point or another has acknowledged that. And the President has the authority to address that crisis under a Federal statute that is duly enacted by Congress. I would just say this in closing. It is time to drop the politics and pick up our principles.

We, in Congress, must rediscover the principle basis for our Article 1 powers. Until we do that, we will move in partisan fits and starts, one day in this direction, next day in that direction, and we will discover one day that we are not moving forward, but rather in circles, down a whirlpool that erodes our legislative powers, spinning with increasing speed in smaller and smaller circles.

I hope this hearing can help right our ship, and help provide us a principled anchor as Congress moves ahead. I look forward to hearing from all of our witnesses here today, and I yield back.

Mr. COHEN. I thank the gentleman from Louisiana for his statement, and I now recognize the chairman of the full committee, the Honorable Jerrrod Nadler of New York for his opening statement.

Chairman NADLER. Thank you, Mr. Chairman, and thank you for convening this hearing on this important topic. I would also like to thank all of the witnesses for appearing here today.

I am heartened by the fact that their opposition to President Donald Trump's emergency declaration comes from across the political spectrum, because ultimately, this debate should not be about partisan politics. It should be about protecting a principle that is fundamental to our constitutional democracy. Namely, that the Chief Executive cannot unilaterally spend taxpayers' money or redirect funds appropriated by the people's representatives.

Article 1, Section 9 of the Constitution makes it unmistakably clear that, quote, "No money shall be drawn from the Treasury, but in consequences of appropriations made by law," closed quote. President Trump violated that basic command when he invented a so-called emergency as an excuse to build a wall that Congress explicitly rejected. The only emergency is the fact that Congress refused the President what he wanted. That kind of bad-faith action

by the President is a violation of his oath of office to defend the Constitution, and to faithfully execute the law.

In addition, the emergency law that President Trump invoked allows the military to redirect funds only if an emergency, quote, “requires used of the armed forces,” closed quote. And those funds can be used only for construction projects that are, quote, “necessary to support such use of the armed forces,” closed quote. This law is supposed to be for action such as building airfields or barracks to help our troops fight wars overseas.

A war, however, cannot possibly be, quote, “necessary to support,” unquote, a military operation on the border, because the Posse Comitatus Act and related laws expressly prohibit the military from engaging in law enforcement activities. The military, therefore, cannot enforce our immigration laws or our drug-smuggling laws. That means the President’s actions are doubly unlawful.

There is no real emergency, and even if there were one, the President could not redirect military funds for a purpose expressly prohibited by law to the military.

This past Tuesday, the House passed a joint resolution to terminate this so-called emergency. That was an important first step in reasserting Congress’ role as a check against President Trump’s unlimited appetite for power. And I hope that my colleagues in the Senate, particularly those on the other side of the aisle, will take a hard look at the bigger principles at stake, including their own role in our constitutional system, when they go to cast their votes.

And let me paraphrase, I think it was Senator Rubio, if today, the so-called emergency is—is at the border, tomorrow the emergency could be climate change or guns. We actually have a gun emergency in this country. What would you say if the President declared an emergency and said, we are going to collect all the guns in the country and melt them down the way they did in Australia? I would say that was unconstitutional.

But the people who uphold this emergency use of the—this emergency power now would have to say, to be consistent, that that was a proper use of the President’s emergency power. No President should have that kind of unlimited power. That is what is at stake here.

But this hearing is about more than debating the legality or the merits of the President’s February 15th emergency declaration. His decision to invoke the so-called emergency authority should give all of us great pause. Because those authorities go beyond the ability to redirect funds in order to build a wall.

The National Emergencies Act, which regulates the process by which the President can declare an emergency, was enacted by Congress in 1976, in order to curtail certain abuses of the emergency authorities that had come before. The Act provides a general framework through which the President can declare national emergencies, and through which Congress can review and terminate them.

Importantly, at the time the law was enacted, it allowed Congress to terminate any emergency by a majority vote in both Houses. But in 1983, the Supreme Court held that Congress cannot veto actions taken by the executive branch, through majority votes

in the House and Senate. Instead, if Congress wants to override the President's actions, it has to pass a new law, which means it has to get the President's signature or pass the law with veto-proof majorities.

Consequently, in 1985, Congress amended the National Emergencies Act to be consistent with that ruling. Unfortunately, in doing so, Congress abdicated a substantial amount of its constitutional power to constrain the President. The bottom line now is that if the President declares an emergency and we in Congress do not like it, we either have to convince the President to sign a joint resolution to terminate his own emergency declaration, an unlikely occurrence, or we need a veto proof majority, which is very difficult to muster.

As to President Trump's bogus emergency, I think on principle that every Member of the House and Senate should vote to terminate it. The administration can scarcely tell you with a straight face that there is an emergency on the southern border. Take the partisan politics away, and this would not be a close call.

But whether we are addressing this so-called emergency or some future emergency declared by some other President, it should not take a super majority of Congress to stop the President from abusing power that has been delegated to address urgent circumstances.

As Elizabeth Goitein will describe, there are numerous emergency statutes that give the President a broad range of potential authorities, including the ability to bar certain exports or even potentially to take control of communications networks. All of which could be subject to abuse by a President who does not respect the rule of law.

We may agree that the President should be allowed some types of discretion during true emergencies, but an emergency cannot continue forever. So to shift the burden of inertia, we should consider legislation that would set a time limit for emergency—for emergency, requiring that they automatically expire after a short period, say, 10 days, unless Congress ratifies the emergency declaration by law. This type of sunset provision—and I emphasize, it should be in the days, not the weeks—would restore the authority and the responsibility to change the law to where it belongs, in Congress.

We should also consider separating out which so-called emergency statutes are designed for true emergencies, and which ones use that term to describe other contingencies that may call for particular responses within the executive branch, but which do not involve truly urgent circumstances.

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

Mr. COHEN. Thank you, Mr. Nadler.

I am going to introduce the witnesses, but I like to introduce them individually before they speak, rather than as a group. So I will—first, I think before we introduce Ms. Goitein, we are going to ask all of the witnesses to stand and be sworn as has become a custom in our committees.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief?

The WITNESSES. I do.

Mr. COHEN. Great. Thank you. Let the record show the witnesses—

Mr. JOHNSON. Point of parliamentary inquiry.

Mr. COHEN. Yes, Mr. Johnson?

Mr. JOHNSON. I think we left out the phrase “so help me God.”

Mr. COHEN. We did.

Mr. JOHNSON. Could we have the witnesses do it again for the record?

Mr. GERSON. I accept the amendment.

Mr. COHEN. Yeah, they want to do it, but some of them don't want to do it. And I don't think it is necessary, and I don't like to assert my will over other people.

Mr. JOHNSON. Well, it goes back to our founding history. It is been part of our tradition for more than 2 centuries, and I don't know that we could abandon it now. Could I ask the witnesses if they would—if they would choose to use the phrase?

Chairman NADLER. Mr. Chairman.

Mr. COHEN. Mr. Nadler.

Chairman NADLER. If any witness objects, he should not be asked to identify himself. We do not have religious tests for office or for anything else, and we should let it go at that.

TESTIMONIES OF: ELIZABETH GOITEIN, CO-DIRECTOR, LIBERTY & NATIONAL SECURITY PROGRAM, BRENNAN CENTER FOR JUSTICE, WASHINGTON, D.C.; NAYDA ALVAREZ, LANDOWNER AND RESIDENT OF LEGISLATIVE ASSISTANT, ROSITA, TEXAS; STUART GERSON, MEMBER, EPSTEIN BECKER GREEN, WASHINGTON, D.C.; JONATHAN TURLEY, J.B. AND MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Mr. COHEN. We will proceed, introduce the first witness.

Mr. JOHNSON. Glad it is noted for the record.

Mr. COHEN. Ms. Elizabeth Goitein is a codirector of the Brennan Center for Justice, Liberty, and National Security program. She is the author of numerous articles and reports regarding national security and civil liberties. She is also the author of an extensive piece in the January/February issue of *The Atlantic*, titled, *What the President Could Do If He Declares a State of Emergency*.

Before coming to the Brennan Center, Ms. Goitein served as counsel to Senator Russ Feingold, then the chairman of the Constitution Subcommittee of the Senate Judiciary Committee, and as a trial attorney in the Federal programs branch of the civil division of the Department of Justice. Ms. Goitein received her J.D. from Yale Law School and clerked for the Honorable Michael Daly Hawkins on the U.S. Court of Appeals for the Ninth Circuit.

She received her B.A. in history from Yale and a Masters of Music degree in oboe performance from the Julliard School. Welcome, and we would like to hear your testimony, and you have 5 minutes to give us.

TESTIMONY OF ELIZABETH GOITEIN

Ms. GOITEIN. Chairman Cohen, Ranking Member Johnson, and members of the committee, thank you for this opportunity to testify on behalf of the Brennan Center for Justice.

President Trump's declaration of a national emergency to build a wall along the southern border is an unprecedented abuse of emergency powers. The President declared this emergency for the stated purpose of getting around Congress, which had repeatedly refused his request for funding to build the wall. No other President has used emergency powers in that way.

Emergency powers are not meant as an end-run around Congress. They are simply standby authorities that Congress has passed in advance, recognizing that true crises often unfold too quickly for Congress to respond in the moment. They are akin to an advance medical directive, in which a person specifies what action a doctor can take in an extreme situation where the patient might not be able to make her wishes known.

A President using emergency powers to thwart the will of Congress, in a situation where Congress has had ample time to express that will, is like a doctor relying on an advance directive to deny life-saving treatment to a patient who is conscious and clearly asking to be saved.

Congress passed the 19—sorry. Congress passed the National Emergencies Act in 1976 to try to prevent abuses of emergency powers. The law provided that states of emergency would expire after a year unless Congress renewed them—I am sorry—unless the President renewed them. It allowed Congress to terminate states of emergency without the President's signature, using a so-called legislative veto, and it required Congress to meet every 6 months while emergencies were in effect to consider a vote on whether to end them.

The law has not proven to be the check that Congress intended. Expiration of emergencies after a year, which was supposed to be the default, has become the exception. Presidents routinely renew states of emergency for years on end. The Supreme Court, in 1983, held that legislative vetoes were unconstitutional, so now it requires a joint resolution signed by the President, or passed over the President's veto, for Congress to terminate a state of emergency. And Congress has simply ignored the requirement to meet every 6 months to review existing emergencies.

In addition, when Congress passed the Act, it didn't include a definition of national emergencies. The legislative history makes clear that this omission was not intended to give the President unlimited discretion. But the fact remains that there are no clearly articulated standards in the law.

Recognizing the unprecedented nature of this emergency declaration, the House has voted to terminate it. The Senate should do the same. And if the President vetoes the bill, Congress should override the veto. All of the witnesses here today agree on that point.

The courts should also play their constitutional role. While the National Emergencies Act gives the President tremendous discretion, even the broadest of discretion can be unlawfully abused.

But these responses are not enough. We have now seen how the permissive legal scheme for national emergencies can be exploited.

The next time the stakes could be even higher. The Brennan Center has cataloged 123 statutory powers that are available to the President when he declares a state of emergency. These include some incredibly potent authorities, including the power to take over or shut down communications facilities, to freeze Americans' bank accounts, or to detail members of the U.S. Armed Forces to any country.

Congress should act now to pass commonsense reforms that preserve the President's flexibility in a true crisis, while better safeguarding against abuse. I made six recommendations in my written testimony, and I will just flag the top two here.

First, Congress should clarify that an emergency involves significant changes in factual circumstances that pose an imminent threat to public health, public safety, or other important national interests. This definition would leave the President with plenty of discretion, just not a blank check.

Second, Congress should vote that an emergency should end after 30 days, or 10 days, if Congress doesn't vote to continue it. This, again, would give the President ready access to enhanced authorities when he needs them most. But when Congress has had time to act—and Congress can act very quickly in the face of real emergencies—at that point, it should be up to Congress to decide whether emergency powers should be used.

In short, it is past time for Congress to reassert itself in its constitutional role as a coequal branch of government, and, again, that is something all the witnesses here agree on.

[The statement of Ms. Goitein follows:]

STATEMENT OF
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SUBCOMMITTEE ON THE CONSTITUTION
HEARING ON
THE NATIONAL EMERGENCIES ACT OF 1976

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Introduction

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

In December 2018, the Brennan Center completed a two-year intensive research project on the legal framework for national emergencies, which I oversaw. This work was a natural outgrowth of the program's longtime focus on executive power in the area of national security.² We began our study of emergency powers by researching the history of the National Emergencies Act of 1976. 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

Based on this research, it is my firm opinion that Proclamation 9844⁵ 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.

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

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

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

⁴ "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.

⁵ 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.⁶

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

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.¹⁰ 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

⁶ 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.

⁷ 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.

⁸ U.S. Const. art. 1, § 9, cl. 2.

⁹ U.S. Const. art. 1, § 8, cl. 15.

¹⁰ 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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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."¹⁵

The committee's work culminated in the introduction and passage of the National Emergencies Act of 1976.¹⁶ The clear purpose of the law, evident in every facet of the legislative

¹¹ 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.

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

¹³ Relyea, *National Emergency Powers*, 7.

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

¹⁵ 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].

¹⁶ 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.¹⁷

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

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.”²⁴ 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.”²⁵

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

¹⁷ Spec. Comm. on National Emergencies Source Book at 50.

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

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

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

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

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

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

²⁴ *See, e.g.* S. 977, 94th Cong. § 201 (a) (1975).

²⁵ 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.²⁶

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.²⁷

²⁶ 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).

²⁷ 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.

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.²⁸ Congress's solution was to substitute a joint resolution as the mechanism for terminating emergencies.²⁹ 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.³⁰ 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.³¹

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.³² These declarations must be considered separately.

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

²⁹ See 50 U.S.C. § 1622(a)(1).

³⁰ 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.

³¹ 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>.

³² 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.

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,³³ 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.³⁴ 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."³⁵ 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."³⁶ 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.³⁷

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,"³⁸ 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."³⁹ State Department spokesperson Jen Psaki echoed

³³ 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)).

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

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

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

³⁷ 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.

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

³⁹ 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.”⁴⁰

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

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)⁴⁴ – 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.

⁴⁰ *Ibid.*

⁴¹ 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).

⁴² *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.

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

⁴⁴ 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.⁴⁵

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

⁴⁵ 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 . . .”).

⁴⁶ 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).

⁴⁷ See Exec. Order No. 13814, 82 Fed. Reg. 49271 (Oct. 20, 2017); Jeff Daniels, “Trump executive order lets Air Force recall up to 1,000 retired pilots for active duty,” *CNBC*, October 21, 2017, <https://www.cnbc.com/2017/10/21/trump-executive-order-lets-air-force-recall-up-to-1000-retired-pilots.html>.

Still, what is most notable about the record of presidential use of emergency powers (outside the unique context of IEEPA⁴⁸) 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.⁴⁹

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”⁵⁰; the Oxford-English dictionary similarly defines it as “[a] serious, unexpected, and often dangerous situation requiring immediate action.”⁵¹

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.

⁴⁸ 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.

⁴⁹ 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>.

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

⁵¹ *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 2018.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵ 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 2019.⁵⁶ 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.”⁵⁷ 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,⁵⁸ which will presumably take months if not years.

⁵² 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>.

⁵³ 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).

⁵⁴ 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).

⁵⁵ Proclamation No. 9844, 84 Fed. Reg. 4949 (February 15, 2019).

⁵⁶ 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>.

⁵⁷ 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/>.

⁵⁸ 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.⁵⁹ 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.⁶⁰ 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."⁶¹ 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.⁶² He

⁵⁹ 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).

⁶⁰ 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/>.

⁶¹ 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.

⁶² "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.”⁶³

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.⁶⁴

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.”⁶⁵ 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.⁶⁶ 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

⁶³ 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/>.

⁶⁴ 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/>.

⁶⁵ U.S. Const. art. I, § 9, cl. 7.

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

powers to build the border wall.⁶⁷ 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,⁶⁸ 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.⁶⁹ 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,”⁷⁰ 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

⁶⁷ 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.

⁶⁸ 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>.

⁶⁹ 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>.

⁷⁰ 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.⁷¹ 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.⁷²

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;⁷³ 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.⁷⁴ Other powers would allow the president to freeze Americans' assets and bank accounts,⁷⁵ to detail members of the U.S. armed forces to any country,⁷⁶ to prohibit or limit the export of any agricultural commodity,⁷⁷ to suspend statutory wage-rate requirements for public contracts,⁷⁸ or to "coordinate" domestic transportation.⁷⁹

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."

⁷¹ 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.

⁷² 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>.

⁷³ See 47 U.S.C. § 606(c).

⁷⁴ 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/>.

⁷⁵ See 50 U.S.C. § 1701 *et seq.*

⁷⁶ See 10 U.S.C. § 712(a)(3).

⁷⁷ See 7 U.S.C. § 5712(c).

⁷⁸ See 40 U.S.C. § 3147.

⁷⁹ 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,⁸⁰ 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 emergencies⁸¹—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

⁸⁰ 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.

⁸¹ 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 Abdolien 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.

Mr. COHEN. Thank you, Ms. Goitein.

Now we have Ms. Nayda Alvarez, who is a teacher, a mother, a grandmother, and a border land owner. Her family has lived along the border in Starr County, Texas, for at least five generations. She has received letters from the U.S. Government indicating its intention to take her property for construction of a border wall that would cross her backyard. There is a 5 minutes, and I think you have got green, you are go, yellow, you are getting close to ending, and red, over. Thank you, Ms. Alvarez, we appreciate your attendance and testimony.

TESTIMONY OF NAYDA ALVAREZ

Ms. ALVAREZ. Good afternoon. Thank you, Chairman Cohen, Ranking Member Johnson, and Members of the committee for inviting me here to share my story. My name is Nayda Alvarez. I live in Starr County, Texas, in an area known as La Rosita. My backyard extends to the Rio Grande River, which forms the border between Texas and Mexico. I am here today to testify that there is no emergency where I live, and there is no good reason for the government to take my property to build a wall in my backyard.

My family has lived on land along the Rio Grande River in Starr County for at least five generations. I have lived on this land for more than 40 years. My father lives next to me, alongside the land where my grandfather lived. We still use a wooden corral built by my great grandfather for keeping farm animals. My grandchildren and nieces and nephews play in the same places where their parents played and where I played as a child, along with my siblings and cousins.

In more than 40 years of living on the border, I can't remember ever seeing migrants from Mexico come across my family's property. To do so, they would have to cross the river, and then they would have to climb up the soft bluff that runs alongside the river at the end of my property. The river and the bluff create a natural barrier on my family's property, a natural barrier between Mexico and my land in the U.S.

Because it is my property and my family's property next door, it is not an area where migrants cross the border. We were surprised in September 2018, we received letters from Customs and Border Protection asking for permission to come onto our land to survey and take soil samples in anticipation of building a border wall across our property. We did not grant permission.

In November 2018, another letter was hand-delivered to us. In January 2019, we received a third round of letters, stating the United States Government is going to take us to court to take our property, to build a border wall across our land. The government sent maps that show a wall and a maintenance road to be constructed feet from the back of my house. This described a 150-foot-wide enforcement zone between my house and the river, but the river's only about 200 feet from my house. And the land closest to the river is unstable and subject to erosion. How will my house survive?

In January, using a telephone number provided in the January letter, I called a U.S. Army Corps of Engineers realty specialist to ask how they would possibly fit the border wall and enforcement

zone between my house and the river. The person I spoke to told me that they were going to build the wall if they got money in 2019, even if they had to squeeze it in there.

Even if my house is spared, it will never be the same. I will lose my entire backyard, and I will be staring at a wall right outside my back door and windows. My family's property next door, where we enjoy family gatherings, raise animals, and enjoy nature, will be divided by the wall, with about two-thirds of the land on the south side of the wall.

Because Congress would not appropriate the funds to build a border wall, the President declared a national emergency to try to build a wall anyway. The President's end-run around Congress is unlawful, as my lawyers at Public Citizen have explained in a lawsuit filed against the President on the same day he issued his emergency declaration. While my lawyers will argue the legalities of the President's action, the bottom line for me is that the Federal government is threatening to take my land to fulfill a campaign promise, but without any need.

I can tell you that there is no invasion in Starr County, no emergency, no need for a wall across the land. I live on a peaceful stretch of property along the river in South Texas in the United States of America. No drugs, no gangs, no terrorists come across my property. There is no need for a wall on our land. My family should not have to sacrifice our ancestral home to a campaign slogan.

We are going to lose our land, our privacy, and our way of life. Thank you, again, for granting me this opportunity to testify. I am ready to address any questions you may have.

[The statement of Ms. Alvarez follows:]

**Statement of Nayda Alvarez, Border Landowner
Before The House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on the National Emergencies Act
February 28, 2019**

Good afternoon. Thank you, Chairman Nadler, Ranking Member Collins, and members of the Committee for inviting me here to share my story.

My name is Nayda Alvarez. I live in Starr County, Texas, in an area known as La Rosita. My backyard extends to the Rio Grande River, which forms the border between Texas and Mexico. I am here today to testify that there is no emergency where I live, and there is no good reason for the government to take my property to build a border wall in my backyard.

My family has lived on land along the Rio Grande River in Starr County for at least five generations. I have lived on this land for more than 40 years; my father lives next to me, alongside the land where my grandfather lived. We still use a wooden corral built by my great-grandfather for keeping farm animals. My grandchildren and nieces and nephews play in the same places where their parents played and where I played as a child, along with my siblings and cousins.

In more than 40 years of living on the border, I can't remember ever seeing migrants from Mexico come across my family's property. To do so, they would have to cross the river, and then they would have to climb up the soft bluff that runs alongside the river at the end of my property. The river and the bluff create a natural barrier on my family's property, a natural barrier between Mexico and my land in the U.S..

Because my property and my family's property next door is not an area where migrants cross the border, we were surprised when, in September 2018, we received letters from Customs and Border Protection asking for permission to come onto our land to survey and take soil

samples in anticipation of building a border wall across our property. We did not grant permission. In November 2018, another letter was hand delivered to us. In January 2019, we received a third round of letters stating the United States government is going to take us to court to take our property to build a border wall across our land.

The government sent maps that show a wall and a maintenance road to be constructed feet from the back of my house. They describe a 150-foot wide “enforcement zone” between my house and the river—but the river is only about 200 feet from my house, and the land closest to the river is unstable and subject to erosion. How will my house survive?

In January, using a telephone number provided in the January letter, I called a U.S. Army Corps of Engineers realty specialist to ask how they could possibly fit the border wall and enforcement zone between my house and the river. The person I spoke to told me that they were going to build the wall if they got money in 2019, even if they had to “squeeze it in there.”

Even if my house is spared, it will never be the same. I will lose my entire backyard, and I will be staring at a wall right outside my back door and windows. My family’s property next door, where we enjoy family gatherings, raise animals, and enjoy nature, will be divided by the wall, with about two-thirds of the land on the south side of the wall.

Because Congress would not appropriate the funds to build a border wall, the President declared a “national emergency” to try to build a wall anyway. The President’s end run around Congress is unlawful, as my lawyers at Public Citizen have explained in a lawsuit filed against the President on the same day he issued his emergency declaration. While my lawyers will argue the legalities of the President’s action, the bottom line for me is that the federal government is threatening to take my land to fulfill a campaign promise but without any need.

I can tell you that there is no “invasion” in Starr County, no emergency, no need for a wall across our land.

I live on a peaceful stretch of property along the river in South Texas, in the United States of America. No drugs, no gangs, no terrorists come across my property. There is no need for a wall on our land. My family should not have to sacrifice our ancestral home to a campaign slogan. We are going to lose our land, our privacy, and our way of life.

Thank you again for granting me this opportunity to testify. I am ready to address any questions you may have.

Mr. COHEN. Thank you, Ms. Alvarez. We appreciate your attendance and your testimony.

Mr. Jonathan Turley, another individual with a Louisiana background—although he is a greeny, not a “Go Tiger”—has a J.B. and Maurice C. Shapiro, professor of public interest law, and the George Washington University School of Law. Nationally recognized legal scholar, has written extensively in areas ranging from constitutional law to legal theory to tort law.

In addition to being the author of over three dozen academic articles, he served as counsel in many notable cases. Among those was his representation of the House in 2014, in its constitutional challenge to certain implementation decisions made by the Obama administration with respect to the Affordable Care Act.

He is also a star of stage, screen, and television—at least the latter. Professor Turley received his B.A. from the University of Chicago and his J.D. from Northwestern. In 2008, he was given an honorary doctorate of law from John Marshall Law School for his contribution to civil liberties in the public interest.

We appreciate your attendance and welcome your testimony.

TESTIMONY OF JONATHAN TURLEY

Mr. TURLEY. Thank you, Chairman Cohen, Ranking Member Johnson, Chairman Nadler, and the members of the subcommittee. It is an honor to appear before you today to talk about this very important issue, involving the National Emergencies Act of 1976.

As some of you know from my background, I am an unabashed and unapologetic Madisonian scholar, and for that reason, I tend to favor Congress in fights with the executive branch, and indeed, I often appear before members of this committee, like a broken record, warning Congress that it is frittering away its authority to an expanding executive power.

Like my testimony, most the testimony of the scholars along those lines have been ignored. The National Emergency Act is the archetype for this long acquiescence of this body. Originally portrayed as an effort to restrict Presidential power, it ultimately was passed as a unfettered grant of authority, to allow declarations to occur with little check of this body.

This Congress has also tied that type of unfettered authority to a history of appropriations that often placed few conditions on funds given to the executive branch. The result is the long and, frankly, irresponsible history that led us to this problem.

Although I disagree on a policy level, with the declaration in this case, it doesn't matter. This problem is the making of Congress, not the President. Courts are not designed to protect Congress from itself. The National Emergencies Act was a case of snatching defeat out of the jaws of victory. Twenty years earlier, this body prevailed in Youngstown Sheet & Tube Company. It was one of the most important rulings ever to come down for the legislative branch.

In that opinion, Justice Jackson warned that the type of emergency powers being claimed by President Truman would be a pretext for authoritarian rule, and that emergency powers, quote, would tend to kindle emergencies.

This Congress responded 20 years later by creating a law that allowed that very problem to occur. There is an old adage that the

road to hell is paved with good intentions, and if that is true, this body stopped to pass the NEA on the way. It started by saying it wanted to restrict the President's power, but through a series of amendments I go through in my testimony, what came out was basically an unfettered grant of authority.

The result has not been surprising. We have had more than one national emergency declared every year since the NEA is passed. It would be funny if it was not tragic for this body and its inherent constitution. Even express provisions in the law, like this body meeting every 6 months to review emergency powers, simply ignored. This body hasn't done it once, because it was too inconvenient apparently or burdensome.

Now, if you sense a sense of frustration, then you are picking up the truth about how I view this problem. Congress created a law that gave unfettered authority. Congress can rescind that law. Congress can rescind emergency declarations.

A court is unlikely to do it. There are two possible challenges to the current declaration by President Trump. One is a source of authority, and one is the source of the funds. The source of authority, which occupies much of the multistate complaint, I am afraid, is not a very promising attack on this problem. They are unlikely to prevail.

I can put it no more bluntly than this. This is a national emergency because the President says it is. Because you gave him that authority. That may seem superficial and simplistic, but the NEA is superficial and simplistic. I don't see how a court is going to substitute its authority as to what an emergency is, when the law itself doesn't even define it.

As for the source of the funds, there is a simple math that leads to a simple problem. This body gave the President roughly \$1.4 billion. We can debate as to how that can be used. The administration has identified multiple sources that would bring up the available funds to \$8 billion. Even if a court was to enjoin two of those different sources of funding, it would still be over the \$5 billion that the President originally sought. So it is unlikely, in the long-term, that a challenge will stop this construction.

Let me end by saying that Oliver Wendell Holmes once said that if my fellow citizens want to go to hell, I will gladly help them. It is my job. Well, this body has been hell-bent for a long time. And you are not going to be rescued from that direction by a Federal court. It will send you along your path, a long chosen road towards institutional obsolescence.

I hope that this hearing, instead of focusing on the lawsuit which I think is not particularly promising, will look at correcting this law, and regaining the authority that this body unwisely frittered away in 1976.

[The statement of Mr. Turley follows:]

Written Statement

**Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University**

“The National Emergencies Act of 1976”

**Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Civil Liberties**

United States House of Representatives

Rayburn House Office Building (Room 2141)

February 28, 2019

I. INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and members of the Subcommittee, my name is Jonathan Turley and I am a law professor at The George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is a distinct honor to appear before you today to discuss the controversy over the declaration of President Donald Trump of an emergency under the National Emergencies Act of 1976.¹

I come to this question as both an academic and a litigator in the field. As a law professor, my published scholarship has focused on constitutional law and legal theory, with an emphasis on the separation of powers, war powers, and the military.² As a litigator, I have litigated various

¹ Pub. L. 94-412, 90 Stat. 1255, codified at 50 U.S.C. §§ 1601-1651.

² See, e.g., Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule’s Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); see also

constitutional cases dealing with presidential and congressional powers, including had the privilege of serving as lead counsel for both Democratic and Republican members in challenging the undeclared war in Libya under the Obama Administration. I also served as lead counsel representing the United States House of Representatives in its successful challenge to the unauthorized use of federal funds in Obamacare. As this body of work reflects, I am an unrepentant Madisonian scholar and, as such, I tend to favor a robust and active role for Congress. Indeed, I have previously testified against the encroachment of the Executive Branch and the growing imbalance in our tripartite system of governance. Much of this imbalance is due to the acquiescence of Congress in yielding greater and greater authority to the Chief Executive.

I have repeatedly testified before both the House and the Senate to implore members to reclaim their inherent powers and exercise legislative authority in our government. Instead, members have frittered away their Article I powers to an ever-expanding executive branch. The National Emergency Act is an archetype of this long acquiescence. While originally portrayed as an effort to limit executive power, the National Emergencies Act actually gives unfettered authority to presidents in making emergency declarations and exercising emergency powers. At the same time, Congress has continued (despite objections by some of us) to appropriate billions of dollars to the Executive Branch with few conditions attached. The current controversy is the result of this long and irresponsible history. Although I disagree on a policy level with the declaration of the emergency on the southern border, this problem is the making of the Congress, not the President.³ Challenges are unlikely to succeed given the language of the Act and the fluidity of federal appropriations. The federal courts are not designed

Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 *George Washington Law Review* 1-90 (2003); Jonathan Turley, *The Military Pocket Republic*, 97 *Northwestern University Law Review* 1-134 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 *George Washington Law Review* 649-769 (2002).

³ Jonathan Turley, *Why Trump Will Win The Wall Fight*, *The Hill*, February 16, 2019; Jonathan Turley, *Why Trump May Win His Legal Fight Over The Border Wall*, *BBC*, February 17, 2019.

to protect Congress from itself. To be blunt, as someone who has long fought for legislative authority, a paraphrasing of the words of Cassius in Shakespeare's *Julius Caesar* seems all too apt: "The fault, dear Congress, is not in our presidents, but in ourselves."

II. THE NATIONAL EMERGENCIES ACT OF 1976

Presidents have long grounded controversial executive actions in claims of inherent Article II powers and the emergency provisions of statutes preexisting the National Emergencies Act. The first formal emergency declaration occurred under President Woodrow Wilson in 1917 when he stated: "I have found that there exists a national emergency arising from the insufficiency of maritime tonnage to carry the products of the farms, forests, mines and manufacturing industries of the United States, to their consumers abroad and within the United States." Notably, this was not done under Wilson's inherent authority but under federal law with Wilson declaring "Now, Therefore, I, Woodrow Wilson, President of the United States of America, acting under and by virtue of the authority conferred in me by said Act of Congress." He declared the emergency under the authority of the act that established the United States Shipping Board. 39 Stat. 729. That declaration would be followed by dozens of emergencies.

The NEA was an example of Congress snatching defeat out of the jaws of victory. The law was passed roughly 20 years after Congress prevailed in a conflict with President Harry Truman over the seizure of steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*.⁴ The ruling against Truman reaffirmed the authority of Congress and expressly warned of the tendency of presidents to declare emergencies. Justice Robert Jackson noted "[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." Despite such warnings, Congress proceeded to create a law that allow presidents to "kindle emergencies" with virtual abandon. The irony is that the statute was originally drafted to end the constant use of emergency powers. Instead, a statute that was designed to discourage the use of national emergency declarations was converted into a virtually unlimited license to make such declarations.

⁴ 43 U.S. 579, 650 (1952).

A. Good Intentions and Bad Drafting.

The original motivation behind the National Emergencies Act was commendable. If the old adage is true that “the road to hell is paved with good intentions,” Congress stopped long enough along the way for the passage of the NEA. Congress was concerned that there seemed to be no limitations or conclusion for emergencies declared by presidents. Sen. Charles Mathias stated “The Committee concluded that not one, but four national emergencies exist and continue to this day. Moreover, we discovered that emergency powers exist in more than 470 separate statutes and, when combined, give the President potential dictatorial powers.”⁵ What became known as the Special Committee on National Emergencies and Delegated Emergency Powers sought to address what it legitimately viewed as a growing usurpation of legislative authority in the area: “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.” Thus, the Act sought to terminate existing emergencies and to provide for a formal process by which emergencies could be declared and Congress could rescind such powers.

The problem is that the National Emergencies Act lacks one conspicuous element: a definition of what constitutes a national emergency. The Act left the declaration of a national emergency as largely an unfettered authority of a president. An early version had a loose but express requirement that a president establish that a declared emergency is “essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States.”⁶ That language was perilously dropped in the final version, leaving the Act without express conditions or elements to establish a national emergency. This was done, according to a Senate report, to rely on the definition of emergencies under other acts. S. Comm. on Gov. Operations, Report to Accompany H.R. 3884, S. Rep. No. 94-1168, at 3

⁵ 121 Cong. Rec. S2302 (daily ed. Mar. 6, 1975) (statement of Sen. Charles Mathias), reprinted in S. Comm. on Gov’t Operations & the Special Comm. on Nat’l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., *The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents*, at 285 (1976).

⁶ S. Rep. No. 93-1170, at 8 (1974).

(1976) (reprinted in Spec. Comm. on National Emergencies Source Book at 292) (“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.”). If this was the purpose, it was a curious choice since the NEA would be the authority of the declaration and the focus of judicial review. Moreover, the language did not tether any NEA declarations to satisfaction of an underlying statute. Finally, a review of the underlying statutes reveals that most do not contain such a definition.

Congress also originally sought to repeal the 49 provisions in various statutes granting emergency powers to the president. Yet, it would ultimately repeal only a handful of such provisions, including the ability of a president to criminalize conduct in military zones and the authority to strip citizenship from certain persons. The federal statutory books are still inundated with ongoing emergency powers that can be used after a president makes an effectively unassailable declaration of an emergency. Currently, there are 136 emergency powers available to a president for use in a unilateral declaration of national emergency, including the use of construction funds appropriated to the Defense Department.

There was an even greater change made at the end of the legislative process at the insistence of the Ford Administration. The original version of the statute had a critical provision that would have made a meaningful change in the status quo in reasserting legislative authority. A president could declare a national emergency but it would end automatically absent an affirmative act of Congress within six months. Thus, a president had months to convince Congress that a national emergency actually existed to continue the exercise of emergency powers. It also required that every six months after a declaration a President would submit to Congress an accounting of expenditures “directly attributable to the exercise of powers and authorities conferred by such declaration.” From a separation of powers standpoint, the requirement of affirmative congressional action was the defining limitation of the law. Yet, at the demand of the Ford Administration that condition was cut out of the final bill. Instead, Congress would be able to rescind an emergency by a vote of both houses. Thus, absent action from Congress, emergencies could continue indefinitely with period notices of renewal.

That is precisely what has occurred under the Act. Since 1979, presidents have declared 58 national emergencies called by presidents. That amounts to more than one new national emergency declaration every year. Thirty-one of those national emergencies are still in effect. After Congress

yielded to Ford's demand to gut the affirmative approval provision, it became easy to declare an emergency but far more difficult to end one. No politician wants to be caught on the wrong side of an emergency. So, the current language allows members to do nothing. If an emergency becomes unpopular, they can deny that they ever really supported it. If there is no vote affirmatively approving the emergency, there is nothing tying members to it. Billions of dollars are spent as Congress watches as a pure spectator to the act of governing.

Even residual checks on executive powers that remained in the Act appear honored primarily in their breach. While the Act purports to require that Congress meet every six months to review these emergencies, Congress quickly found even that modest level of involvement in governing to be inconvenient or burdensome. The Congress has never met to fulfill this express duty. Not once. The failure to exercise congressional review was challenged but the courts refused to hold Congress to the commitment to actually vote on the record through a joint resolution or any other formal means. Indeed, the most that Congress has done to show a modicum of responsibility over emergency declarations was the introduction of a single resolution to terminate a declaration related to Hurricane Katrina. That declaration however was later revoked by President George W. Bush.⁷

The result is a law that proved to be the ultimate political bait-and-switch. Congress promised the public to limit future declared emergencies, curtail presidential emergency powers, and restore congressional authority. Instead, Congress knuckled under to demands from the Ford Administration and created the opposite: a law with largely unbridled emergency powers tied that allow the use of largely unconditioned funds.

B. Unfettered Authority Meets Unconditional Funding.

The current controversy is the combination of two long-standing trends in Congress: the granting of largely unfettered authority and the appropriation of largely unconditioned funds to presidents. I have previously testified about the loss of legislative authority in the modern appropriations process where billions are loosely committed to various agencies.⁸

⁷ Gregory Korte, *America's Perpetual State of Emergency*, USA Today, Oct. 22, 2014.

⁸ See, e.g., United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial*

While the “power of the purse” is central to the separation of powers,⁹ it has become something of a constitutional mythology in many cases. Due to modern budget rules, it is practically difficult for Congress to immediately alter government programs with appropriation changes. There are billions sloshing around in federal budgets that can be moved around to fill gaps in funding. The Libyan War is a good example. President Obama announced that he would not ask Congress for authority to attack another country, including attacks on its capital and military units in support of rebel forces. Instead, he merely shifted billions to fund a war without the need to ask for immediate funding. Thus, even without a declaration, Congress has routinely given federal agencies billions in funds that can be easily moved around under loose conditions on their use.

The NEA magnifies that problem by affirmatively stripping conditions off funds whenever a president unilaterally declares an emergency. For example, Section 2808 allows a president, through the Secretary of Defense, to “undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces.” 10 U.S.C. § 2808(a). This includes “the total amount of funds that have been appropriated for military construction . . . that have not been obligated.” *Id.* Such military construction projects encompass “any construction, development, conversion, or extension of any kind carried out with respect to a military installation,” and “military installation” includes a “base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department.” 10 U.S.C. § 2801. This is but one of the 136 powers listed under the Act that range from suspending any Clean Air Act implementation to drafting retired Coast Guard officers.

Deference to Agencies,” March 15, 2016 (testimony of Professor Jonathan Turley); United States House of Representatives, “*Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States*” Before the H. Comm. On Rules, 113th Cong., July 16, 2014 (testimony of Professor Jonathan Turley).

⁹ See, e.g., *Campbell*, 203 F.3d at 23 (“Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again, there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress’ authority on these matters.”).

The NEA allows presidents to augment any undedicated money with emergency funding to achieve objectives not expressly approved by Congress. Given the absence of a definition or any criteria for a declared emergency, the ability to shift billions in dollars without a vote of Congress has proven an irresistible temptation for presidents after the passage of the NEA.

III. THE MERITS – AND PERILS – IN THE CHALLENGES TO THE TRUMP DECLARATION

Until the declaration by President Trump, there was notably little interest in Congress or the public in most declarations despite the exercise of largely unfettered authority by presidents. Indeed, most citizens were entirely unaware that there are dozens of such emergencies still in place. President Bill Clinton had 18 such declarations in 8 years – more than two for every year in office. Presidents George W. Bush and Barack Obama had another 13 and 12, respectively. Moreover, most of these declarations concern “national emergencies” that the public is still largely unaware of or particularly concerned about. The importation of rough diamonds from Sierra Leone or the transfers of property by certain Haitian or Zimbabwean officials are clearly serious matters but hardly household concerns with the public. Most declarations were made for diplomatic or economic purposes, particularly with reference to International Emergency Economic Powers Act (IEEPA). Even though that law refers to an “unusual and extraordinary threat,” there have been no meaningful limitations on these routine declarations. Yet, not only has the Congress never rescinded such declarations but no court has ever ruled that a president lacked the authority to declare a national emergency under the Act.

There are two basic challenges that can be brought in national emergency cases: a challenge to the source of the authority and a challenge to the source of the funding. While it is certainly possible that the Administration could suffer a defeat in a lower court, the statutory text and the existing precedent strongly favor the Trump Administration in ultimately prevailing in this litigation on both grounds. The most promising claims are largely procedural or limited in character.

A. The Source Of The Authority.

The multistate lawsuit filed in the Northern District of California in *State of California, et al v. Trump* spends considerable space challenging the

Administration's basis for the emergency declaration. It is in large measure a challenge on the merits of treating the border crossings as a true emergency. Thus, the filing invites the court to do something that most courts steadfastly refuse to do: substitute its judgment for that of a sitting president on a discretionary matter.

I have previously stated that I do not view the situation on the southern border as a national emergency. However, neither my view of the situation nor that of the court should be determinative. Under the law written by this body, this is a national emergency because President Trump said it is an emergency. That may seem superficial and simplistic but the NEA is superficial and simplistic.

President Trump has detailed the reasons for his declaration,¹⁰ which states in part:

“The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate.”

There are ample reasons to disagree with that declaration on a policy level. However, this is a question of the constitutional role of the courts and Congress respectively, not the merits.

First and foremost, a court is unlikely to do for Congress what Congress will not do for itself. It was Congress that enacted such a vacuous bill allowing for the declaration of national emergencies. It is Congress that can rescind such an order, as the House of Representatives showed this week with its vote to terminate the emergency. If Congress cannot muster the

¹⁰ Declaration of President Donald Trump, February 15, 2019, available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>

votes to rescind the emergency or the supermajority needed to override a veto, it is not the function of the courts to compel the same result by the decision of a single jurist. Congress must either live with the system that it created or it must change the system. The record before the Court will show that a significant number of members agree with the President on the declaration, including 182 members of the House this week. In the Senate, this is likely to be close to fifty percent. That remains a political question that is extrinsic to the function of an Article III judge. Indeed, such a judge is likely to note that Congress has been repeatedly criticized over the toothless language of the NEA and its regular use by presidents, including its use in non-emergencies.¹¹ Congress has ignored that criticism despite emergencies that seem not only opportunistic but never-ending.

Second, for a court to rule against the President, it would have to effectively amend the NEA to insert the standard that Congress conspicuously omitted. What would that standard be? A court would have to set some elements as a prerequisite for a presidential declaration without benefit of a research staff, expert testimony, or regulatory experience. It would also have to ignore the supportive declarations of various agencies, which are ordinarily given deference under controlling federal precedent like *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹² That case addressed the question of how the Environmental Protection Agency could treat “non-attainment” states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. As noted by Chief Justice John Roberts, “*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”¹³ *Chevron* put forward a simple test for courts in first looking at whether the underlying statute clearly answers the question and, if not, whether the agency’s decision is “permissible” or reasonable.¹⁴ The court in this case would have to reject the expert views of agencies like the Department of Homeland Security. As

¹¹ See, e.g., Gregory Korte, *America’s Perpetual State of Emergency*, USA Today, Oct. 22, 2014.

¹² *Chevron*, 467 U.S. 837 (1984).

¹³ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

¹⁴ *Chevron*, 467 U.S. at 842-43.

a critic of *Chevron* in both writing¹⁵ and testimony,¹⁶ I have encouraged closer scrutiny of agency decisions but it must be based on some clear and cognizable standard. It is difficult to see such a clear foundation for a federal court to not only constructively amend this statute but override these agencies.

¹⁵ See, e.g., Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); see also Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013).

¹⁶ See United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, March 21, 2017; United States House of Representatives, House Committee on Science, Space, and Technology, “*Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*,” September 14, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016; United States Senate, Committee on Homeland Security and Governmental Affairs, “*The Administrative State: An Examination of Federal Rulemaking*,” April 20, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*,” March 15, 2016; *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014); *Enforcing The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014); *Executive Overreach: The President’s Unprecedented “Recess” Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012); see also *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015).

Finally, even if a court were to delve into the merits, it would be unlikely to delve too far. The multistate lawsuit argues that apprehensions are down significantly from their historic highs. That factual point seems unassailable. In 2018, apprehensions at the border were less than 400,000. In 2000, that rate was 1.6 million. However, that does not mean that the rate of crossings cannot be deemed an emergency. It is akin to saying that a storm surge of 25 feet in 2000 must mean that a storm surge of 12 feet is not an emergency this year. The President can still declare that the ongoing rate of crossings constitutes an emergency in his judgment. Indeed, elections often result in significant changes in how elected officials view public safety concerns, particularly presidents. The public elected President Trump based in part on his view that the border situation is a national security crisis. For an unelected federal judge to substitute his or her view on such a question would go well outside of the navigational beacons for judicial review.

A challenge to the source of the authority in this controversy is highly dubious. It is unlikely to prevail not because of what the President has done but what the Congress did not do in crafting the National Emergencies Act.

B. The Source of the Funds.

The second area of challenge is more promising but only to a limited extent. The use of federal funds does offer a court a more concrete basis to review executive action based on any conditions set by Congress. The problem is that the NEA is designed to remove such conditions on some funding and other sources have broad possible uses. Thus, even if the challengers could succeed in enjoining a couple areas of funding, there would still be ample funding to continue wall construction.

The funding for the wall starts with the \$1.375 billions approved by Congress for border security in a compromise to end the recent government shutdown. If critics are hoping that this purported limitation in the appropriation will stop the Executive Branch, they are relying on the same low-grade legislative work that characterizes the NEA itself. On February 14, 2019, Congress passed the Consolidated Appropriations Act, 2019 (H.J. Res. 31) (the “2019 Appropriations Act”), which provides \$1.375 billion for construction of primary pedestrian fencing. This fencing expressly is approved for in “the Rio Grande Valley Sector” of the border. H.J. Res. 31 § 230(a)(1). The Rio Grande Valley sector alone runs along 316 river miles and 317 coastal miles. It also covers 34 Texas counties. While the Congress specified that the money “shall only be available for operationally effective designs deployed as of the date of the Consolidated Appropriations Act,

2017 (Public Law 115-31), such as currently deployed steel bollard designs, that prioritize agent safety.” Id. § 230(b). This would still allow border construction for hundreds of miles. Moreover, the Congress has not even required the use of steel bollard designs per se. It merely specified the use of “operationally effective designs” previously deployed in wall construction. A court would be hard pressed to deny the use of such funds when Congress, again, gave ample flexibility to the federal agencies in the use of the funds.

A second source of funding is directly related to the NEA declaration. President Trump has declared that he will use military construction funding as allowed under Section 2808, which states that a declaration allows a president to “undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces.” 10 U.S.C. § 2808(a). The challengers insist that “military construction” under Section 2808 includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation.” Again, Congress used language that defeats meaningful limitations. While the language “to support such use of the armed forces” may seem like a meaningful limitation, presidents have previously dispatched military to the border and border protection is a classic role for military units. It is certainly true that our border has long been maintained by our non-military border patrol and other assets. However, that does not mean that military units cannot be used so long as they do not violate such laws as the Posse Comitatus Act. *See* 18 U.S.C. § 1385. Some have suggested that the funds may be barred because the construction of the wall is not an activity where the use of the armed forces is required. However, that is not what the law actually says. Section 1385 says that the funds may be used when those funds are “necessary to support use of the armed forces.” It is not that the armed forces are required but that the funds are required as support for such forces. It is the President who determines whether armed forces are to be used and few have questioned that the military can be used on our borders for security. Finally, the reference to a “military installation” seems like a meaningful limitation until you actually look how Congress defined it. It includes a “base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department.” 10 U.S.C. § 2801. Using words like “other activity” defeats efforts to limit the scope of such construction.

The Administration has also linked the drug interdiction elements of the declaration to the use of drug enforcement resources. Even without the NEA, Section 284 authorizes the Secretary of Defense to assist civilian drug enforcement activities, including the providing of support “for the

counterdrug activities or activities to counter transnational organized crime.” 10 U.S.C. § 284. Notably, this includes “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” Again, Congress elected to give this authority to presidents by an overwhelming vote in 2016. It was signed into law by President Barack Obama and is now being used by President Trump. The meaning of the law does not change with the identity of the president.

The Administration is also indicating that it will use forfeiture funds under Section 9705(g)(4)(B) that expressly allows for the discretionally use of the Treasury Forfeiture Fund’s “unobligated balances . . . shall be available to the Secretary . . . for obligation or expenditure in connection with the law enforcement activities of any Federal agency. . . .” Again, Congress decided that this free and fluid use of forfeiture funds was in the interests of the public when the White House was under the control of a different president. A court will apply the limitations – or lack thereof – set by Congress.

These funds constitute \$6.7 billion over the roughly \$1.4 billion appropriated recently by Congress. That constitutes roughly \$8 billion – three billion above the amount originally sought by President Trump. That simple math reveals the simple problem for a challenge. Even if a court were to enjoin one or two sources of funding, there would remain ample money to fund the construction. It would be quite extraordinary for a court to “run the table” and block all such sources for funds.

C. A Question of Deference and Discretion.

My judgment that the current challenges face a low likelihood of success is based not only on the text of the National Emergencies Act but also prior judicial precedent. A court would have to depart not only from the text of various laws but the approach of past courts to entirely block construction of the wall.

One such ruling was handed down in *Beacon Products Corp. v. Reagan*,¹⁷ where a business sought to challenge the declared national emergency related to Nicaragua. That declaration imposed trade restrictions under National Emergencies Act and International Emergency Economic

¹⁷ 814 F.2d 1 (1st Cir. 1987).

Powers Act (IEEPA).¹⁸ However, the challengers noted that the Congress had not fulfilled its obligation under section 202(b), which states:

“Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.”

50 U.S.C. § 1622(b). Then Judge (and now Supreme Court Justice) Stephen Breyer ruled against the challenge and adopted a fluid interpretation of even the express language of Section 202(b). Here the language states clearly that “each House of Congress shall meet to consider a vote on a joint resolution.” It is the last residue of affirmative congressional action. It is not a high burden but even that requirement was declared by the court to be unnecessary to fulfill. Breyer wrote that it was practically inconvenient and unnecessary to actually meet for such a purpose:

“Failure to vote likely means that few legislators wish to end the emergency. It would be odd to think that Congress would make it easier to terminate a popular emergency than an unpopular one. It seems far more likely that Congress meant the “shall meet to consider a vote” language to give those who want to end the emergency the chance to force a vote on the issue, rather than to *require* those who do *not* want to end the emergency to force congressional action to prevent automatic termination.”

What is most striking about this decision is that Section 202(b) is a model of specificity in comparison to the rest of the NEA. Yet, even that language was read broadly to eliminate conditions placed by Congress. Moreover, Breyer emphasized that this view is supported by the fact that Congress can always exercise its authority to rescind an emergency order. Given such reserved authority, the court did not feel compelled to intervene in such controversies.

Rulings in other areas are equally relevant to this controversy. The last major litigation over inherent presidential powers occurred over the President’s immigration orders. While I criticized the first immigration order as a dreadful document that was poorly written and later poorly supported,

¹⁸ 50 U.S.C. §§ 1701-1706.

there was no doubt that the President had the better case based existing case law. For that reason, I disagree with the lower court rulings though I recognized that there were good-faith arguments on both sides. The order was later changed though challengers insisted that the core violations under the Constitution and statutes remained. Ultimately, in *Trump v. Hawaii*, the Supreme Court ruled for the President. In a 5-4 decision, the Supreme Court reversed the Ninth Circuit in finding that the multistate plaintiffs did not have a “likelihood of success on the merits.” The decision by Chief Justice John Roberts reaffirmed the high level of deference afforded to a president in this area—the same level of deference likely to be applied in the current challenge over the emergency declaration along our border.

There are other such cases affirming deference accorded to presidents along the border but there is little need to establish this obvious fact. It is probably more useful to note what case is not determinative. Some in Congress have insisted that this declaration is unconstitutional under the precedent established under *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁹ House Intelligence Committee Chair Adam Schiff has made this point in “Look, if Harry Truman couldn’t nationalize the steel industry during wartime, this President doesn’t have the power to declare an emergency and build a multibillion-dollar wall on the border, so, that’s a nonstarter.”²⁰ I have to disagree with Chairman Schiff despite my respect for his legal judgment (learned as his opposing counsel in the last impeachment trial in the United States Senate).

In *Youngstown Sheet & Tube Co.*, Justice Hugo Black ruled “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress ... from which such a power can be fairly implied.” Likewise, in his famous concurrence, Justice Robert Jackson explained that presidential actions are reviewed along a spectrum of legitimacy with three critical categories. First, a president’s actions are largely unassailable when “[t]he President acts pursuant to an express or implied authorization of Congress.” Second, there are cases where a president acts in areas where Congress is silent. Finally, a president has the least legitimacy “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”

¹⁹ 343 U.S. 579 (1952).

²⁰ Melissa Caen, *CA Congressman Says President Cannot Use National Emergency To Build Wall*, CBS News, Jan. 6, 2019.

This is not *Youngstown*. In that case, President Truman sealed the steel mills without any authorization of Congress. In this case, President Trump is acting under such authority given to him and all presidents by Congress under the NEA. It falls into the first category described by Justice Jackson of an express authorization of Congress. Thus, to the extent that *Youngstown Sheet & Tube Co.* applies, it works heavily in favor of President Trump in this litigation. To rule against this declaration would not only gut that ruling but circumvent decades of legal authority affording great deference in this area to presidents.

IV. CONCLUSION

Justice Oliver Wendell Holmes once said, “If my fellow citizens want to go to hell, I will help them. It is my job.” He was expressing the limited role of courts in challenges to federal law. They will gladly send Congress to hell. It only needs to point to the destination.

The National Emergencies Act of 1976 is an example of this body being hellbent to surrender its institutional powers—even its institutional relevancy—in the governing of this nation. Indeed, it is more proof that Madison may have been wrong in his faith that members would fight jealously to protect their constitutional authority. While Madison hoped in *Federalist No. 51* that “ambition must . . . counteract ambition,” members have shown little institutional fidelity as they worked toward their own institutional obsolescence. If this controversy has any positive result, it will be to expose that record and force members to resume their constitutional duties under Article I. Yet, the effort to litigate this matter seems to suggest that this controversy is the making of the President, not Congress. To make matters worse, some have suggested that this body should sue as a party to contest the declaration. Such a filing would use the precedent secured in *United States House of Representatives v. Burwell*,²¹ where the House of Representatives succeeded in establishing standing in what proved to be a successful challenge to President Obama ordering potentially the payment of billions to insurance companies under the Affordable Care Act without an authorization from Congress. I was lead counsel for the House of Representatives in that case. We won the case. Superficially, it may look like the wall controversy. Obama sought funds from Congress and, when unsuccessful, acted unilaterally. But Obama ordered the money directly from the Treasury as a permanent appropriation, like the money used to pay tax

²¹ 185 F. Supp. 3d 165 (D.D.C. 2016).

refunds. Congress had never approved such payments. Conversely, Trump is using appropriated funds and an authorization under federal law.

The border declaration is now being challenged in multiple courts. That is right and proper. However, there is no need for this body to file as a party. As a long advocate of legislative authority and specifically legislative standing, I can only implore this body not to risk the hard-fought victory in *Burwell* with an ill-considered challenge. The concern is that the challenge will not only fail but that this body will undermine its own standing precedent. While a court could rule on the merits of the arguments in such a challenge, it is a well-known fact that courts will often look to standing as a way to avoid such difficult question. There is no reason for members to risk a negative ruling on standing in a weak case when it is already being fully litigated by others and members can join as *amicus curiae*. Some of us have written and argued for years to establish legislative standing. Much still must be done but it would be a wasteful and self-defeating act for this body to risk our victory in *Burwell* on a filing with such a low likelihood of success.

That brings us back to Holmes. Congress has the authority to rescind the national emergency declaration of Trump with a vote of both chambers. If Congress cannot muster the votes, however, a federal judge is unlikely to do so. The court is more likely to send Congress along its long chosen road toward institutional obsolescence.

I thank you again for the honor of appearing today and I am happy to answer any questions that you might have.

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Mr. COHEN. Thank you, Mr. Turley. Appreciate it, Professor Turley.

Finally, we have Stuart Gerson, who is a member of the law firm of Epstein Becker & Green. His practice has centered on providing representation to clients in the healthcare industry particularly. He has had a long and distinguished career serving both as acting attorney general and assistant attorney general for the civil division during the administration of President George H.W. Bush.

He also served as an advisor to several Presidents, including serving on the transition team of President George W. Bush.

He received his J.D. from Georgetown University Law Center, and his B.A. from Pennsylvania State, Penn State. He is not as commonly on television as Mr. Turley, but he started with the team of Tribe and Gerson as TV personalities. We welcome Mr. Gerson.

TESTIMONY OF STUART GERSON

Mr. Gerson. Thank you, Mr. Chairman. Chairman Nadler, pleasure to see you again. Mr. Chairman, Ranking Member Johnson, and I especially give a nod towards Ms. Escobar, whose home county is my client in the litigation that Professor Tribe and I are sharing, and which doesn't bear the characteristics criticized by Professor Turley.

I am a life-long Republican. I have been a Republican longer than some of you have been alive. And I am a conservative Republican, and I enjoy the support of a lot of conservatives with respect to the position that I am taking today. Indeed, I would take that very position if I agreed with President Trump with respect to his desire to build a contiguous border wall. I don't. I am a tech wizard and know a lot about what DARPA has done since Vietnam in creating technical means, and I like those a lot better.

But I don't favor open borders and I don't know anybody here that does either.

And so I am here as an advocate for the Constitution, and, in fact, I agree with 95 percent of everything that I have heard from everybody so far. And I expect that to continue.

Mr. Johnson, Professor Turley and I disagree as to one point and that is with respect to the ability of a neutral, of a judge, to determine an emergency. But in terms of the history, we don't disagree at all, and I was as much a critic of acting contrary-wise to Congress by the executive in the previous administration as I am presently. As I say, even if I agreed with the President, I would have the same position.

Your job is to revisit the Act, and I am hopeful and expect that you will do it, and in so doing, that the Congress will stop acting like a parliamentary body, and will act as what James Madison, Alexander Hamilton, and the other Framers intended, which was an adversary to the executive branch.

This goes back, even in my lifetime, to the 1940s, and it has been a continuous trend. And I say that as somebody who represented the first Bush administration arguing in court all the way up to the Supreme Court about the President's war powers. Different from what we have here, but certainly this entire case cries out for the

definition of what constitutes an emergency, where a President can act, and for how long.

Why I think a neutral will be able to decide this question, notwithstanding my full agreement with Professor Turley that the Act, as currently written, looks like a turducken, if I can give you a Louisiana reference, you know, things slapped on one another, eliminating old emergencies that persisted for years.

But the reason why I think that a court will be able to do that is that I don't think you can be the referee of your own game. And I don't think that using just the textualist tools that I believe are proper, when I support the judicial nominees of this administration, which I generally do, that "emergency" requires a definition. It is got to be an exigency of some kind, unplanned, sudden, that requires action in a time frame too short for the two political branches to confer and to act. That is similar to what other witnesses have had to say.

One can argue about the language, but I think we know what an emergency looks like when we see it, if I can paraphrase Justice Stewart. And that is what I am asking you to do. As far as the litigation goes and our ability to challenge the Act, I am comfortable with the positions that we are taking. It is a coalition of organizations left, right, and center. None of us views it as—as political. It is simply that we believe that it is constitutionally impermissible for the President to take action in what really is a nonemergency, when the Congress has already spoken and told him not to do the very thing that he is doing.

Like in a sport, the Constitution intended that there be winners and losers, and something ends a particular dispute. In this case, what should have happened was that Congress should have had, not only the last word, but the definitive word. I am happy to answer your questions, I respectfully ask that my prepared testimony be made part of the permanent record of this hearing.

[The statement of Mr. Gerson follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on The National Emergencies Act of 1976
February 28, 2019

Testimony of Stuart Gerson
Member of the Firm, Epstein Becker Green

**Prepared Testimony of Stuart M. Gerson
House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties**

Introduction

Good afternoon, Chairman Nadler, Ranking Member Collins, Chairman Cohen, Ranking Member Johnson, and Members of the Committee. Thank you for calling this important hearing and inviting me to testify.

I am a lifelong Republican and a devoted constitutional conservative. I served in a senior role in the Justice Department as an Assistant Attorney General during President George H.W. Bush's Administration, and have advised in the campaigns and transitions of several Republican Presidents and have been the outside general counsel to the National Republican Senatorial Committee during several election cycles. As a counterpoint, I also was the Acting Attorney General of the United States during the early part of the Clinton Administration. Early in my career, I was an Assistant United States Attorney and, before that, a counter-intelligence officer in the U.S. Air Force.

It is with first allegiance to the country I have served and to the Constitution that has held it together and allowed it to prosper and become an economic leader and bastion of freedom in the world at large that I come here to explain why the President's so-called emergency proclamation presents a dangerous violation of the separation of powers that the Framers correctly intended to be the core principle of a viable and effective American Constitution.

Although I believe that the President's policy is flawed and that his proposal as to a border wall is ill considered, I also believe that the Congress unwisely has, over time, surrendered its own powers in its inability to fashion a truly coherent and effective immigration policy and its passage of laws that ambiguously deal with the Executive. But I testify here today, not as a politician, but in support of a Constitution that is under threat. Indeed, I have supported the Trump Administration enthusiastically with respect to judicial nominations and to its policies that are directed at reducing unnecessary regulatory burdens and the power of the un-elected administrative agencies. These positions might not be popular with some members of this Committee and some of my fellow panelists, but they align with my fundamentally conservative beliefs about the Constitution, the rule of law, and the role of the different branches of government in our constitutional system. My position here also squares with those of many constitutional conservatives including those who have joined with me in the organization known as "Checks and Balances," which is dedicated to promoting the rule of law.

Based on my considered constitutional views, I have joined with the non-profit organizations Protect Democracy and the Niskanen Center, as well as the distinguished constitutional scholar

Laurence Tribe and others, on behalf of the County of El Paso, Texas and the Border Network for Human Rights, in filing a lawsuit challenging the President's action. Although I am honored to be part of this legal team representing our clients, pro bono, in standing up for the Constitution, I am here today only to speak on my own behalf on not that of other persons or organizations.

The Constitutional Separation of Powers Gives Congress, not the President, the Power of the Purse

The separation of powers is at the core of our constitutional structure. The Framers understood that if too much power were concentrated in one person or one branch of government, it would inevitably lead to tyranny. The American Revolution was premised on the rejection of the right of a unitary person or body to control all of the affairs of government. And so in crafting the Constitution, while correcting for the flaws in the failed Articles of Confederation, the Framers were keenly aware of the need to limit government and to disperse the powers of government among coordinate branches that, in the event of irreconcilable disagreement could act as checks and balances amongst one another. As James Madison cautioned in Federalist No. 47, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹

Thus, the Framers created, and the States ratified, a Constitution that grants the Congress, not the Executive, the power to make laws. The President may propose measures to Congress,² and he must sign bills for them to go into law,³ unless his veto is overridden. But otherwise the President's role in our system of checks and balances is to faithfully execute the laws Congress has enacted.⁴ It is not to make the laws himself.

The fundamental “check” assigned to the Congress is the exclusive power to decide how the government spends money. The Appropriations Clause provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁵ And the Spending Clause grants Congress alone the “Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States.”⁶

As James Madison wrote in The Federalist Papers, “[the] power over the purse may [be] the most complete and effectual weapon with which any constitution can arm the immediate

¹ The Federalist No. 47 (James Madison).

² U.S. Const. art. II, § 3.

³ U.S. Const. art. I, § 7.

⁴ U.S. Const. art. II, § 3.

⁵ U.S. Const. art. I, § 9, cl. 7.

⁶ U.S. Const. art. I, § 8, cl. 1.

representatives of the people.”⁷ Indeed, with respect to the matter at hand, this power may be the only real and effective means of restraining the power of the Executive when the two political branches of the government are at loggerheads.

In short, any reasonable notion of the constitutionally fundamental separation of powers must carry with it a necessary limitation on the power of the Executive. If the Executive can declare himself the maker of laws and override the will of Congress on how money is spent, it is an affront on the constitutional structure.

Here, the President proposed to Congress that it enact certain laws and appropriate certain funds for constructing a wall at the Southern border. The American people and their representatives in Congress debated that proposal extensively. Congress considered the President’s proposal in great detail. And Congress decided ultimately to restrict the amount of money that could be spent on border barriers and the ways that money could be spent, effectively rejecting the President’s proposal.

On February 15, 2019, President Trump signed into law the 2019 consolidated appropriations bill containing those appropriations and restrictions. And yet, on the very same day, he issued an executive Proclamation declaring that he would ignore the laws Congress had passed and spending decisions it had made under our constitutional system and instead usurp the purse by attempting to supersede that which the Congress specifically had appropriated for a stated purpose by redirecting funds appropriated by the Congress other purposes.

The current case is therefore one in which the President is defying Congress. In his famous concurrence in the *Youngstown* steel seizure case, Justice Robert Jackson put this type of action in the category of disputes in which the Constitution most stringently restrains the power of the Executive. Indeed, there are some striking similarities between the Proclamation and that case. For *Youngstown* also involved the President seeking to deploy military resources for civilian domestic purposes—without the consent of Congress. In that case, Justice Jackson observed that no doctrine could be “more sinister and alarming” than to allow a President to “vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.”⁸ Here, there is not even a “foreign venture” motivating the President; he simply wishes to ignore the will of Congress in carrying out his own civilian domestic policy preferences. What the President has done reflects just the type of aggrandizement of all powers in the hands of one person that the Framers feared. And it is why I and so many other conservatives oppose this emergency declaration on constitutional grounds.

⁷ The Federalist No. 58 (James Madison).

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

The National Emergencies Act Does Not Allow the President to Override Congress on Long-running Policy Disagreements. Neither does the Constitution nor Common Sense.

The constraints of this hearing do not allow wading deeply into the minutiae of the statutes that the President has invoked in his Emergency Proclamation. But I do want to explain briefly why they do not apply here.

As the Committee is aware, the President has purported to act under the National Emergencies Act (“NEA”). Congress enacted the NEA in 1976 out of a widely-shared recognition that Presidents were overusing the powers that Congress had granted them to act quickly in situations where Congress lacked adequate time to respond. The NEA terminated existing emergencies (some of which had persisted for decades) and created a new framework to cabin the President’s authority.⁹ The NEA’s primary purpose was therefore to *prevent* the President from exercising unbounded authority to declare emergencies and to continue states of emergency in perpetuity.

A state of emergency is something that should describe an objectively demonstrable exigency that time doesn’t allow for inter-branch resolution, not merely a bothersome situation that not only has persisted for years but is diminishing. That is all the more so when this long-running situation has been the subject of extended congressional debate and action. As Senator Blunt accurately put it, “I don’t think that the emergency declaration law was written to deal with things that the President asked the Congress to do, and then the Congress didn’t do. It’s never been used that way before.”¹⁰ Indeed, as I’ve suggested, the Constitution doesn’t allow it.

As George Mason Scalia School of Law Professor Ilya Somin has explained, and as textualists like I am agree, the NEA must be read to give the word “emergency” its ordinary meaning, which requires some sudden sort of crisis. As Somin puts it: “Disagreement between the legislature and the executive is not an emergency. It’s a normal part of our system of separation of powers. If the president can’t get Congress to pass the laws he wants, that doesn’t justify circumventing it by declaring an ‘emergency.’”¹¹

Any other reading of the term “emergency” in the NEA would threaten to turn the Act into an override on the separation of powers at the core of our Constitution. If the President could wave a magic “emergency” wand to override Congress in any episode of disagreement, it would render all the rest of the Constitution without meaning. The NEA does not give the President any such power.

⁹ 50 U.S.C. § 1601 *et seq.*

¹⁰ *Full Transcript of “Face the Nation” on February 24, 2019*, CBS News (Feb. 24, 2019, 5:36 AM), <https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-february-24-2019/>.

¹¹ Ilya Somin, *Why Trump’s Emergency Declaration Is Illegal*, Reason Foundation (Feb. 23, 2019, 5:35 PM), <https://reason.com/volokh/2019/02/23/why-trumps-emergency-declaration-is-illegal>.

The Military construction statute does not allow mobilizing the armed forces to fund civilian construction projects

As I have explained, the separation of powers at the core of our constitutional system of government prohibits turning a long-running political debate into an “emergency” in order to override that constitutional system. But there is yet another legal flaw in the Emergency Proclamation. The principal funding statute referenced in the President’s Proclamation is 10 U.S.C. § 2808, a provision of the Military Construction Codification Act.¹² This statute, however, does not permit the President to fund border-barrier construction that Congress has not authorized. Instead, it provides a narrowly cabined exception to the requirement of congressional authorization for military construction projects. As explained above, an abiding disagreement with Congress is not an “emergency,” so this statute is not implicated in the first place. And even were there a bona fide emergency declaration, because the 2019 Consolidated Appropriations Act that the President signed specifically addresses border fencing, section 2808 simply does not apply.

But section 2808 does not authorize border-barrier construction for civilian law enforcement on its own terms. Under the NEA, in the event the President declares war or a national emergency that “requires use of the armed forces,” the Secretary of Defense “may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces.”¹³ In other words, the military construction statutes permits construction to support the military in a situation where the military’s use is required. It does not permit the president to deploy the military or its construction funds to support civilian law enforcement operations.

The Proclamation does not satisfy either of section 2808’s two statutory requirements: first, there is no emergency that “requires use of the armed forces,” and second, there are no “military construction projects” or projects “necessary to support such use of the armed forces.”

As to the first, the Proclamation itself counters the claim that an emergency “requires use of the armed forces.” The Proclamation describes criminal law and humanitarian challenges, as well as long-standing civilian problems on the border—but no situation that requires the use of the armed forces.

With respect to the second, the construction of a border wall does not qualify as “military construction” as defined by the statute. Subsection (a) of 10 U.S.C. § 2801 describes “military construction” as a project “carried out with respect to a military installation.” And in subsection (c)(4), “military installation” refers to “a base, camp, post, station, yard, center, or other activity

¹² 10 U.S.C. §§ 2801-2885. The White House issued a Fact Sheet alongside the Proclamation referencing two other sources of funds—the Pentagon’s counter-drug funds and the Treasury Forfeiture Fund. These also do not permit overriding specific congressional appropriations.

¹³ 10 U.S.C. § 2808(a).

under the jurisdiction of the Secretary of a military department.” Those criteria are not met here. It reads the statute entirely backwards to say that because a wall will be built using Department of Defense funds, it is “necessary” to support the armed forces. As conservative lawyer and commentator David French put it in the *National Review*, “[a] border wall, by contrast, is a civilian structure to be manned by civilian authorities to perform a civilian mission. The troops would not be creating a military fortification for military use.”¹⁴ The Proclamation turns the statute on its head, seeking to mobilize the armed forces to engage in a civilian construction project; not to engage in a construction project necessary to support the mobilization of the armed forces.

Conclusion

Mr. Chairman, I have focused my testimony up to this point on some of the principal constitutional and legal flaws of the Declaration. But I would like for a moment to turn to the substance of what the President is attempting. My previous positions have given more than a passing view of the nature of border security and the technical means by which it might be achieved. The starts with the assumption that the political branches ultimately fashion a comprehensive and effective immigration policy for the nation. But it follows with an understanding of the impracticability of a largely contiguous border wall and of the under-reliance of surveillance technologies that DARPA began developing in the Vietnam era and have been refined and significantly improved in recent times. Moreover, it seems clear that attempting to redirect a portion of the defense budget from the purposes for which Congress appropriated it to the President’s own political project would, in fact, weaken the national defense. This is not just my view. Now, more than 60 leading former national security officials who have served across Republican and Democratic Administrations take the same view—that redirecting money from defense budget “will undermine U.S. national security and foreign policy interests.”¹⁵ I believe that none of these security officials or the former legislators who similarly oppose the President favor a completely “open border.” Nor do I. However, the expressed views of all of these people, many of whom are traditional conservative Republicans, make it clear that the President cannot justifiably claim that his action is somehow required by national security.

Finally, with respect to policy considerations, I know the Committee may consider legislative reforms to the NEA and other statutes. Given arguable vagueness of some of its language, I recommend it. It is always wise for Congress to revisit and revise legislation. But there should be

¹⁴ David French, *Trump’s Emergency Declaration Is Contemptuous of the Rule of Law*, *National Review* (Feb. 15, 2019), <https://bit.ly/2TWwY56>.

¹⁵ Ellen Nakashima, *Former Senior National Security Officials Issue Declaration on National Emergency*, *Wash. Post* (Feb. 25, 2019, 1:31 PM), https://www.washingtonpost.com/world/national-security/former-senior-national-security-officials-to-issue-declaration-on-national-emergency/2019/02/24/3e4908c6-3859-11e9-a2cd-307b06d0257b_story.html?utm_term=.be8bfd00a566.

no doubt that the Constitution, as well as statutory law as currently written, precludes what the President has done in issuing the Proclamation.

Some defenders of the President have argued that Republicans should come together to support the President's Proclamation. In declining to do so, I harken back to a comment that President George H.W. Bush made to me when I asked him if he had any reservations about my acting as Attorney General in the administration of his successor. He simply stated: "Country comes before party." I echo that statement today and ask that you and persons of all political persuasions stand behind the Constitution.

At the conclusion of the Constitutional Convention, the 81-year-old Benjamin Franklin was asked what sort of government the delegates had created. He answered famously: "A republic, if you can keep it." This is one of those times when all of us, members of Congress and private citizens alike, must remember how much of the nation's continued existence as a country free from tyranny depends upon us and what it takes to "keep it."

Thank you, Mr. Chairman and Members of the Committee.

Mr. COHEN. Thank you, Mr. Gerson. All of your prepared testimonies will be part of the permanent record, and we appreciate your testimony.

We will now proceed under the five-minute rule for questions, and I will begin, recognizing myself.

Ms. Goitein, you gave us two of the ways you thought we should change the law. The first one had to do with clarifying it was a significant change, and—and the second one was the idea that it ended after a certain number of days, 10 or 30 or whatever. Can you tell us—you had some others in your testimony—can you go over those quickly? And then I would like to ask Mr. Turley and Mr. Gerson to comment on your proposals.

Ms. GOITEIN. Sure. Thank you for the question.

My third recommendation was that Congress could renew states of emergency on a periodic basis up to 5 years. After 5 years, it can no longer be called an emergency. It has become a new normal of sorts, and at that point, Congress should be passing permanent laws, or laws potentially with sunsets, in order to address the phenomenon rather than pretending that it is still an unforeseen circumstance that is going on.

The fourth recommendation I made is, right now, under the National Emergencies Act, when the President declares an emergency, he has access to any of the statutes that are available during a national emergency, even if they are facially irrelevant to the nature of the emergency. There is no requirement in the Act that there be some kind of connection.

Now, a few of those laws, like 10 U.S.C. 2808, have some additional language that cabins how they can be used. Most of them do not. And there is no reason for that, and it invites abuse. So the law should clarify that emergency powers can only be used to address—for the purpose of addressing that emergency and not for any other emergency.

Fifth, the law should make clear that emergency power can never be used as an end-run around Congress. So if the current Congress has had an opportunity to consider and vote on the circumstances that lead to the emergency declaration, then the President cannot introduce a national emergency to get around what the current Congress has decided.

Finally, there should be greater transparency in terms of how Presidents are using emergency powers. Right now, the President has to report every 6 months on expenditures related to the emergency. These reports have been filed. Since 2003, they have gone missing. I think Congress is getting them, but they are not publicly available.

There should be a requirement, first of all, that the reports be made public; and, second, that the reports cover not just expenses, but the details of what activities and what programs have been put in place, with classified annexes where necessary. So those are my recommendations.

Mr. COHEN. Thank you. First, let me ask you this. On your first recommendation, it was that they are significant—only if exists significant change in factual circumstances and pose an imminent threat to the police powers, or pressing national interest. The President could say that there is a factual change on the border,

and if he did such, how does that first recommendation, how would that interface with our current circumstance?

Ms. GOITEIN. In the current circumstance, I believe the only change that he has pointed to, as a factual matter, is that there are more families coming to the border seeking asylum. And, of course, these individuals are coming to make claims they are entitled to make under the law, and they are seeking lawful entry into the United States. So that is not contributing to the problem of unlawful migration, which he cited as the emergency in the declaration. He hasn't cited any change in circumstances, any unforeseen developments, which is what an emergency is, other than that one.

Mr. COHEN. Well, isn't he—and maybe you are right and I am missing it in his official declaration, but in his—in his verbiage, he has talked about drugs pouring in, and he has talked about the women being bound and taped and you name it. And that is something new, I think. And so new that it doesn't exist, but it is new.

Ms. GOITEIN. It is new that he is talking about it. I think what we have to understand is that a problem is not the same thing as an emergency. Even a very serious problem is not the same thing as an emergency. "Emergency" has a meaning. It is not that obscure a word. And it does relate to unforeseen, sudden changes in circumstances that require an immediate response.

Most of the things the President has talked about—drugs, unlawful border crossings, crime—are things that if you look at the government's own statistics, they are not getting worse. If anything, they are getting better.

Mr. COHEN. Thank you.

Professor Turley, what are your thoughts about her five recommendations, and do you have any others that are in addition to that?

Mr. TURLEY. Well, I—I think it might—I haven't really looked very closely at the recommendations by my fellow witness, but I would put up a cautionary flag that you should not try to write with such specificity, that you turn this into an endless form of litigation, and debate over the meaning of what is a problem, what is an emergency. You can define "emergencies."

But I think the key failure of the NEA is that this body doesn't have to take an affirmative act to allow an emergency declaration to continue. As I say in my testimony, originally, the bill had that in it. Originally, the Congress did the right thing and said that after a certain period, we have to affirmatively agree that there is an emergency, and for it to continue. So without that agreement, it is a dead letter. That was removed at the insistence of the Ford administration. That could solve a lot of these problems. You wouldn't have to get into all of the weeds as to, you know, what type of conditions are going to trigger what type of provisions.

As long as this body had to affirmatively agree that an emergency existed, then you could hold a hearing and address many of the fine issues that my co-witnesses identify, and I agree entirely that those are relevant factors to consider.

Mr. COHEN. Thank you.

Mr. Gerson.

Mr. GERSON. Well, I am not sure that life can't continue very well without this Act altogether, because one starts with the Con-

stitution. But speaking to the Act, and you are here to amend it, I mean, remember that its purpose was to clear the deck of a bunch of emergencies that were a decade old and were littering the field.

And remember, also, that your fundamental power, that undergirds any of this is the power of the purse. And so what you ought to be doing, it seems to me, is, by amending this statute clearly—and everybody agrees about this—that you need a clear, plain English definition of what constitutes an emergency.

What you are saying is, we are giving license to the executive to carry on, on this—on this basis without our intervening to cut off that activity by taking action with relationship to finance, what your Article 1 powers are. I mean, so you need to think—you are thinking about process when you do this.

And as I say, I start with the Constitution. And first and foremost, I think a clear definition, some practicable time frame should be attached to that, and the rest should be up to considering how this actually will work in practice, how Congress can play a meaningful role, particularly the House which has this ability to originate revenue bills and appropriations bills, and how that—how that will work in practice.

That shouldn't inhibit a President, for example, with respect to the exigencies of exercising the war powers or foreign affairs powers, assuming that there is an emergency. Avoid those kinds of problems. Avoid the kinds of problems that the Tonkin Gulf Resolution created. I think with historical reference, with a look back, with some common sense, you can simplify this, make it clear, define what your role is, and take a much more activist role, given the limited, but very profound, power that the House of Representatives has.

Mr. COHEN. Thank you, each of you, and we will come back to this, I am sure. But right now I recognize the ranking member, Mr. Johnson, 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Professor Turley, can you just describe for us how the Obama administration's use of nonappropriated funds for healthcare insurers differs from this current situation, the Trump administration using statutory authority here.

Mr. TURLEY. Well, there is a very significant difference. I was a bit alarmed when I saw some members talking about using the precedent we created in Burwell to challenge this declaration as a body. And in my testimony, I strongly discourage that.

One of the reasons I took the Burwell case is, I have been a long believer in legislative standing. I believe a lot of the problems that we have today is that there are some types of constitutional violations by Presidents that can't be challenged in court. They are sort of blind spots. And legislative standing solves that problem. This body worked for decades to get a court to—to recognize legislative standing, and we prevailed on that.

I—quite frankly, I don't think this is a very promising litigation, and I would not put that precedent at risk.

Now, the reason it is not the same situation is that what President Obama did, was, as you described, they came to Congress to ask for funding for the insurance agency—insurance companies, under 1402's program. And this body, for whatever reason, declined

to do that. The administration then declared that this would be a sort of implied permanent appropriation, much like the appropriations that pay citizens their tax refunds. That Congress doesn't require the IRS to come to you every year and say this is the amount of money we want to give citizens. You give a permanent appropriation. It is like an open credit card. That is something this body does not like to do, unless it really seriously looks at whether it wants that type of year-in, year-out type of appropriation.

What the administration said is that we will pay this directly out of the Treasury, and that is what Judge Collier said was a no-go. She just said, look, this is unconstitutional, Congress never said that, and this would really destroy the power of the purse.

That is not what President Trump is doing. You can disagree with his policy, but he is acting under a Federal statute that gives him this authority, and he is using appropriated funds.

Now, we can—I actually think that the challenge on the source of the funds could potentially have a positive ruling for the challengers on some, I doubt if on all of the funds. That is a statutory issue that we can debate. I talk a little bit about it in my testimony.

But that is very different from what happened in *Burwell*. And so what I encourage this body to consider is, regardless of where you come out on this, there are ample lawsuits pending, and they are being well litigated, including some by friends of mine. Let that happen. The members can come in as *amicus curiae* but protect the precedent that we were able to win in *Burwell*.

Mr. JOHNSON. Thank you for that. One more question. To what extent does the Supreme Court consider Presidential rhetoric when they are interpreting statutory authority? So, I mean, are they going to consider the legal provision that governs, or are they going to look at comments made in the press? You know, we remember President Obama famously said, if you like your healthcare plan, you can keep it. But could people have sued to keep their plan even if they didn't have that right under the *ObamaCare* statute itself?

Mr. TURLEY. I actually may create a course on Presidential rhetoric after this administration and its use in constitutional interpretation. I have to say that I disagreed with the Ninth Circuit to the degree to which it utilized the President's tweets and campaign statements in reaching its decision on immigration. I thought the first immigration order was dreadful. It was poorly written, poorly defended. It was—it was really a product that was shocking.

But, ultimately, the Supreme Court agreed with the administration on the underlying core issues, and that opinion recognized the President's inherent authority on the border. Usually, courts are reluctant to go outside the record to read the motivation behind a declaration or, for example, the motivation of this body, in legislation. They tend to try to stick to what you say in your official documents, and they do the same with the President.

So I understand that the President certainly stepped on his lines when he talked about the fact that he really didn't have to do this, but I do not believe that that is going to be determinative, and I am not even entirely sure it is that relevant.

Mr. JOHNSON. So tweets cannot alter an order or a statute? No, that is my words, not yours.

Real quick, Ms. Alvarez, I just had a quick question. And I don't mean this disrespectfully. It is an honest question. But you described your property, you said, in some part of the property, you use a wooden corral built by your great grandfather, you have been there for a number of generations, and there is a soft bluff that separates the river and your property. And you said very conclusively that there has never been, in your words, no drugs, no gangs, no terrorists have ever come across that property. The question is, do you have video surveillance of your whole—that whole length of your property?

Ms. ALVAREZ. Not of the whole length of the property, but towards the part where my home is and my parents' home, yes.

Mr. JOHNSON. Does someone monitor it like through the night, like 24/7? I mean, the question is, how do you know, how can you be certain that no one has ever crossed your property illegally?

Ms. ALVAREZ. Well, it does capture Border Patrol people going through my property, and it sends alerts. So therefore, if somebody else would be passing through there, I would get an alert. I haven't gotten any.

Mr. JOHNSON. Thank you. No further—I am out of time. Thank you, I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

I now recognize the chairman of the full committee, Mr. Nadler.

Chairman NADLER. Thank you.

Professor Turley, I unfortunately agree with you that courts are very reluctant to question the President's honesty or—any President's honesty or motivations, and go behind his determinations, but I think that on this one, at least as to the use of military funds, he wants to move military funds to have the border guarded by building a wall with military funds. Presumably, the wall is a military asset for military use. But the Posse Comitatus Act specifically says the military cannot be used to enforce domestic law. So how can you justify use of military funds for military purpose—for a military purpose that is denied to be a military purpose by law?

Mr. TURLEY. Now, that is an excellent question, and it will be an issue the court will have to deal with. I have to say that I am skeptical—

Chairman NADLER. Because?

Mr. TURLEY. Because the military has been used on the border in the past. Presidents have called the military to the border. It is a classic use of the military.

Chairman NADLER. Have they ever been challenged in court?

Mr. TURLEY. Not that I recall. But I doubt a court's going to seriously debate whether a President has the authority to send the military to the border.

Your point, Mr. Chairman, is a perfectly good one, to the extent that they are doing law enforcement duties, that does bring up Posse Comitatus. That is a legitimate—

Chairman NADLER. Immigration law is law enforcement duties.

Mr. TURLEY. But the—

Chairman NADLER. Drug smuggling is—what would they be doing that wouldn't be law enforcement duties?

Mr. TURLEY. Well, because the border is also a national security border. It is a classic use of the military. They patrol the border. And I am just saying how I believe a court is going to view this.

Chairman NADLER. But the patrol the border, presumably, against foreign troops. Insofar as they are talking about drug smuggling or illegal immigration, that is domestic law enforcement.

Mr. TURLEY. Well, I would say that border protection is a mix. And the question is, are you—do you expect a Federal judge to say, you can't order troops to the border to deal with border security? The answer is—

Chairman NADLER. No, but I expect a Federal judge maybe to say, you can't order troops to the border to deal with drug smuggling or illegal immigration. National security, yes. If the Mexicans are going to invade, 1848 isn't that long ago, yeah.

Mr. TURLEY. Yeah. I do—I do think that this body can correct this problem. It can create clarity on the use of this—

Chairman NADLER. Mr. Gerson, would you comment on that?

Mr. TURLEY [continuing]. Because it doesn't currently exist in the statute.

Mr. GERSON. On which part of it?

Chairman NADLER. On the use of military forces to enforce domestic law, or is that what is happening here?

Mr. GERSON. I agree with you in the abstract, but in the—in the real, I have to agree with you, because that is a point that we make in our litigation, and I expect it to be accepted. I think the—I think what—what to me is the right answer to that, comes from the fact that, sure, the President can dispatch troops to the border for a reason that is consistent with Presidential war powers. There needs to be an underlying fact. If it is just a question of interdicting immigrants, that doesn't relate to the enumerated power that the President has.

Chairman NADLER. So the express purpose of the wall, which is to interdict immigrants and prevent smuggling, would not be a military purpose within the meaning of the Posse Comitatus Act?

Mr. GERSON. Again, I am on the public record in our filing saying that, and I happen to agree with it, but I am not free to say anything else either. You know, as to the—as to other issues, can this be vindicated, of course it can. I am not burdened by—I am not commenting on anybody else's lawsuit, but I am not burdened by the problems that congressional standing raises.

Chairman NADLER. Okay. Let me ask—let me ask one other question. I agree with you on congressional standing, and I am glad of that. In fact, it gets to a different question, which is probably a little off topic, but I will mention it here, anyway.

The Justice Department maintains, as a matter of law, that no President can be indicted. As a matter of law. Okay. Justice Department maintains a lot of positions that one might contest and think they are wrong. Normally, however, one can test it in court. If the Justice Department thinks it can indict you for something or other, it indicts you. You move to dismiss on the grounds that it is—whatever the grounds are, and the court will decide. But if the Justice Department decides it cannot indict a President as a matter of law, then it won't do so, and how does a court ever decide—how do you ever get the court to decide whether the Justice Department

is right or not? It seems to me there is a catch 22 there, but I—go ahead.

Mr. GERSON. Well, I am quite familiar with that provision. It was written with respect to the potential indictment not of a President, but the Vice President.

Chairman NADLER. Right.

Mr. GERSON. And it—it wasn't tested. It—it served—

Chairman NADLER. My point is, it cannot be tested.

Mr. GERSON. I think you are probably right. I think that there is a range of nonjusticiable disputes that will never be tested. There are some that relate to war powers that will never be tested.

Chairman NADLER. Okay. Let me ask one last question because that is a different topic. What would you think of a statute—and Ms. Goitein recommended some version of this—that said any Presidential declaration of emergency automatically ends in 10 days or 30 days, if the Congress hasn't affirmatively acted to extend it, or to ratify it?

Mr. GERSON. Well, it is impracticable.

Chairman NADLER. Why?

Mr. GERSON. I think that my fundamental look at that is not—is not so much philosophical. I mean, how quickly can you—can you obtain meaningful action, and what happens—put aside dealing with issues of border security that have gone on for years that you can—that you can debate forever and come up with conclusions—what if we were under attack of some kind, say a cyber attack that hit us on many fronts that was—

Chairman NADLER. Well, the President could—the President could act, could declare an emergency, could act on the emergency. Congress, within 10 days or 30 days, could decide to extend it or not.

Mr. GERSON. Again, I go back to something I said earlier, you can extend it forever. But when you—when you get to what the fundamental congressional power is, it is the power of the purse. And so what you are—what you are going to do is something that relates to the power that you actually have. If you disapprove what the President is doing, you are going to take steps to cut off his ability to do it, or her ability to do it.

Chairman NADLER. Well, either—either you act to—either you automatically cut off the declaration of emergency if Congress doesn't declare it in a certain period of time. To act on the power of the purse, requires a two-thirds vote to overcome the President's veto of your prohibition on his use of money, and that is shifting the burden.

Mr. GERSON. Yeah, I don't care—I don't say that you are not going to have a practical and constitutional difficulty if you—if you do what you are going to do. Let me just say this: I think with clearer definitions as to what constitutes an emergency, you are going to be on much better grounds, not only judicially, but politically.

Chairman NADLER. Clear definitions are certainly in order. But without—without a time limit within which Congress has—which was originally the intent in 1976—without restoration in some version of that, it seems to me to say that Congress, to stop the

appropriation of money, needs a two-thirds vote, is turning Article 1 on its head.

Mr. GERSON. Well, what happens—it is not my job to ask you the questions, but yours to ask me. But as you war-game this in committee, what is it that you think happens after the expiration of 10 days or 30 days?

Chairman NADLER. Whatever authorities that the President was granted in the—by the emergency declaration cease.

Mr. GERSON. And what if—what if the President doesn't do what you want?

Chairman NADLER. Well, that is always a question. Hopefully—

Mr. GERSON. Yeah, but, again, I think the time limit issue is somewhat—is somewhat artificial, that it may be helpful to have a time limit. You ought to consider that. But what happens at the end of it? I think—I think you need to think that through.

Chairman NADLER. Thank you very much.

My time is very much expired.

Mr. COHEN. Thank you, sir. And I wasn't going to call time on the chairman, but Mr. Johnson did mention there were flights coming. So thank you for mentioning time limits.

Mr. Armstrong of North Dakota is recognized.

Mr. ARMSTRONG. Thank you, Mr. Chairman.

Professor Turley, and I am just going to start with, I think this is a great conversation to have. This is an abdicated—we have abdicated this responsibility over the course of 30 years. And taking some power back on this side of the aisle, and oftentimes the only time you can do it is looking into the future instead of looking into the present, because the President becomes highly polarized, and we all know that very well. And if you didn't before this week in Congress, you sure do today. So I do appreciate all that.

But my question is, not based on how Congress can act to change the law, because I think we should. My question is, under the current law, as it stands now, what risks do you see by those who are filing these lawsuits against the President? I mean, just kind of along the lines of, be careful what you wish for, you might get it.

Mr. TURLEY. Well, there is a chance of bad cases making bad law, and that is always a concern you have when you look at a high-profile case. I don't see how these cases can prevail under the existing law. I don't see a good-faith argument that President Trump lacks the authority that he used, because there is virtually no conditions on that authority.

And I also don't see how a judge is going to run the table on every one of the sources of these funds. Some of them seems—will likely go through. And it is more than enough for the next 2 years to start construction.

I think the more productive use of our time is to focus on how we can have a workable solution to the NEA, which had some very noble purposes at the outset, and one of those is to—to go back to the original draft and the concept of having an affirmative act from Congress after some period of time.

Mr. ARMSTRONG. And that is another question I just have. We talk about legislative intent. We talk about what happened in the—what was originally in the Act and then taken out of the Act. But before we can ever get to that, we have to deal with the statu-

tory framework as it exists. So you only go to legislative intent if there is a discrepancy in the statute. And I would argue—I am not nearly as accomplished a lawyer as the gentlemen sitting down there are—I mean—but—or the witnesses sitting down there, but it is so vague in so many different ways, and so broad-based that I don't know how you would find a discrepancy in it, particularly in order to ever go to those kind of questions.

Mr. TURLEY. No, you can. And history actually works against the challenge, that most of the emergencies that have been declared are largely economic and diplomatic issues. And, frankly, they are not that significant in terms of emergencies. Most people, frankly, in the United States had no idea that there is dozens of national emergencies ongoing. They didn't have any idea that we had an emergency over uncut diamonds from Africa or Zambians who might be, you know, passing transfers of wealth.

The problem is that this is so easy, that the administration—past administrations have just used it to get an edge or to deal with a problem, internationally, on a unilateral basis. So when a judge looks at this, is she really going to say, even though we have never ruled that a President cannot exercise the authority in this way, even though we have had dozens of still-ongoing emergencies, I am going to use my judgment as to what constitutes an emergency on the border, on the NEA, even though emergencies aren't defined.

Now, you might find a judge like that, but at the end of the day, I don't think you are going to prevail. I mean, that is what judges are not supposed to do. They are not supposed to substitute their judgment for what is an emergency. And when people say, Look, well, it is not an emergency because look how the numbers have declined, there is less than 400,000, you know, people being—being captured or arrested along the border. Once again, a judge is going to say, Look, it is not my job to say that 1.2 million is an emergency and 400,000 is a problem.

Elections have consequences. This President ran on this being a national-security concern. He won. And he declared this as a national emergency.

Mr. ARMSTRONG. And in my effort to get everybody to their flights, I will yield the rest of my time.

Mr. COHEN. Thank you, sir.

Mr. Raskin from Maryland, Professor Raskin, you are recognized.

Mr. RASKIN. Thank you, Mr. Chairman, and thanks for all of your great testimony.

Let me try out a theory on the witnesses here. I noticed that most of the cases have been brought first in the name of the Constitution, and then as a statutory matter, which I think is the right way to do it. To me, the whole current situation is solved by the steel-seizure case, where President Truman came to Congress asking for authorization to be able to seize the steel mills and Congress said no. Then the President went out and did it anyway, and then the Supreme Court ended up saying no, it is a red light by Congress, you can't run the red.

And that is exactly what has happened here. The President came to us, asking for money for the border wall. In good faith, what have you, we had a disagreement. We didn't give it to him. Now, he very blatantly, clearly, explicitly wants to go around the back

of Congress and say I am just going to go ahead and use this money anyway. So we say that it violates our power of appropriation and the power of the purse, and the steel-seizure case is on point.

Now, if they want to plead that they have got some statutory authority to do so, we very simply say, Well, no President has ever been able to invoke one of these rare, emergency provision statutes for the purpose of circumventing the will of Congress, the express will of Congress. And I don't see why that doesn't settle it, and I don't see why we would lack legislative standing, without saying one way or another what Congress would do in that situation. But can you guys just illuminate a response to what I am thinking? Mr. Gerson?

Mr. GERSON. Well, I am not dealing with the problem of legislative standing in the litigation that I am bringing. I represent El Paso County and some other groups that are—not only directly but immediately injured, and have to do things now and so—

Mr. RASKIN. And you are actually facing something like use of eminent domain power.

Mr. GERSON. That is right. And the planning that has to do with that. We will deal with all those issues in time.

I have been an opponent of congressional standing. I think that it is rare that it can be supported because I do believe in the political-question doctrine. What distinguishes this case that—that we have, that a judge doesn't have to make his or her own determination as to what constitutes an emergency. This case can be decided on the—on just the grounds that you describe. Obviously, you have read our papers and endorse everything that we have said to the District Court, but what a judge can, and I hope does say in this case, is that this so-called event lacks all the characteristics of an emergency. I can think of any number of things that—

Mr. RASKIN. But are you speaking in constitutional or statutory terms?

Mr. GERSON. Well, I am speaking in constitutional terms, that a judge doesn't have to exceed textualism, if you will.

Mr. RASKIN. But we don't have a constitutional definition of "emergency."

Mr. GERSON. More importantly, you don't have a statutory one. And so—

Mr. RASKIN. Well, at least the word "emergency" appears in the statute.

Mr. GERSON. Yes, but it is—but it is undefined. And there can be—

Mr. RASKIN. Yeah.

Mr. GERSON [continuing]. Emergencies, and there can be emergencies.

Mr. RASKIN. Yeah.

Mr. GERSON. But in this case, where Professor Turley and I disagree is with respect to what the ability of a court is to decide something that, to me, is of an objective nature, that is within the realm of permissible activity by the judiciary.

Mr. RASKIN. Yeah.

Mr. GERSON. We also can win this case on purely statutory grounds for reasons that—

Mr. RASKIN. Yeah.

Mr. GERSON [continuing]. Mr. Nadler pointed out and you would advert to.

Mr. RASKIN. Yeah. I mean, I tend to say I agree with Mr. Turley that on the statutory grounds, it is more ambiguous because it appears to be, you know, a delegation to the President. Of course—

Mr. GERSON. Well—

Mr. RASKIN [continuing]. If the interpretation is completely deranged and off the wall, then maybe a court would—

Mr. GERSON. Yeah, but there are two parts to the statutory grounds. I mean, I think that a court can say this is not an emergency, because it lacks all the objective criteria that any emergency would need to have.

Mr. RASKIN. Yeah.

Mr. GERSON. But in addition, with respect to the use of funds—

Mr. RASKIN. Yeah.

Mr. GERSON [continuing]. I am very confident that we are going to prevail on that—

Mr. RASKIN. But doesn't—

Mr. GERSON [continuing]. and prevail in front of conservative judges.

Mr. RASKIN. But doesn't the cannon of constitutional avoidance help you, too, that you want to interpret the statute in a way that is consistent with the Constitution, and here, the Constitution completely militates for a reading which protects Congress' power over the purse rather than giving the President license to mangle the legislative will.

Mr. GERSON. Now we are leaving Justice Jackson concurring in *Youngstown Sheet & Tube* and moving to Justice Frankfurter and Ashwander. Yeah, certainly, constitutional avoidance can be applied, and we can win this on a pure—on a pure statutory ground. I think it is more likely to go back to—to Justice Jackson. This is, to me, one of those things that he describes in his third category of disputes, the justiciable category, because as you pointed out, the President is directly disobeying what the Congress has legislated.

Mr. RASKIN. Okay. Mr. Turley.

Mr. TURLEY. Hi. I think that the staff, part of the fun they had, for Stuart and I to share the same mic as he argues against legislative standing. It took everything I could not to push the button.

I strongly disagree with Stuart about his objections to legislative standing, but we can put that aside. What I would encourage the committee to consider is that there is no need to use that. The concern I have is that there has been a long suspicion that judges go to standing when they don't want to deal with a tough question. And so if you—you use legislative standing on this issue, you risk a judge avoiding these difficult questions and just saying, You know what, I have come to a different conclusion, you don't have standing. And you don't have to take that risk because you have got people who are ably arguing this.

But the one thing I have to disagree with—and I see this with great respect because you are my ideal of a law professor with Article I authority—something that—

Mr. RASKIN. A minor particle of it, but, yeah.

Mr. TURLEY. I would disagree with you, this is not Youngstown. In Youngstown, Hugo Black said, There is no statute underlying the exercise of authority. There is a statute here. You gave them a statute. And Jackson's first category—

Mr. RASKIN. We are talking about the most recent legislative pronouncement on the issue. We had a very specific answer as to the request for money for the wall.

Mr. TURLEY. Yeah.

Mr. RASKIN. And the President was clear about that; we were clear about that. I mean, there is no ambiguity here.

Mr. TURLEY. No, but that is not the same thing. Just because you did not grant an appropriation is not the same as an authorization of authority which you gave to the President. And this is the first category under Jackson. Jackson says that if there is an underlying statute, the President—

Mr. RASKIN. That has been overridden by a more recent statement by Congress? I don't think so.

Mr. TURLEY. I don't think statutes are overridden by statements of any kind. You simply decided how much money to give the President. That doesn't speak very loudly to some amendment of NEA.

Mr. RASKIN. All right. I am going to have to yield back, but can I just ask you one very quick question. Would you agree that—would you agree that Congress should use its power under the current statutory framework to say that there is no emergency, and to override the President?

Mr. TURLEY. Yes. I love Congress standing up for its authority.

Mr. RASKIN. Okay. Thank you very much. I yield back.

Mr. COHEN. You are welcome, Mr. Raskin.

Next, we will recognize Mr. Goodlatte's successor, Mr. Cline.

Mr. CLINE. Thank you, Mr. Chairman.

I want to continue that line. So, Mr. Turley, in the absence of a positive act to prohibit, are we to infer, you know, Congress not providing the money that the President requested, that there is a statutory prohibition, therefore, to any action to provide money for said wall?

Mr. TURLEY. Yeah, it doesn't work that way. It is like Woody Allen saying, I wish I had a positive thing to say, let me give you two negatives. It doesn't work that way. That is, you have a positive grant of authority under the NEA. Your decisions under appropriations are informed by various issues, of how much money you want to give, under what circumstances, how are you going to tie the money in. A court is not going to use that as a constructive amendment of the National Emergencies Act. It is just not going to do that.

And so what you have is what Jackson described as the first category where a President's authority is virtually unassailable, a grant of authority by the Congress to the President that he is using. And you can disagree with the decision that he is making, but you gave him that authority. You have the ability to rescind the emergency, and a court is not going to do that for you.

Mr. CLINE. I want to drill down—well, I will get to you in a minute, Ms. Goitein—the authority that was granted by Congress in 1976, Congress had enacted over 470 statutes by 1973, and so what we are doing, is, we are allowing under the statute, using ap-

propriated funds for military—in support of military action. Didn't—wasn't the military asked by Immigrations Customs Enforcement for assistance at the border?

Mr. TURLEY. Right. Part of the problem with going down on the military construction is precisely that. Agencies are given deference under the Chevron doctrine, but more importantly, unlike the first immigration order, this thing is likely to be armor-plated with agency findings. A court is hard-pressed to substitute its own judgment for those agency decisions, including the need for military forces. Where there is a Posse Comitatus issue—and I think that can be a real issue—will go to what exactly they are doing along the border.

But if you—as I say in my testimony, I drilled down on each of the sources that the President has cited for these funds, and there are very strong arguments under every one of them that he can, in fact, use these funds. This has been a longstanding problem. When President Obama launched the Libyan war, I represented both Republican and Democratic Members opposing that war for the absence of a declaration and absence of an appropriation. President Obama funded that war out of loose change.

I mean, this body gives so much money to the executive branch, without many conditions, that he was able to fund a war out of what was just sloshing around.

Mr. CLINE. And isn't it true that it is not even—emergency authority is not even required—

Mr. TURLEY. That is right.

Mr. CLINE [continuing]. To move money around within departments—

Mr. TURLEY. That is right.

Mr. CLINE [continuing]. In various cases.

Okay. So, Ms. Goitein, I want to move beyond the debate over what the President has done, and, quite frankly, this hearing would have—if this hearing is designed to examine that, it would have been better if we had had it before Tuesday or whenever the vote was by the House.

But looking forward, I think we have a great opportunity here to make Article I great again. And so I want to follow up on your suggestions. Publicly available reports, can you expand a little bit about what is missing and what we need to be doing?

Ms. GOITEIN. Well, it would be great, to start out, if you guys could find them and make them public. Because the President is supposed to report to Congress every 6 months on expenditures associated with states of emergency. That happened up through, I believe it was 2003. At that point, President Bush delegated all of the emergencies other than 9/11 and the Cuba Naval Blockade, at that point, were issued under IEEPA, the International Emergency Economic Powers Act. And President Bush delegated to the Treasury Department the authority to submit those reports.

From that point on, you can't find them in the Congressional Record. They were no longer read into the Congressional Record. So they are not publicly available from 2003 on.

We also haven't been able to find any of the reports on the 9/11 state of emergency. If you can find those and make them public, that would be terrific. We have, of course, filed a FOIA request for

those. But what I would say is, going forward, that was another omission in the statute for accountability purposes, that the NEA did not require those reports to be made public in some form and also was a little too minimalist in what it asked for in those reports. The expenditures give us some information, but not quite enough.

Mr. CLINE. I do agree that we need to more clearly define what an emergency is. I disagree with you that Congress unintentionally left that out of the 1976 NEA. I think the President is fully acting within his authority to define that emergency. He has stated multiple times he believes there to be an emergency at the border, and I concur with that, given the humanitarian crisis that is ongoing and the lack of ability of ICE to handle that threat and that emergency on its own.

So—but putting that definition in the Code is something I would agree with, and would be happy to work with the chairman toward that end. And with that I yield back. Thank you.

Mr. COHEN. Thank you, sir. Good maiden speech.

Ms. Scanlon, you are recognized.

Ms. SCANLON. Thank you very much.

I think it is great that we seem to have agreement by all four of our witnesses today that Congress should assert its power to declare this national emergency null and void, so it is great we have got a starting point. I just want to look at a little bit of the underpinnings on the differences in opinion that folks have.

Professor Turley, you have given your opinion that the absence of an explicit definition of “emergency” in the National Emergencies Act gives the President virtually unfettered authority to determine when we have an emergency, right?

Mr. TURLEY. That is correct.

Ms. SCANLON. Okay. So you have argued that if we accept your definition that this President, or a subsequent President could, for example, declare gun violence to be national emergency, right?

Mr. TURLEY. I don’t see a basis to deny that, because there is no definition.

Ms. SCANLON. Okay. And similarly, if we accept your definition that there is—or your argument that there is no definition, then a President could declare climate change to be a national emergency?

Mr. TURLEY. Yes. The only—the only caveat I would note, when the chairman referred to melting down guns, for example, is that just because the President has the authority to declare a national emergency, that does not suspend the United States Constitution. So acts like that could very well violate the Second Amendment or a President could violate other amendments.

So the national—the Congress could not pass a statute that allows for the suspension of the Constitution unless it is a suspension of habeas corpus.

Ms. SCANLON. Okay. And that is kind of where the rub seems to be here, and that is the part that I am interested in. At what point does the declaration of a national emergency start encroaching on explicit, constitutional language or implicit, constitutional language?

So, I mean, as I was looking at your argument that the absence of a definition means there is unlimited authority, I did what a lawyer does, and I started looking at dictionaries, because in the rules of statutory construction, we look at the purpose of a statute, or then we look at the plain language, the plain meaning. So when I looked at Black's Law Dictionary and Webster's and everything, I found the definitions differed a little, but the clear commonality was words like "sudden" and "unexpected" and "unforeseen." And having worked in the immigration law sector for many years and having visited the El Paso border with my colleague, Representative Escobar, recently, I can tell you that the situation at the border isn't sudden or unexpected or unforeseen.

So with that, Ms. Goitein, you have pointed out that—you spoke in your testimony about abuse of emergency powers. Can you speak to whether the situation at the border meets, either the statutory intent or common definition of an emergency, and whether it may be pushing so far into the idea of undermining constitutionality?

Ms. GOITEIN. Thank you for that question. I certainly agree with Professor Turley that the National Emergencies Act gives the President pretty much maximal discretion. However, as I said in my opening statement, even the broadest discretion can be unlawfully abused, and I see that as having two dimensions in this case.

One is that I do think that courts are entitled and certainly Congress—are entitled to look at the plain meaning of words. We don't have to pretend that President Trump could define "emergency" as its opposite. There are some basic parameters that must be adhered to, and that I think courts are allowed to consider—either take judicial notice of, or look at a dictionary.

So I don't think that the President could say that a potted plant is an emergency. It just wouldn't work. There is not that much discretion, necessarily.

But the second part of this is what both of you were talking about, which is that Congress cannot give the President discretion to violate the Constitution. The President could not declare a national emergency because too many people of color are voting. The President could not declare a national emergency because newspapers are publishing editorials critical of him.

And there is strong evidence in this case that the President declared a national emergency because Congress exercised the power of the purse. That is a constitutional prerogative of Congress that he is trying to undermine with this declaration.

Professor Turley's analysis treats Congress' repeated votes against funding the wall as if they were legally irrelevant. And I don't believe they are. I think they could factor in, in a number of ways, but the one I mentioned just now is one.

Ms. SCANLON. Okay. If I can quickly move to Mr. Gerson, can you comment on the constitutional problem created by the President's declaration of a national emergency following the considered bipartisan, bicameral vote by Congress to fund a variety of border-security measures other than the wall proposed by the President?

Mr. GERSON. Well, that is the—that is the constitutional crux of our argument. That is the point at which it begins. We wouldn't be able to fit into Justice Jackson's third criteria without disobe-

dience of a congressional edict by the executive. So that is our starting point.

Ms. SCANLON. Okay.

Mr. GERSON. If you are implying that you agree with me, I am happy to know that.

Ms. SCANLON. Yes, I do. Thank you very much. I yield back.

Mr. COHEN. Thank you. The Republicans have exhausted their witnesses, and so we will recognize Ms. Garcia from Houston.

Ms. GARCIA. Thank you, Mr. Chairman.

And I just wanted to make a little comment here. We keep talking about campaigns and campaign slogans, and I think one of our colleagues mentioned, make Article I great again. I think the better button might be, just like we had, It is the economy, stupid; it should probably be, It is the Constitution, stupid. But maybe I will put some money together and get some of those buttons done real quick.

But, you know, I am concerned about the balance of power. I am concerned about separation of powers, because I do think that this is a constitutional issue. And I really do thank everyone for coming today, particularly you, Ms. Alvarez, because, obviously, you have traveled a long distance. You come from my home State. You are from La Rosita. I am from Palito Blanco, which is between Alice and Kingsville. I, too, grew up on a farm. And I don't recall—you know, although I am not next to the border, I am close enough that I can tell you that any time we always got concerned and we always knew when somebody crossed over our farm because there would either be a fence that was unlocked or some footprints. There would be some sign that somebody had traversed our property. And I know that you are concerned.

So tell me, again, you have not seen or know of any rapists or murderers or drug dealers or human traffickers, or any, you know, people trying to do harm to anyone around your property, or any of your neighbors' properties?

Ms. ALVAREZ. Not at all, ma'am.

Ms. GARCIA. And have you had a chance to visit with any of the property owners adjoining you to see if they share in your concern about what this proposed wall might be doing to your—your farm and your livelihood?

Ms. ALVAREZ. Yes, ma'am. I will say, I can speak for my community. Most of my community is made up of elders who are not very familiar with the issue. They have been actually threatened at one point or another to sign over documents and stuff or else their properties will be taken away.

Mind you, we people in Starr County—and I can speak for myself and for my area—we do not want this wall, and we do not see a crisis, especially rapists, gang members, or an invasion.

Ms. GARCIA. Right. And are you the only party in this lawsuit, or is there a number of other parties in the lawsuit that you mentioned? I am not familiar with it. I just—

Ms. ALVAREZ. There is a few other parties.

Ms. GARCIA. There is a few other parties. Well, in your opinion because you are down there, I mean, do you see a crisis as something that is, as one of my colleagues has described, of grave con-

cern, a change, or something that may be endangering to your area?

Ms. ALVAREZ. Not at all.

Ms. GARCIA. Not at all. Well, thank you, again, for coming. I know it is a long distance.

And, Mr. Gerson, I wanted to first tell you that I think El Paso County is in good hands, and I wonder if you had reviewed or had listened to the recommendations that Ms. Goitein put forth in her opening statement and had any reaction to her recommendations, or do you have any other recommendations that we should consider?

Mr. GERSON. Well, I suggested earlier that I would start with the definition. But as to Ms. Goitein's views, I have read her testimony, I find it edifying. I mean, you have noticed that the range of disagreement here is very small—

Ms. GARCIA. Well—

Mr. GERSON [continuing]. In terms of what your legislative purpose is going to be. So I would—I would recommend considering all—all of those things. None of this—none of what you ultimately have to do deals with the lawsuits or other things that are going to be determined elsewhere, but you will have a chance to write meaningful law.

As I say, I am someone who normally, in—in my own political life, supports conservative judges because they read the law, that they are textualists, that they don't—that they don't make it up, that they are originalists in terms of constitutional interpretation. I carry that through to this, and much of my criticism, it has to lay at the feet of the Congress, which has abdicated responsibilities that it has.

I know from long history of dealing with this body that oftentimes things are left contradictory or unstated, so that the law itself gets passed, so that somehow 11th hour agreement is reached. That is a bad policy to follow, whether—whether you are talking about who is covered by the Civil Rights Act, which is constantly being litigated, or anything else. And so I think it is fair to say that there is pretty great agreement in this room that there has been an erosion of congressional power, as I suggested earlier. Too often, the Congress acts like a Parliament. That is not what it was set up to do. Indeed, it was set up to be something else. Because there was a Parliament that allowed a king to act in an arbitrary way, we fought and won a revolution.

Ms. GARCIA. What—what do you think about this whole notion of time limits, whether it is a termination period or a come back and get extended, or any of those other options that have been mentioned?

Mr. GERSON. Well, I said to Mr. Nadler earlier on that—that the concept—that you ought to address the question of time limits, but recognize that it is inherently problematic, that you have got to play it out, because time limits expire, and what do you do when they do expire and no definitive action has been taken? You have got to play that through when you decide what to do, and you are not doing it just for yourself. You are doing it for future Congresses. You are doing it for future administrations that might be of a different party than you are. So you have to think about the

country, and you have to think about policy, and as I say, you need to be wise.

Ms. GARCIA. Okay, thank you. I think my time is up, and I yield back.

Mr. COHEN. Thank you, ma'am. I now recognize Judge Gohmert from Texas.

Mr. GOHMERT. Thank you. Appreciate the witnesses being here. Reading earlier, an article quoting from Washington Post and so many of—ABC, NBC—repeatedly calling what is going on on the border, a crisis, constantly using the word C, the crisis word. But then again, that was when President Obama was in office. And now that he is not in office, those same medium—media are now saying, oh, there is no crisis.

I know there are some that have said the numbers are down last year, but if you look at October, November, December, January, as we had testimony from that very table earlier this week, it used to be 80 percent adult males coming into the country looking for jobs, from Mexico, and now it is a huge majority of family units, or alleged family units bringing children because they know if they bring children, they are going to be allowed to stay here.

From the nights—and I certainly appreciate testimony from anybody that lives there, but of all the nights I have spent all night on the border, I have seen a crisis. And the crisis doesn't stop when the Homeland Security takes over as some of the Border Patrol have related to me. The drug cartels call us their logistics. And I said like the commercial—the drug cartels get them illegally into the country, and then they often provide an address or a contact in the city where the drug cartels are going to allow them to work off the rest of the money they owe the cartels. And then Homeland Security would ship them to those locations.

So it shouldn't have been any surprise, people in the last week or so, there was a massive bust in one of our biggest cities, drug cartel meth lab. When you see a rape tree, you see multiple rape trees, signifying this is where we have raped women, I guess it is all in whose view, but I would think that the women felt like it was a crisis.

But I have been very concerned about the power we have given up here in Congress, concerned about that during the Bush administration, the Obama administration, and I thought it was a terrible time to give up, specifically, legislating appropriations. Some call them earmarks. Earmarks, if they are self-serving, they are an abomination, but if it is legislature specifically saying this is where you spend the money, it is a good—normally, a good thing for a Congress to do. And we haven't been doing that for a long time.

So when the National Emergency Act was passed, it did, indeed, give up tremendous amount of power that Congress, I don't think, should have given up. But I know you are aware—I mean, when we talk about maybe a time limit, looks like the Obama administration has 11 of their emergency declarations still going on.

Professor Turley, whether I agree or disagree with you, I always appreciate your consistency and integrity. And you made the comment that, first and foremost, a court is unlikely to do for Congress what Congress will not do for itself, and it reminded me of a comment my friend Justice Scalia said when I asked him about some-

thing, not specific because they don't give advisory opinions. He said, Look, if you guys in Congress are not willing to do your job, don't come running over to our court wanting us to do it for you.

And I think that you put it more succinctly, but that would seem to be—I mean whether—even though we have given up all this power, Professor Turley, it looks like the courts have been pretty consistent in saying, Yeah, you gave it up, but it is your job, not ours. Do you know of any cases of courts of appeal, other than, maybe, a Ninth Circuit that have said otherwise?

Mr. TURLEY. No. In fact, in the—in the testimony I talk about a couple of cases that strongly militate in the opposite direction. One was actually a decision, I believe, by Justice Breyer, when he was on the Court of Appeals, called Deacon, where he looked at this issue of the loss, expressly stating that the Congress has to get together every 6 months. And an emergency was challenged by someone that said, look, you haven't gotten together and satisfied that part of the statute, so this emergency must be invalid.

Now, just look at that for a second. This, in comparison with the rest of the Act, that provision is the model of clarity. It says, 6 months, you must get together and make a decision, or deliberate on this emergency. Even that, the court said, is not going to be binding under the statute. So what you are going to ask a court to do is to go deeply into a policy judgment of what constitutes an emergency, and you are going to have to do that after the Supreme Court just ruled in favor of the administration on its immigration orders, and said that there was not a likelihood of prevailing in that case, because the President has such tremendous deference at the border. I don't consider that a winning hand. I don't consider that a hand of any kind, to go to court with.

Mr. GOHMERT. Thank you.

And, Mr. Chairman, I would just submit, I would be glad to work with anybody on your side to try to limit the National Emergency Act, but I do think it is our job. Thank you, I yield back.

Mr. COHEN. Thank you, Judge. I think we—I appreciate your coming to the hearing, and the previous time we have been here, we have seen a lot of unanimity that this needs to be something that could happen, and so maybe we will have a bipartisan result to this.

Ms. Escobar is next, and we appreciate your—your constituent and your lawyer.

Ms. ESCOBAR. I do, too. Thank you, Mr. Chairman, and many thanks to our panel.

Mr. Gerson, thank you, especially, for representing the great County of El Paso.

For context, let me tell all of you about my community. I am from El Paso, Texas, the beautiful, vibrant, new Ellis Island, which is on the U.S./Mexico border. With absolutely sincerity, I invite all of you, every member of this Judiciary Committee, to come visit. Please allow me the opportunity to give you a tour of our border.

I am a proud *fronteriza*, a woman of the border. My family has lived there for over 100 years, so I can speak with some authority on this issue. I can assure you, we have never been safer or more secure. While we have a wall in El Paso, we were safe long before it was ever constructed. And the question is, why have we been so

safe? Well, there is three factors that I can point to quickly—community policing by local law enforcement, a significant Federal law-enforcement presence, and most importantly, I believe, the fact that immigrant communities are among the safest in the Nation.

Our immigrant community is made up of one-quarter immigrants, and we have multigenerational roots in the region. El Paso is not unique in this way. Most of our southern border communities are just like this. And Mr. Johnson, we do face a challenge. I agree with you on that, you are right. And you are right when you say that we should be introspective about these issues in order to find real solutions.

So the drug issue, which is one of the issues cited for the wall, is not a new issue. We know it is not a new issue. Our country has long had an insatiable appetite for illegal drugs.

The other reason cited—and this seems to be the one most discussed by my colleagues—is the thousands of central American asylum seekers arriving every day at our doorstep. This, too, is not new. We first saw this phenomenon in 2014. Central American unaccompanied minors and families have been running from crushing poverty, violence, and persecution for nearly 5 years now.

What happens is that they come in what is called a surge. This is the fourth surge in 5 years. Mr. Gohmert just mentioned that the 2014 surge was called a crisis by members of the media. Yes, it was the members of the media, not by those of us on the U.S./Mexico border. In fact, I just had Jacqueline print out a piece that I wrote and published for The New York Times about this very surge in 2014, called, Why the Border Crisis is a Myth. This was published on July 25th, 2014.

Mr. Chairman, I ask unanimous consent to enter this into the record.

Mr. COHEN. Without objection, it will be done.

[The information follows:]

MS. ESCOBAR FOR THE OFFICIAL RECORD

OP-ED CONTRIBUTOR

Why the Border Crisis Is a Myth

By Veronica Escobar

July 25, 2014

EL PASO — TO hear the national news media tell the story, you would think my city, El Paso, and others along the Texas-Mexico border were being overrun by children — tens of thousands of them, some with their mothers, arriving from Central America in recent months, exploiting an immigration loophole to avoid deportation and putting a fatal strain on border state resources.

There's no denying the impact of this latest immigration wave or the need for more resources. But there's no crisis. Local communities like mine have done an amazing job of assisting these migrants.

Rather, the myth of a “crisis” is being used by politicians to justify ever-tighter restrictions on immigration, play to anti-immigrant voters in the fall elections and ignore the reasons so many children are coming here in the first place.

In the last month, about 2,500 refugees have been brought to El Paso after crossing the border elsewhere. The community quickly came together to support the women and children and Annunciation House, the organization coordinating the effort.

Contrary to the heated pronouncements, this is nothing we haven't seen before. Groups of refugees arrive by plane and are processed by Immigration and Customs Enforcement. When they are released, Annunciation House takes them to a shelter where they get a shower, a place to sleep, meals and even health care — all provided by volunteers and private donations.

The families of the refugees also help, often paying for travel costs and taking them into their homes. The refugees then move on, to Florida, Georgia, New York or elsewhere.

While the numbers of refugees arriving in El Paso are a fraction of the number arriving in McAllen, in southern Texas, the chain of events is generally the same. Like El Paso, South Texas is not the permanent destination for these refugees. And the response from McAllen's citizens has been generous, too.

The same can't be said of our politicians. What we are hearing from Austin and Washington is an almost Pavlovian response to immigration concerns. My governor, Rick Perry, a Republican, announced this week that he was sending 1,000 National Guard soldiers, at a cost of \$12 million a month, to bolster the border.

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And despite President Obama's efforts to work with Central American leaders to address the root causes of the migration, his recently announced request for \$3.7 billion, supposedly to deal with these new migrants, contains yet more border security measures: Almost \$40 million would go to drone surveillance, and nearly 30 percent of it is for transportation and detention.

In Texas, state legislators and the Department of Public Safety are planning to spend an additional \$30 million over six months to create a "surge" of state law enforcement resources, an expenditure that some in our state's Capitol would like to see made permanent.

The costs are significant. Every day we detain an undocumented child immigrant, it costs Immigration and Customs Enforcement — i.e., the taxpayer — \$259 per person, significantly more than we spend to educate a child in a middle-class school district.

The irony is that this cash-intensive strategy comes from leaders who consistently underfund health care, transportation and education. And they ignore the crucial fact that children crossing our borders aren't trying to sneak around law enforcement: They are running *to* law enforcement.

What is most alarming, however, is the attempt to erode rights and protections created by intelligent, humane legislation.

The debate is centered on the Trafficking Victims Protection Reauthorization Act, a law signed by President George W. Bush to provide legal and humanitarian protections to unaccompanied migrant children from countries other than Mexico or Canada. The act passed with bipartisan support, yet the "crisis" is now being cited by some of the same legislators who supported the law as a reason to repeal or change it.

This effort to take away rights that were granted when there was significantly less anti-immigrant fervor isn't just shortsighted and expensive, it's un-American. We can debate the wisdom of providing greater protection to Central American children than to Mexican children, but there can be no doubt that giving safe haven to a child facing violence in a country that cannot protect its most vulnerable citizens is what a civilized country, with the resources we possess, should do.

Our border communities understand this. I hope the rest of the country, including our leaders in Austin and Washington, can follow our lead.

Veronica Escobar, a Democrat, is the county judge in El Paso.

A version of this article appears in print on July 26, 2014, on Page A21 of the New York edition with the headline: Why the Border Crisis Is a Myth

Ms. ESCOBAR. The question we should be asking, is, why hasn't the Department of Homeland Security, which has received massive Federal investment, been strategic or nimble enough to deal with each successive surge? Especially when we are in year number five.

I am not afraid of these families arriving at my doorstep. I live in El Paso. What I am afraid of is the willingness I have seen by some to ignore the responsibility we have as a coequal branch of government. I am afraid of the amount of money that this non-emergency will be stealing from military families, who were promised badly needed day cares and schools.

In my district, I am afraid this nonemergency will steal, or could steal, up to \$275 million from Ft. Bliss, one of this country's most important assets, money that is being taken from our troops to fund a political prop. This obsession with a wall, which will be funded at the expense of our military, is heartbreaking to me.

The day before yesterday, one of my colleagues on the House floor said that we are a Nation at war. We are not at war. Yet, in my community, barricades with concertina wire are being put up at our ports of entry. Starting this week, the return-to-Mexico policy will be implemented. We are turning away asylum seekers at our ports. We are driving them to places that are more treacherous and dangerous. That is the crisis, and that is a man-made crisis. That one is easily solvable.

If we truly want to get to the bottom of this surge, then we need to do the hard work necessary to work with the Northern Triangle to address the challenges, some of which we have created.

I shared that with you, Mr. Johnson. We have had a hand in driving people out of their homes from Central America. We have an obligation to solve this in a compassionate, humanitarian way, but, again, this is not new, this is not an emergency.

I know my time is up. And if I had just a couple of more seconds, I would ask our landowner, Ms. Alvarez, everything that you have had to endure as an American property owner at the hands of this government. You have obviously had to hire lawyers. You have had to fly to Washington, D.C. to defend your property. I am very curious about what this government is putting you through.

Ms. ALVAREZ. This government has created a loss of family members, a loss of friendships, a division amongst us in our communities, because, you know, people agree and disagree, mind you, over an issue that I strongly disbelieve in. There is no crisis. These people, like you said, are in the ports of entry, trying to create—come in, with every lawful right, because they do have a right to claim political asylum. But somewhere, someone has created hate towards these people. We are at a record low of entries right now, even though the numbers are so high, because the media has put it out there. Yet, why do we as a community have to pay for someone who wants to put up a barrier, a wall or so, that is not going to work, and that has been proven not to work? I am here—I have been going through a lot, but I am here and I am here to fight this.

And I agree with a lot of things. Things need to change. We need to change immigration reform. We need to change parts of what the Constitution is there, so we do not create loopholes where people take advantage of them and we are in this situation that we are in.

Ms. ESCOBAR. Thank you.

Mr. COHEN. Thank you, Ms. Escobar.

Ms. Dean, you are recognized, and thank you for deferring.

Ms. DEAN. Thank you. Thank you, Mr. Chair. Thank you for the opportunity that you are giving our committee to examine and address the gross overreach by the executive branch. The President has already identified \$8.1 billion in congressionally appropriated funds that he plans to take in order to build his ineffective wall which he promised Mexico would pay for.

In my home State of Pennsylvania alone, we have identified more than \$165 million in military projects that could be on the chopping block and at risk. It is an irony that the protection of our Homeland Security, which the President professes to, he is actually going to harm. He is harming our military.

I also want to reiterate the findings of 58 former national security officials who condemned the President's emergency declaration, and stated that any redirection of funds will, quote, "undermine U.S. national security and foreign policy interests."

Mr. Chairman, if it is all right with you, under unanimous consent, I would offer this report into the record.

Mr. COHEN. Without objection, so done.

[The information follows:]

MS. DEAN FOR THE OFFICIAL RECORD

**JOINT DECLARATION OF FORMER UNITED STATES
GOVERNMENT OFFICIALS**

We, the undersigned, declare as follows:

1. We are former officials in the U.S. government who have worked on national security and homeland security issues from the White House as well as agencies across the Executive Branch. We have served in senior leadership roles in administrations of both major political parties, and collectively we have devoted a great many decades to protecting the security interests of the United States. We have held the highest security clearances, and we have participated in the highest levels of policy deliberations on a broad range of issues. These include: immigration, border security, counterterrorism, military operations, and our nation's relationship with other countries, including those south of our border.

a. **Madeleine K. Albright** served as Secretary of State from 1997 to 2001. A refugee and naturalized American citizen, she served as U.S. Permanent Representative to the United Nations from 1993 to 1997. She has also been a member of the Central Intelligence Agency External Advisory Board since 2009 and of the Defense Policy Board since 2011, in which capacities she has received assessments of threats facing the United States.

b. **Jeremy B. Bash** served as Chief of Staff of the U.S. Department of Defense from 2011 to 2013, and as Chief of Staff of the Central Intelligence Agency from 2009 to 2011.

c. **John B. Bellinger III** served as the Legal Adviser to the U.S. Department of State from 2005 to 2009. He previously served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005.

d. **Daniel Benjamin** served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

e. **Antony Blinken** served as Deputy Secretary of State from 2015 to 2017. He previously served as Deputy National Security Advisor to the President from 2013 to 2015.

f. **John O. Brennan** served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

g. **R. Nicholas Burns** served as Under Secretary of State for Political Affairs from 2005 to 2008. He previously served as U.S. Ambassador to NATO and as U.S. Ambassador to Greece.

- h. **William J. Burns** served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.
- i. **Johnnie Carson** served as Assistant Secretary of State for African Affairs from 2009 to 2013. He previously served as the U.S. Ambassador to Kenya from 1999 to 2003, to Zimbabwe from 1995 to 1997, and to Uganda from 1991 to 1994.
- j. **James Clapper** served as U.S. Director of National Intelligence from 2010 to 2017.
- k. **David S. Cohen** served as Under Secretary of the Treasury for Terrorism and Financial Intelligence from 2011 to 2015 and as Deputy Director of the Central Intelligence Agency from 2015 to 2017.
- l. **Eliot A. Cohen** served as Counselor of the U.S. Department of State from 2007 to 2009.
- m. **Ryan Crocker** served as U.S. Ambassador to Afghanistan from 2011 to 2012, as U.S. Ambassador to Iraq from 2007 to 2009, as U.S. Ambassador to Pakistan from 2004 to 2007, as U.S. Ambassador to Syria from 1998 to 2001, as U.S. Ambassador to Kuwait from 1994 to 1997, and U.S. Ambassador to Lebanon from 1990 to 1993.
- n. **Thomas Donilon** served as National Security Advisor to the President from 2010 to 2013.
- o. **Jen Easterly** served as Special Assistant to the President and Senior Director for Counterterrorism from 2013 to 2016.
- p. **Nancy Ely-Raphel** served as Senior Adviser to the Secretary of State and Director of the Office to Monitor and Combat Trafficking in Persons from 2001 to 2003. She previously served as the U.S. Ambassador to Slovenia from 1998 to 2001.
- q. **Daniel P. Erikson** served as Special Advisor for Western Hemisphere Affairs to the Vice President from 2015 to 2017, and as Senior Advisor for Western Hemisphere Affairs at the U.S. Department of State from 2010 to 2015.
- r. **John D. Feeley** served as U.S. Ambassador to Panama from 2015 to 2018. He served as Principal Deputy Assistant Secretary for Western Hemisphere Affairs at the U.S. Department of State from 2012 to 2015.
- s. **Daniel F. Feldman** served as Special Representative for Afghanistan and Pakistan at the U.S. Department of State from 2014 to 2015.
- t. **Jonathan Finer** served as Chief of Staff to the Secretary of State from 2015 to 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to 2017.

- u. **Jendayi Frazer** served as Assistant Secretary of State for African Affairs from 2005 to 2009. She served as U.S. Ambassador to South Africa from 2004 to 2005.
- v. **Suzy George** served as Executive Secretary and Chief of Staff of the National Security Council from 2014 to 2017.
- w. **Phil Gordon** served as Special Assistant to the President and White House Coordinator for the Middle East, North Africa and the Gulf from 2013 to 2015, and Assistant Secretary of State for European and Eurasian Affairs from 2009 to 2013.
- x. **Chuck Hagel** served as Secretary of Defense from 2013 to 2015, and previously served as Co-Chair of the President's Intelligence Advisory Board. From 1997 to 2009, he served as U.S. Senator for Nebraska, and as a senior member of the Senate Foreign Relations and Intelligence Committees.
- y. **Avril D. Haines** served as Deputy National Security Advisor to the President from 2015 to 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.
- z. **Luke Hartig** served as Senior Director for Counterterrorism at the National Security Council from 2014 to 2016.
- aa. **Heather A. Higginbottom** served as Deputy Secretary of State for Management and Resources from 2013 to 2017.
- bb. **Roberta Jacobson** served as U.S. Ambassador to Mexico from 2016 to 2018. She previously served as Assistant Secretary of State for Western Hemisphere Affairs from 2011 to 2016.
- cc. **Gil Kerlikowske** served as Commissioner of Customs and Border Protection from 2014 to 2017. He previously served as Director of the Office of National Drug Control Policy from 2009 to 2014.
- dd. **John F. Kerry** served as Secretary of State from 2013 to 2017.
- ee. **Prem Kumar** served as Senior Director for the Middle East and North Africa at the National Security Council from 2013 to 2015.
- ff. **John E. McLaughlin** served as Deputy Director of the Central Intelligence Agency from 2000 to 2004 and as Acting Director in 2004. His duties included briefing President-elect Bill Clinton and President George W. Bush.
- gg. **Lisa O. Monaco** served as Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor from 2013 to 2017. Previously, she served as Assistant Attorney General for National Security from 2011 to 2013.

- hh. **Janet Napolitano** served as Secretary of Homeland Security from 2009 to 2013. She served as the Governor of Arizona from 2003 to 2009.
- ii. **James D. Nealon** served as Assistant Secretary for International Engagement at the U.S. Department of Homeland Security from 2017 to 2018. He served as U.S. Ambassador to Honduras from 2014 to 2017.
- jj. **James C. O'Brien** served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.
- kk. **Matthew G. Olsen** served as Director of the National Counterterrorism Center from 2011 to 2014.
- ll. **Leon E. Panetta** served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.
- mm. **Anne W. Patterson** served as Assistant Secretary of State for Near Eastern Affairs from 2013 to 2017. Previously, she served as the U.S. Ambassador to Egypt from 2011 to 2013, to Pakistan from 2007 to 2010, to Colombia from 2000 to 2003, and to El Salvador from 1997 to 2000.
- nn. **Thomas R. Pickering** served as Under Secretary of State for Political Affairs from 1997 to 2000. He served as U.S. Permanent Representative to the United Nations from 1989 to 1992.
- oo. **Amy Pope** served as Deputy Homeland Security Advisor and Deputy Assistant to the President from 2015 to 2017.
- pp. **Samantha J. Power** served as U.S. Permanent Representative to the United Nations from 2013 to 2017. From 2009 to 2013, she served as Senior Director for Multilateral and Human Rights at the National Security Council.
- qq. **Jeffrey Prescott** served as Deputy National Security Advisor to the Vice President from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.
- rr. **Nicholas Rasmussen** served as Director of the National Counterterrorism Center from 2014 to 2017.
- ss. **Alan Charles Raul** served as Vice Chairman of the Privacy and Civil Liberties Oversight Board from 2006 to 2008. He previously served as General Counsel of the U.S. Department of Agriculture from 1989 to 1993, General Counsel of the Office of Management and Budget in the Executive Office of the President from 1988 to 1989, and Associate Counsel to the President from 1986 to 1989.

- tt. **Dan Restrepo** served as Special Assistant to the President and Senior Director for Western Hemisphere Affairs at the National Security Council from 2009 to 2012.
- uu. **Susan E. Rice** served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor to the President from 2013 to 2017.
- vv. **Anne C. Richard** served as Assistant Secretary of State for Population, Refugees, and Migration from 2012 to 2017.
- ww. **Eric P. Schwartz** served as Assistant Secretary of State for Population, Refugees, and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues at the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.
- xx. **Andrew J. Shapiro** served as Assistant Secretary of State for Political-Military Affairs from 2009 to 2013.
- yy. **Wendy R. Sherman** served as Under Secretary of State for Political Affairs from 2011 to 2015.
- zz. **Vikram Singh** served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.
- aaa. **Dana Shell Smith** served as U.S. Ambassador to Qatar from 2014 to 2017. Previously, she served as Principal Deputy Assistant Secretary of Public Affairs.
- bbb. **Jeffrey H. Smith** served as General Counsel of the Central Intelligence Agency from 1995 to 1996. He previously served as General Counsel of the Senate Armed Services Committee.
- ccc. **Jake Sullivan** served as National Security Advisor to the Vice President from 2013 to 2014. He previously served as Director of Policy Planning at the U.S. Department of State from 2011 to 2013.
- ddd. **Strobe Talbott** served as Deputy Secretary of State from 1994 to 2001.
- eee. **Linda Thomas-Greenfield** served as Assistant Secretary for the Bureau of African Affairs from 2013 to 2017. She previously served as U.S. Ambassador to Liberia and Deputy Assistant Secretary for the Bureau of Population, Refugees, and Migration from 2004 to 2006.
- fff. **Arturo A. Valenzuela** served as Assistant Secretary of State for Western Hemisphere Affairs from 2009 to 2011. He previously served as Special Assistant to the President and Senior Director for Inter-American Affairs at the National Security Council from 1999 to 2000, and as Deputy Assistant Secretary of State for Mexican Affairs from 1994 to 1996.

2. On February 15, 2019, the President declared a “national emergency” for the purpose of diverting appropriated funds from previously designated uses to build a wall along the southern border. We are aware of no emergency that remotely justifies such a step. The President’s actions are at odds with the overwhelming evidence in the public record, including the administration’s own data and estimates. We have lived and worked through national emergencies, and we support the President’s power to mobilize the Executive Branch to respond quickly in genuine national emergencies. But under no plausible assessment of the evidence is there a national emergency today that entitles the President to tap into funds appropriated for other purposes to build a wall at the southern border. To our knowledge, the President’s assertion of a national emergency here is unprecedented, in that he seeks to address a situation: (1) that has been enduring, rather than one that has arisen suddenly; (2) that in fact has improved over time rather than deteriorated; (3) by reprogramming billions of dollars in funds in the face of clear congressional intent to the contrary; and (4) with assertions that are rebutted not just by the public record, but by his agencies’ own official data, documents, and statements.

3. *Illegal border crossings are near forty-year lows.* At the outset, there is no evidence of a sudden or emergency increase in the number of people seeking to cross the southern border. According to the administration’s own data, the numbers of apprehensions and undetected illegal border crossings at the southern border are near forty-year lows.¹ Although there was a modest increase in apprehensions in 2018, that figure is in keeping with the number of apprehensions only two years earlier, and the overall trend indicates a dramatic decline over the last fifteen years in particular.² The administration also estimates that “undetected unlawful entries” at the southern border “fell from approximately 851,000 to nearly 62,000” between fiscal years 2006 to 2016, the most recent years for which data are available.³ The United States currently hosts what is estimated to be the smallest number of undocumented immigrants since 2004.⁴ And in fact, in recent years, the majority of currently undocumented immigrants entered the United States legally, but overstayed their visas,⁵ a problem that will not be addressed by the declaration of an emergency along the southern border.

4. *There is no documented terrorist or national security emergency at the southern border.* There is no reason to believe that there is a terrorist or national security emergency at the southern border that could justify the President’s proclamation.

¹ *Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf> (last accessed Feb. 17, 2019); *Southwest Border Migration FY2019*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed Feb. 17, 2019).

² *Southwest Border Migration FY2019*, *supra* note 1; *Southwest Border Migration FY2017*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (last accessed Feb. 17, 2019).

³ U.S. DEP’T OF HOMELAND SECURITY, DEP’T OF HOMELAND SECURITY BORDER SECURITY METRICS REPORT 13 (May 1, 2018), https://www.dhs.gov/sites/default/files/publications/BSMR_OIS_2016.pdf.

⁴ Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RES. CTR. (Nov. 27, 2018).

⁵ Richard Gonzales, *For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings*, NPR (Jan. 16, 2019, 7:02 PM) (noting “that from 2016-2017, people who overstayed their visas accounted for 62 percent of the newly undocumented, while 38 percent had crossed a border illegally”).

a. This administration's own most recent Country Report on Terrorism, released only five months ago, found that "there was no credible evidence indicating that international terrorist groups have established bases in Mexico, worked with Mexican drug cartels, or sent operatives via Mexico into the United States."⁶ Since 1975, there has been only one reported incident in which immigrants who had crossed the southern border illegally attempted to commit a terrorist act. That incident occurred more than twelve years ago, and involved three brothers from Macedonia who had been brought into the United States as children more than twenty years earlier.⁷

b. Although the White House has claimed, as an argument favoring a wall at the southern border, that almost 4,000 known or suspected terrorists were intercepted at the southern border in a single year,⁸ this assertion has since been widely and consistently repudiated, including by this administration's own Department of Homeland Security.⁹ The overwhelming majority of individuals on terrorism watchlists who were intercepted by U.S. Customs and Border Patrol were attempting to travel to the United States by air;¹⁰ of the individuals on the terrorist watchlist who were encountered while entering the United States during fiscal year 2017, only 13 percent traveled by land.¹¹ And for those who have attempted to enter by land, only a small fraction do so at the southern border. Between October 2017 and March 2018, forty-one foreign immigrants on the terrorist watchlist were intercepted at the northern border.¹² Only six such immigrants were intercepted at the southern border.¹³

5. *There is no emergency related to violent crime at the southern border.* Nor can the administration justify its actions on the grounds that the incidence of violent crime on the southern border constitutes a national emergency. Factual evidence consistently shows that unauthorized immigrants have no special proclivity to engage in criminal or violent behavior. According to a Cato Institute analysis of criminological data, undocumented immigrants are 44 percent *less likely* to be incarcerated

⁶ U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2017, at 205 (Sept. 2018).

⁷ See Alex Nowrasteh, *Trump's Wall Will Not Stop Terrorism*, CATO INST. (Dec. 18, 2018).

⁸ See *Congressional Border Security Briefing: A Border Security and Humanitarian Crisis*, WHITE HOUSE (Jan. 4, 2019); Holly Rosenkrantz, *Sanders Repeats Claim on Terrorists at the Border Refuted by Administration's Own Data*, CBS NEWS (Jan. 7, 2019, 3:28 PM). Vice President Mike Pence made similar statements during his appearance on ABC the next week. See Betsy Klein, *Pence Misleadingly Cites Some Statistics to Push Trump Border Wall*, CNN (Jan. 8, 2019, 5:46 PM).

⁹ See U.S. DEP'T OF HOMELAND SECURITY, MYTH/FACT: KNOWN AND SUSPECTED TERRORISTS/SPECIAL INTEREST ALIENS (Jan. 7, 2019); see also, e.g., Brett Samuels, *Conway: Sarah Sanders Made 'Unfortunate Misstatement' About Terror Suspects at Border*, HILL (Jan. 8, 2019, 10:30 AM).

¹⁰ See U.S. DEP'T OF HOMELAND SECURITY, *supra* note 9.

¹¹ See Press Release, Dep't of Homeland Security, DOJ, DHS Report: Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign-Born (Jan. 16, 2018).

¹² See Julia Ainsley, *Only Six Immigrants in Terrorism Database Stopped by CBP at Southern Border from October to March*, NBC NEWS (Jan. 7, 2019, 4:10 PM).

¹³ See *id.*

nationwide than are native-born citizens.¹⁴ And in Texas, undocumented immigrants were found to have a first-time conviction rate 32 percent below that of native-born Americans;¹⁵ the conviction rates of unauthorized immigrants for violent crimes such as homicide and sex offenses were also below those of native-born Americans.¹⁶ Meanwhile, overall rates of violent crime in the United States have declined significantly over the past 25 years, falling 49 percent from 1993 to 2017.¹⁷ And violent crime rates in the country's 30 largest cities have decreased on average by 2.7 percent in 2018 alone, further undermining any suggestion that recent crime trends currently warrant the declaration of a national emergency.¹⁸

6. *There is no human or drug trafficking emergency that can be addressed by a wall at the southern border.* The administration has claimed that the presence of human and drug trafficking at the border justifies its emergency declaration. But there is no evidence of any such sudden crisis at the southern border that necessitates a reprogramming of appropriations to build a border wall.

a. The overwhelming majority of opioids that enter the United States across a land border are carried through legal ports of entry in personal or commercial vehicles, not smuggled through unauthorized border crossings.¹⁹ A border wall would not stop these drugs from entering the United States. Nor would a wall stop drugs from entering via other routes, including smuggling tunnels, which circumvent such physical barriers as fences and walls,²⁰ and international mail (which is how high-purity fentanyl, for example, is usually shipped from China directly to the United States).²¹

b. Likewise, illegal crossings at the southern border are not the principal source of human trafficking victims. About two-thirds of human trafficking victims served by nonprofit organizations that receive funding from the relevant Department of Justice office are U.S. citizens, and even among non-citizens, most trafficking victims usually arrive in the country on valid visas.²² None of these instances of trafficking could be addressed by a border wall. And the three states with the highest per capita trafficking reporting rates are not even located along the southern border.²³

¹⁴ Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO INST. (Mar. 15, 2017).

¹⁵ Alex Nowrasteh & Andrew Forrester, *Illegal Immigrant Conviction Rates Are Low, Even When Factoring in Recidivism*, CATO INST. (Jan. 7, 2019).

¹⁶ Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST. (Feb. 26, 2018).

¹⁷ John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Jan. 3, 2019).

¹⁸ Ames Grawert & Cameron Kimble, *Crime in 2018: Updated Analysis*, BRENNAN CTR. FOR JUST. (Dec. 18, 2018).

¹⁹ *2018 National Drug Threat Assessment*, U.S. DEPT OF JUST. DRUG ENFORCEMENT ADMIN. (2018). Ninety percent of heroin seizures at U.S. borders and more than 85 percent of cocaine and methamphetamine seizures occur at ports of entry, where drugs can be smuggled in personal vehicles or hidden among legal commercial goods in tractor trailers. Joe Ward & Anjali Singhvi, *Trump Claims There Is a Crisis at the Border. What's the Reality?*, N.Y. TIMES (Jan. 11, 2019).

²⁰ See Gustavo Solis, *Drug Smuggling, and the Endless Battle To Stop It*, USA TODAY (last visited Feb. 18, 2019).

²¹ *2018 National Drug Threat Assessment*, *supra* note 19, at 33.

²² Jenna Krajeski, *The Hypocrisy of Trump's Anti-Trafficking Argument for a Border Wall*, NEW YORKER (Feb. 5, 2019).

²³ Holly Yan, *The Deadly Toll of Human Smuggling and Trafficking in the U.S.*, CNN (July 28, 2017, 3:45 PM).

7. *This proclamation will only exacerbate the humanitarian concerns that do exist at the southern border.* There are real humanitarian concerns at the border, but they largely result from the current administration's own deliberate policies towards migrants. For example, the administration has used a "metering" policy to turn away families fleeing extreme violence and persecution in their home countries, forcing them to wait indefinitely at the border to present their asylum cases, and has adopted a number of other punitive steps to restrict those seeking asylum at the southern border. These actions have forced asylum-seekers to live on the streets or in makeshift shelters and tent cities with abysmal living conditions, and limited access to basic sanitation has caused outbreaks of disease and death. This state of affairs is a consequence of choices this administration has made, and erecting a wall will do nothing to ease the suffering of these people.

8. *Redirecting funds for the claimed "national emergency" will undermine U.S. national security and foreign policy interests.* In the face of a nonexistent threat, redirecting funds for the construction of a wall along the southern border will *undermine* national security by needlessly pulling resources from Department of Defense programs that are responsible for keeping our troops and our country safe and running effectively.

a. Repurposing funds from the defense construction budget will drain money from critical defense infrastructure projects, possibly including improvement of military hospitals, construction of roads, and renovation of on-base housing.²⁴ And the proclamation will likely continue to divert those armed forces already deployed at the southern border from their usual training activities or missions, affecting troop readiness.²⁵

b. In addition, the administration's unilateral, provocative actions are heightening tensions with our neighbors to the south, at a moment when we need their help to address a range of Western Hemisphere concerns. These actions are placing friendly governments to the south under impossible pressures and driving partners away. They have especially strained our diplomatic relationship with Mexico, a relationship that is vital to regional efforts ranging from critical intelligence and law enforcement partnerships to cooperative efforts to address the growing tensions with Venezuela. Additionally, the proclamation could well lead to the degradation of the natural environment in a manner that could only contribute to long-term socioeconomic and security challenges.

c. Finally, by declaring a national emergency for domestic political reasons with no compelling reason or justification from his senior intelligence and law enforcement officials, the President has further eroded his credibility with foreign leaders, both friend and foe. Should a genuine foreign crisis erupt, this lack of credibility will materially weaken this administration's ability to marshal allies to support the United States, and will embolden adversaries to oppose us.

²⁴ Claudia Grisales, *Trump Declares Emergency on Southern Border, Opens Battle Over Use of Military Funds To Build Wall*, STARS & STRIPES (Feb. 15, 2019).

²⁵ Leo Shane III, *Democrats Want To Know Why Active-Duty Troops Are Still on the Southern US Border*, MIL. TIMES (Jan. 29, 2019); Thomas Gibbons-Neff & Helene Cooper, *Impact of Border Deployments Is Felt by Troops at Home and Away*, N.Y. TIMES (Dec. 24, 2018); Ashley Roque, *Readiness Questions Abound, the Pentagon Prepares To Send Thousands of Additional Troops to Border*, JANE'S DEFENCE WKLY. (Jan. 29, 2019).

9. *The situation at the border does not require the use of the armed forces, and a wall is unnecessary to support the use of the armed forces.* We understand that the administration is also claiming that the situation at the southern border “requires use of the armed forces,” and that a wall is “necessary to support such use” of the armed forces. These claims are implausible.

a. Historically, our country has deployed National Guard troops at the border solely to assist the Border Patrol when there was an extremely high number of apprehensions, together with a particularly low number of Border Patrol agents. But currently, even with retention and recruitment challenges, the Border Patrol is at historically high staffing and funding levels, and apprehensions—measured in both absolute and per-agent terms—are near historic lows.²⁶

b. Furthermore, the composition of southern border crossings has shifted such that families and unaccompanied minors now account for the majority of immigrants seeking entry at the southern border; these individuals do not present a threat that would need to be countered with military force.

c. Just last month, when asked what the military is doing at the border that couldn’t be done by the Department of Homeland Security if it had the funding for it, a top-level defense official responded, “[n]one of the capabilities that we are providing [at the southern border] are combat capabilities. It’s not a war zone along the border.”²⁷ Finally, it is implausible that hundreds of miles of wall across the southern border are somehow necessary to support the use of armed forces. We are aware of no military- or security-related rationale that could remotely justify such an endeavor.

10. *There is no basis for circumventing the appropriations process with a declaration of a national emergency at the southern border.* We do not deny that our nation faces real immigration and national security challenges. But as the foregoing demonstrates, these challenges demand a thoughtful, evidence-based strategy, not a manufactured crisis that rests on falsehoods and fearmongering. In a briefing before the Senate Intelligence Committee on January 29, 2019, less than one month before the Presidential Proclamation, the Directors of the CIA, DNI, FBI, and NSA testified about numerous serious current threats to U.S. national security, but none of the officials identified a security crisis at the U.S.-Mexico border. In a briefing before the House Armed Services Committee the next day, Pentagon officials acknowledged that the 2018 National Defense Strategy does not identify the southern border as a security threat.²⁸ Leading legislators with access to classified information²⁹ and

²⁶ Alex Nowrasteh, *Sending Troops to the Border Is Unnecessary and Dangerous*, CATO INST. (Apr. 4, 2018).

²⁷ Heather Timmons, *The US Border Situation Isn’t a National Emergency, Pentagon Officials Tell Congress*, QUARTZ (Jan. 29, 2019).

²⁸ *See id.*

²⁹ *See, e.g.*, Press Release, Sen. Lamar Alexander, Statement on National Emergency Announcement (Feb. 15, 2019); Press Release, Sen. Susan Collins, Statement on Reports President Trump Will Declare National Emergency To Fund More Border Walls (Feb. 14, 2019); Press Release, Sen. Mitt Romney, Statement on Spending, Border Security Deal (Feb. 14, 2019).

the President's own statements³⁰ have strongly suggested, if not confirmed, that there is no evidence supporting the administration's claims of an emergency. And it is reported that the President made the decision to circumvent the appropriations process and reprogram money without the Acting Secretary of Defense having even started to consider where the funds might come from,³¹ suggesting an absence of consultation and internal deliberations that in our experience are necessary and expected before taking a decision of this magnitude.

11. For all of the foregoing reasons, in our professional opinion, there is no factual basis for the declaration of a national emergency for the purpose of circumventing the appropriations process and reprogramming billions of dollars in funding to construct a wall at the southern border, as directed by the Presidential Proclamation of February 15, 2019.

Respectfully submitted,

*Signed/**

1. Madeleine K. Albright
2. Jeremy B. Bash
3. John B. Bellinger III
4. Daniel Benjamin
5. Antony Blinken
6. John O. Brennan
7. R. Nicholas Burns
8. William J. Burns
9. Johnnie Carson
10. James Clapper
11. David S. Cohen
12. Eliot A. Cohen
13. Ryan Crocker

³⁰ *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, White House (Feb. 15, 2019) ("I didn't need to do this. But I'd rather do it much faster.").

³¹ Noah Gray, *Acting U.S. Defense Secretary Will Review Programs To Cut for Wall Funding*, CNN (Feb. 17, 2019).

* Signatures on file with Harold Hongju Koh, Rule of Law Clinic, Yale Law School, P.O. Box 208215, New Haven, CT 06520, harold.koh@ylsclinics.org, 203-432-4932.

14. Thomas Donilon
15. Jen Easterly
16. Nancy Ely-Raphel
17. Daniel P. Erikson
18. John D. Feeley
19. Daniel F. Feldman
20. Jonathan Finer
21. Jendayi Frazer
22. Suzy George
23. Phil Gordon
24. Chuck Hagel
25. Avril D. Haines
26. Luke Hartig
27. Heather A. Higginbottom
28. Roberta Jacobson
29. Gil Kerlikowske
30. John F. Kerry
31. Prem Kumar
32. John E. McLaughlin
33. Lisa O. Monaco
34. Janet Napolitano
35. James D. Nealon
36. James C. O'Brien
37. Matthew G. Olsen

38. Leon E. Panetta
39. Anne W. Patterson
40. Thomas R. Pickering
41. Amy Pope
42. Samantha J. Power
43. Jeffrey Prescott
44. Nicholas Rasmussen
45. Alan Charles Raul
46. Dan Restrepo
47. Susan E. Rice
48. Anne C. Richard
49. Eric P. Schwartz
50. Andrew J. Shapiro
51. Wendy R. Sherman
52. Vikram Singh
53. Dana Shell Smith
54. Jeffrey H. Smith
55. Jake Sullivan
56. Strobe Talbott
57. Linda Thomas-Greenfield
58. Arturo A. Valenzuela

Ms. DEAN. It is signed by such people from both sides of the aisle with decades of leadership experience in bipartisan, different administrations such, as Madeleine Albright, James Clapper, Samantha Powers, Leon Panetta, Susan Rice, just to name a few. And here are just a few of their important findings. And it will be entered into the record.

Illegal border crossings are at nearly 40-year lows. There is no documented terrorist or national-security emergency at the southern border. There is no emergency related to violent crime at the southern border. There is no human or drug-trafficking emergency that can be addressed by a wall at the southern border.

And I won't go on, but you know the other, very substantive findings. But I will end on a final one. There is no basis for circumventing the appropriations process with a declaration of national emergency on the southern border.

So I would like to ask the question—and, Mr. Gerson, I will pivot to you if I can—specifically, the President cited 10 U.S.C. 2808 in his proclamation which, quote, “requires the use of armed forces,” end quote, and allows for the taking of funds that, quote, “have been appropriated for military construction.”

Can you please explain why these two requirements in 2808 do not apply to this proclamation, and also, if you could speculate, and importantly, substantively speculate on the impact that these takings will have on readiness and morale?

Mr. GERSON. Well, I am an erstwhile Pennsylvanian, and military veteran, so perhaps I have some useful knowledge there, but that is not why I am here. But I will address it if you would like. The issue that we face, that you just described, is something I talked about earlier, and you are, in essence, paraphrasing something that I and Professor Tribe and the lawyers at Willkie Farr who have helped us, have said in our briefs. It is one of the reasons why, as I said to Mr. Raskin earlier, if there is a constitutional-avoidance issue here, that we can win on statutory grounds.

Funds that are—that are appropriated for a specific purpose, pursuant to law as to what they are, should not be held to be flexible, but, again, the point is, that this whole thing can be defeated irrespective of any discussion of that, because there ain't no emergency. You know, this is the reverse of things. You know, if it doesn't look like a duck, if it doesn't walk like a duck, if it doesn't quack, it might be a hippopotamus, but it isn't a duck.

And it is your job to define this law. I mean, I am very appreciative of the remarks that are made by the people who live on the border. My son's godfather's name is Susano Ortiz. He described himself as a wetback, who made good under the name of George Ortiz as he moved from Texas to California. I am conscious of these—of these issues.

But as I said, I would be here making the argument that I made even if I agreed fully with the President as to the—as to the need for the wall. There is nothing illegal about your appropriating money to do that. The problem here arises because you specifically declined to give him what he asked for. It is no implication. You didn't do it.

And as I say, I think, as I said at the outset, that I am making a fundamentally conservative point. Plenty of conservatives agree

with me. As you know from my descriptions in the documents here, that I am affiliated with people well on the—to the right of center and way to the right of you, and that is okay. What you have heard here and the thing that I hope to take away from this, and I hope that all of you take away from this, is the high level of agreement as to how you ought to be exercising the autonomy that some good conservatives like James Madison have bequeathed to you.

Ms. DEAN. Mr. Chairman, if you would allow me, I know my time has expired, but just a couple of seconds to compliment Mr. Gerson, a fellow Pennsylvanian. I used to teach writing at La Salle University in Philadelphia for 10 years. So I so appreciate your plain English when you say, “There ain’t no emergency.” Thank you, Mr. Gerson.

Mr. COHEN. Thank you. We have, and with unanimous consent, will enter into the record the following materials: A cover letter and three articles by Professor Ilia Soman; a statement by the Constitution Project at the project on government oversight opposing Trump’s declaration of a national emergency; a letter from former GOP lawmakers also opposing the emergency declaration; an article by Elizabeth Goitein, I think, and the Atlantic, which was the article that spurred my interest in this and kind of set the ball rolling; and an article by David French in the National Review. Without objection, so entered.

[The information follows:]

MR. COHEN FOR THE OFFICIAL RECORD

**Statement of The Constitution Project at the Project On Government Oversight
to the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Civil Liberties
“Opposition to President Trump’s Unconstitutional Declaration of a National Emergency”
February 28, 2019**

On February 14, 2019, Congress passed a spending bill to keep the federal government open. On the same day President Trump signed the bill, he announced that he was declaring a national emergency in order to procure funding to build a wall along a portion of the United States border with Mexico.¹ The bill he signed—which was passed 83 to 16 in the Senate and 300 to 128 in the House of Representatives—appropriated only \$1.375 for 55 miles of “physical barriers.”²

At the Project On Government Oversight (POGO), we take no position on whether there should be a physical barrier built along our southern border. We do, however, join the many Democrats and Republicans who believe that the President’s emergency declaration is unconstitutional.

Founded in 1981, POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. The Constitution Project was founded in 1997 and joined POGO in 2017. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

IT IS THE JOB OF CONGRESS, NOT THE PRESIDENT, TO APPROPRIATE TAXPAYER MONEY

The framers of the Constitution created a government of separate and distinct powers, which is “essential to the preservation of liberty.”³ The founders were particularly concerned with severing the power to make war and the power of the purse from the executive: not only are these two of the most significant functions of government, but they also represent powers susceptible to grave abuse by a single head of state. In “Federalist 58,” James Madison explained that the power of the purse was the “most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every

¹ Executive Office of the President, “Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States,” February 15, 2019. <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/> (Downloaded February 26, 2019)

² U.S. Congress, “Consolidated Appropriations Act of 2019,” (H.J.Res.31). <https://www.congress.gov/bills/116/congress/house-joint-resolution/31/all-actions?overview=closed#tab> (Downloaded February 25, 2019); see also Camilo Montoya-Galvez, “Senate passes bill to fund government, avert another shutdown,” *CBS News*, February 14, 2019. <https://www.cbsnews.com/news/senate-passes-bill-to-fund-government-avert-shutdown/> (Downloaded February 25, 2019)

³ James Madison, “Federalist No. 51”, *The Federalist Papers*, February 8, 1788. http://avalon.law.yale.edu/18th_century/fed51.asp (Downloaded February 24, 2019)

grievance, and for carrying into effect every just and salutary measure.”⁴ In short, the closer the proximity of the spending power to the people, the better.

In the following two provisions, the framers gave Congress—“the people’s representative”⁵—the power to raise and spend funds:

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...”

and

“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁶

The president can no more spend the people’s money without Congress appropriating it than he can levy taxes without Congress’s approval. As Madison wrote in “Federalist 48,” “the legislative department alone has access to the pockets of the people.”⁷ And time and again, the Supreme Court has reaffirmed the primacy of Congress in appropriating money from the national treasury.⁸

By declaring a national emergency to circumvent Congress’s spending decision on border security, the President is acting as appropriator and legislator, roles exclusively reserved for the Congress. If the President is unhappy with Congress’s allotment of funding, the Constitution affords him a single remedy: he can veto the spending bill.⁹

THE PRESIDENT’S POWER IS AT ITS “LOWEST EBB” WHEN OPPOSING THE WILL OF CONGRESS

While past presidents viewed certain events as requiring funding so immediately that they merit superseding the Constitution’s clear limit on the executive, these instances are exceedingly rare and are without parallel in the modern age. The last such instance was by President Abraham

⁴ James Madison, “Federalist No. 58,” *The Federalist Papers*. http://avalon.law.yale.edu/18th_century/fed58.asp (Downloaded February 24, 2019)

⁵ Louis Fisher, *Congressional Abdication on War & Spending*, College Station, TX: Texas A&M University Press, 2000, p. 7.

⁶ U.S. Constitution, art. I, sec. 8, cl. 1, and U.S. Const. art. I, sec. 9, cl. 7, respectively.

⁷ James Madison, “Federalist No. 48,” *The Federalist Papers*, February 1, 1788. http://avalon.law.yale.edu/18th_century/fed48.asp (Downloaded February 25, 2019)

⁸ See Gary Kepplinger, “Appropriations Clause,” *The Heritage Guide to The Constitution*, The Heritage Foundation. <https://www.heritage.org/constitution/#!/articles/1/essays/67/appropriations-clause> (Downloaded February 25, 2019)

⁹ U.S. Const. art. I, sec. 7, cl. 2.

Lincoln, who ordered the expenditure of \$2 million in federal funds in advance of the appropriations from Congress.¹⁰ He did so at the outbreak of the Civil War and with a Congress unable to hastily convene to appropriate necessary funds to support the Union.¹¹

In 2019, there is no such exigency. The situation on the southern border simply is not tantamount to an actual invasion or an act of war.¹² Moreover, the Congress *has* convened and it *has* appropriated funding for border security. In light of these events, President Trump cannot override the separation of powers by declaring a national emergency.¹³

President Trump first announced he was considering declaring an emergency to construct a border wall on January 4, 2019.¹⁴ Over the next month, Congress negotiated a bill, drafted with bipartisan input and passed with bipartisan support, to fund the government. While the continuing resolution passed on February 14 contained \$1.38 billion for pedestrian fencing along the border, it contained no provision or funding to build a “wall.”¹⁵ In so doing, Congress expressed its will through the appropriations process, which is as determinative of the intent of the Congress as if it had passed “substantive legislation” on the matter.¹⁶

¹⁰ Bob Allen and Sarah Miller, “The Constitutionality of Executive Spending Powers,” Briefing Paper No. 38, Harvard Law School Federal Budget Policy Seminar, May 10, 2008, p. 23. (“That no significant act of unappropriated spending has occurred in the 147 years since the beginning of the Civil War should not be surprising; Presidents are generally quite adept at securing the resources they need without risking the political repercussions of spending tax dollars based on a seemingly undemocratic and constitutionally-suspect theory of an inherent spending power.”) http://www.law.harvard.edu/faculty/hjackson/ConstitutionalityOfExecutive_38.pdf (Downloaded February 25, 2019); Kate Stith, “Appropriations Clause,” The National Constitution Center, <https://constitutioncenter.org/interactive-constitution/interpretations/appropriations-clause-article-i-section-9-clause-7> (Downloaded February 25, 2019)

¹¹ David Barron and Martin Lederman, “The Commander in Chief at the Lowest Ebb—A Constitutional History,” *Harvard Law Review* Vol. 80, No. 4 (February 2008), pp. 996-1004. https://harvardlawreview.org/wp-content/uploads/pdfs/barron_lederman2.pdf (Downloaded February 26, 2019)

¹² In 2017, arrests for illegal border crossings reached their lowest level since 1971. Joe Ward and Anjali Singhvi, “Trump Claims There is a Crisis at the Border. What’s the Reality?,” *New York Times*, January 11, 2019. <https://www.nytimes.com/interactive/2019/01/11/us/politics/trump-border-crisis-reality.html> (Downloaded February 27, 2019).

¹³ 10 U.S.C. § 2808. See below for further discussion of this statute.

¹⁴ David Nakamura and Josh Dawsey, “‘I can do it if I want’: Trump threatens to invoke emergency powers to build wall,” *The Washington Post*, January 4, 2019. https://www.washingtonpost.com/politics/i-can-do-it-if-i-want-trump-threatens-to-invoke-emergency-powers-to-build-border-wall/2019/01/04/992a129c-105b-11e9-8938-5898adc28fa2_story.html?utm_term=.1c7ed8ea59f9 (Downloaded February 25, 2019).

¹⁵ Mike DeBonis, “What’s in the 1,169 page border-security bill to avert a government shutdown,” *The Washington Post*, February 14, 2019. https://www.washingtonpost.com/politics/whats-in-the-1169-page-border-security-bill-to-avert-a-government-shutdown/2019/02/14/fb422a96-3068-11e9-8781-763619f12cb4_story.html?utm_term=.f49223008ed1 (Downloaded February 25, 2019)

¹⁶ William C. Banks & Peter Raven-Hansen, “Pulling the Purse Strings of the Commander in Chief,” *Virginia Law Review*, Vol. 80 (May 1994), p. 842. <https://advance.lexis.com/api/permalink/2d6eb68e-42ed-4cfe-802b-a4f6266da425?context=1000516> (Downloaded February 26, 2019) (“Any legislative consideration that the Constitution requires has presumptively been given every bill that becomes law, so the mechanics of the appropriation process afford no basis for diminishing the force and effect of appropriations as law.”)

President Trump's declaration of a national emergency therefore directly contravenes the will of Congress. As Supreme Court Justice Robert Jackson noted in his often-cited concurrence to the 1952 landmark ruling in *Youngstown Sheet & Tube Co. v. Sawyer*, when a president seeks to contravene the will of Congress, his "power is at its lowest ebb."¹⁷ Justice Jackson continued, a "[p]residential claim to a power [under those circumstances]... must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."¹⁸ Unlike this declaration, none of the nearly 60 previous emergency declarations since the passage of the National Emergencies Act of 1976¹⁹ have directly contradicted the will of Congress, and so posed no threat to the equilibrium on which our constitutional system depends.²⁰ Thus, it is not surprising that, as Senate Majority Leader Mitch McConnell (R-KY) recently noted, emergency declarations "issued in the past have not been contentious."²¹

If Congress allows President Trump's declaration of an emergency—issued the day after Congress rejected his bid for wall funding—to stand, this would set a dangerous precedent for future presidents to create a constitutional workaround to force their will in policy conflicts. As numerous former Republican Members of Congress have noted, in addition to jeopardizing the separation of powers, if Congress allows this president to contravene its will, it would set a precedent that could later be used for purposes that would surely cause Republicans in office now to regret ceding the power of the purse to the whims of the executive.²² What would stop a Democrat in the White House from declaring something like climate change a national emergency and subsequently suspending duly enacted laws to address the crisis?²³

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952), discussing the three categories of presidential power, relative to Congressional power: Category I, in which the president's power is at its peak when he is acting pursuant to an express authorization by Congress; Category II, in which the president is acting in absence of a Congressional grant or denial of authority and thus constitutes a "zone of twilight in which the president and the Congress may have concurrent authority"; and Category III, in which the president is acting contrary to the express or implied will of Congress, putting the president's power "at its lowest ebb." Bob Allen and Sarah Miller, "The Constitutionality of Executive Spending Powers," Briefing Paper No. 38, Harvard Law School Federal Budget Policy Seminar, May 10, 2008, p. 3.

¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 638.

¹⁹ See below for further discussion of the National Emergencies Act of 1976.

²⁰ Catherine Padhi, "Emergencies Without End: A Primer on Federal States of Emergency," *Lawfare*, December 8, 2018. <https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency> (Downloaded February 27, 2019) (noting that Congress has not voted to end any of the national emergencies previously declared under the Act).

²¹ Nancy Cordes, "Dozens of federal workers will join Democrats at State of the Union," *CBS News*, February 5, 2019. <https://www.cbsnews.com/news/dozens-of-federal-workers-will-join-democrats-at-state-of-the-union-2019-02-05/> (Downloaded February 25, 2019)

²² "26 Former GOP Lawmakers: Honor Your Oath and Protect the Constitution," Project On Government Oversight, February 25, 2019. <https://www.pogo.org/letter/2019/02/former-gop-lawmakers-honor-your-oath-and-protect-the-constitution/>

²³ See Senator Thom Tillis, "I support Trump's vision on border security. But I would vote against the emergency," *The Washington Post*, February 25, 2019. https://www.washingtonpost.com/opinions/2019/02/25/i-support-trumps-vision-border-security-i-would-vote-against-emergency/?utm_term=.aed030566c1a (Downloaded February 26, 2019)

If a president no longer has to come to Congress to withdraw funds from the national treasury, there are endless purposes for which taxpayer money may be spent at the whim of a single individual. This kind of conduct defines an autocracy, not a democracy.

EMERGENCIES DO NOT SUSPEND THE SEPARATION OF POWERS

In objecting to President Trump's emergency declaration, we are not suggesting that there is never a circumstance under which this president, or any other, could properly declare an emergency.

Since the passage of the National Emergencies Act, there had been 59 previous national-emergency declarations, not including the most recent.²⁴ These declarations, as Senator McConnell noted, have not been contentious; they have addressed issues such as the Iran hostage crisis of 1979 and the swine flu outbreak in 2009.²⁵ In fact, President Trump has previously declared three national emergencies, and 28 emergencies declared by past administrations, most of which provide for the imposition of sanctions on foreign entities, are still in effect.²⁶

Upon a president's declaration of a national emergency, there are over 100 statutory provisions that allow him to exercise emergency powers.²⁷ Some of these statutes list conditions that must be met in order for the president to exercise the authorities contained within them—for example, a potential bioterrorism attack²⁸—while others do not. The statutes that lack clearly defined conditions are ripe for abuse of power by the executive. The National Emergencies Act, which was enacted to “make the executive branch more responsible to Congress when using statutory

²⁴ Brennan Center for Justice, “Declared National Emergencies Under the National Emergencies Act 1978-2018.” <https://www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf> (Downloaded February 25, 2019)

²⁵ Executive Order 12170, 44 Fed. Reg. 65729 (November 14, 1979) and Executive Proclamation 8443, 74 Fed. Reg. 55439 (October 23, 2009), respectively.

²⁶ President Trump's prior declarations were Executive Orders 13818, 82 Fed. Reg. 60839 (December 20, 2017); 13848, 83 Fed. Reg. 46843 (September 12, 2018); 13851, 83 Fed. Reg. 61505 (November 27, 2018). Brennan Center for Justice, “Declared National Emergencies Under the National Emergencies Act 1978-2018.” <https://www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf> (Downloaded February 25, 2019)

²⁷ Brennan Center for Justice, “A Guide to Emergency Powers and Their Use,” December 5, 2018 (Updated January 23, 2019). <https://www.brennancenter.org/analysis/emergency-powers> (Downloaded February 25, 2019)

²⁸ See, for example, 21 U.S.C. § 360bbb-3, which permit the FDA to allow unapproved uses of medical products in an emergency as defined in the statute and after said emergency is declared by the Secretary of Health and Human Services. For example, part of the statute's defining language specifies that “The Secretary may make a declaration that the circumstances exist justifying the authorization under this subsection for a product on the basis of (A) a determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents...”

emergency authority,” requires the president to identify the emergency powers laws he is invoking upon declaring an emergency.²⁹

When President Trump declared a national emergency on February 15, he invoked a 1982 emergency powers law that does not list the sort of conditions described above. This law allows the president, “in the event of a declaration of war or the declaration by the President of a national emergency... that requires use of the armed forces,” to exercise the emergency powers contained in the statute.³⁰ This is problematic because the president alone can create the conditions that trigger the authorization of those powers, as he has the authority to act unilaterally to declare a national emergency and to determine when a situation requires the use of the armed forces. Even so, while this law grants the president far too much discretion, it does not authorize the President to overstep the separation of powers by contravening the will of Congress.

In short, emergencies do not suspend the separation of powers. Indeed, it is during emergencies when constitutional protections from executive overreach may be most needed.

Our nation’s founders knew well the dangers of entrusting a single executive with unfettered power. And, as Constitution Project at POGO Scholar in Residence Louis Fisher, a well-known expert on executive power, has observed,

It could be argued (and has been argued) that the framers’ model was appropriate for the eighteenth century but not for contemporary times, when it is supposedly important to concentrate greater power in the president to respond promptly to national emergencies. The framers were fully aware of such arguments and rejected them. Living in a time of crisis and situated on the highly vulnerable eastern seaboard, they decided to vest in Congress the core powers of war and spending.³¹

The Constitution plainly gives Congress the power to spend, but the separation of this power from the executive has little meaning—and does little to protect the pockets of the people—if Congress abdicates the role to the president.

²⁹ George G. Slater, “The National Emergencies Act of 1976- End of Emergency Government?” *IUSTITIA*: Vol. 4, No. 2, (April 15, 1977), p. 6.

<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1079&context=iustitia> (Downloaded February 25, 2019); 50 U.S.C. § 1631 (“When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.”).

³⁰ 10 U.S.C. § 2808(a)

³¹ Louis Fisher, *Congressional Abdication on War & Spending*, College Station, TX: Texas A&M University Press, 2000, p. 162.

Recent history provides an example of Congress attempting to hand over this authority to the president, with the 1996 Line Item Veto Act, which allowed the president to cancel various spending measures contained within a bill passed by Congress unless the Congress voted within 30 days to reverse the cancellation.³² The Supreme Court soon proved more willing than Members of Congress themselves to protect Congress's institutional prerogatives and responsibilities, finding the Act unconstitutional.³³

In passing a law to permit the president to issue line item vetoes, Congress gave away its power. Now, Congress appears to be on the brink of handing over that power to the president again, allowing the president act as appropriator. It could be that, should litigation on the national emergency reach the Supreme Court, the Court would view this issue similarly and reject the President's attempt to usurp Congress's spending power. But the preferable path is for Congress to defend its own constitutional and institutional prerogatives and expressly reject the President's creation of a "national emergency" workaround of the Constitution.

HISTORY REPEATS ITSELF

Rather than resembling previous national emergency declarations, President Trump's declaration is akin to past, ill-fated attempts by presidents to invoke a crisis to justify overstepping the separation of powers. Congress would be wise to see this ploy for what it is.

President Lincoln suspended habeas corpus while Congress was not in session and later suggested that his own action had been illegal.³⁴ Facing a nationwide strike of steelworkers, President Harry S. Truman attempted to federalize steel mills around the country, which the Supreme Court forcefully repudiated as an unconstitutional power grab, in the *Youngstown Steel* case discussed above.

The Constitution Project at the Project On Government Oversight would have opposed those illegal actions, just as we have opposed their modern iterations. These include our opposition to

³² U.S. Congress, "Line Item Veto Act of 1996," (Public Law 104-130), April 9, 1996. <https://www.govinfo.gov/content/pkg/PLAW-104publ130/pdf/PLAW-104publ130.pdf> (Downloaded February 27, 2019)

³³ *City of New York v. Clinton*, 524 U.S. 417 (1998)

³⁴ Abraham Lincoln, "Special Session Message (July 4, 1861)," in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, Vol. 6, 1902. <http://www.gutenberg.org/files/12462/12462-h/12462-h.htm>https://harvardlawreview.org/wp-content/uploads/pdfs/barron_lederman2.pdf (Downloaded February 27, 2019)

President Barack Obama's unconstitutional use of force in Iraq in 2014³⁵ and in Libya in 2011,³⁶ as well as our pointed criticism of senior-level officials under President George W. Bush for violating treaty obligations through forced disappearances and arbitrary detention of terror suspects in secret prisons around the world after 9/11.³⁷

If even acts of war and terrorism do not warrant breaking the law, then a funding dispute over border security clearly does not. The fact of the matter remains that when it comes to spending the people's money, *it is the president who is subordinate to Congress, not the other way around.*

We must vigorously oppose abuse of power, regardless of who is in the White House, and we call on all Members of Congress to do the same.

Accordingly, we strongly urge Congress to pass a resolution to end the national emergency.

Furthermore, this episode illuminates long-simmering problems with the current legal framework for addressing real emergencies. Most notably, the National Emergencies Act does not define what constitutes a national emergency. This was a purposeful omission, as legislators intended to rely on the definitions to be found in "the various statutes which give [the president] extraordinary powers."³⁸ Such reliance was misguided, as plainly demonstrated by President Trump's invocation of a 1982 law that provides no meaningful limit on what conditions permit reallocation of funds appropriated for military construction.

We also urge Congress to consider reforms to the National Emergencies Act to better ensure that presidents are both well-equipped to respond to actual emergencies and precluded from abusing that authority. These amendments could include a sunset provision that would, absent Congressional action within a specified time period, end the national emergency; providing some basic definition and justiciable standards as to what constitutes an emergency; as well as

³⁵ Letter from Members of The Constitution Project's War Powers Committee to President Barack Obama, calling on him to recall Congress to authorize military intervention in Iraq, Aug. 20, 2014. http://constitutionproject.org/wp-content/uploads/2014/08/8-20-Iraq-WP-Letter-President-Obama.pdf?utm_source=PR%3A+Ltr+to+Obama+on+Iraq&utm_campaign=Release+-+Obama+Ltr+on+Iraq+Aug20&utm_medium=email (Downloaded February 25, 2019).

³⁶ Louis Fisher, The Constitution Project, "Libya and War Powers," before the Senate Committee on Foreign Relations, June 28, 2011. http://constitutionproject.org/pdf/62811_loufisher_testimonysenforrelationscommittee_libyawarepowers.pdf (Downloaded February 25, 2019)

³⁷ Report of The Constitution Project's Task Force on Detainee Treatment, Washington, DC, April 16, 2013, pp.16-17. <https://detainee-taskforce.org/pdf/Findings-and-Recommendations.pdf> (Downloaded February 25, 2019).

³⁸ Senate Committee on Government Operations, 94th Congress, 2nd Session, *National Emergencies Act Source Book*, April 15, 1977, p. 1, cited in George G. Slater, "The National Emergencies Act of 1976- End of Emergency Government?," *IUSTITIA*: Vol. 4, No. 2, (April 15, 1977), p. 6.

ensuring that the Act cannot be used for expenditures that Congress has rejected through its authorization or appropriations process.

Finally, Congress must begin the difficult task of examining emergency provisions found across dozens of federal statutes, with an eye toward amending those that are ripe for abuse. While some of these laws may provide sufficient definition and reasonable restrictions on executive powers, others, like the 1982 law the President invoked, do not.

It is of the utmost importance that Congress act now to reassert its constitutional authority as the nation's lawmaker and appropriator by ending this national emergency, lest it allow the executive branch to do lasting damage to our constitutional system.

Constitutional Principles

26 Former GOP Lawmakers: Honor Your Oath and Protect the Constitution

FILED UNDER LETTER | FEBRUARY 25, 2019

An Open Letter to Republican Members of Congress

As Republican Members of Congress, each of us started with one central understanding of our party's overarching commitment: to honor our pledge to protect and defend the Constitution of the United States. After each election, when our constituents granted us the privilege to again represent them in Congress, we renewed that pledge. It has always been a Republican fundamental principle that no matter how strong our policy preferences, no matter how deep our loyalties to presidents or party leaders, in order to remain a constitutional republic we must act within the borders of the Constitution. Our oath is to put the country and its Constitution above everything, including party politics or loyalty to a president.

We who have signed this letter are no longer Members of Congress but that oath still burns within us. That is why we are coming together to urge those of you who are now charged with upholding the authority of the first branch of government to resist efforts to surrender those powers to a president.

We offer two arguments against allowing a president—any president, regardless of party—to circumvent congressional authority. One is the constitutional placing of all lawmaking power in the hands of the people's representatives. Article 1 of the Constitution, which vests the legislative branch with specific powers, states in section 9: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The power of the purse rests with Congress because it is comprised of 535 representatives of the taxpayer and is the most direct connection between those being governed and those governing. If you allow a president to ignore Congress, it will be not your authority but that of your constituents that is deprived of the protections of true representative government.

2/27/2019

Former GOP Lawmakers: Honor Your Oath and Protect the Constitution

The second argument goes directly to the question each of you must face: how much are you willing to undermine both the Constitution and the Congress in order to advance a policy outcome that by all other legitimate means is not achievable? The current issue—a wall on our southern border—has gone through the process put in place by the Constitution. It has been proposed by the President, it has been debated by Congress, and the representatives of the people allocated funding at a level deemed appropriate by Congress. We understand that there are many Members of Congress who disagree with the final funding compromise reached by a bipartisan group of legislators. To you, we ask this question: what will you do when a president of another party uses the precedent you are establishing to impose policies to which you are unalterably opposed? There is no way around this difficulty: what powers are ceded to a president whose policies you support may also be used by presidents whose policies you abhor.

Like us, you have taken an oath of office. You were elected to Congress to carry out the constitutional duties and responsibilities of the United States House of Representatives and the United States Senate. You were sent to Congress to be the voice of the people. That is an awesome burden and it may require you to exercise restraint to protect the constitutional model—that which is the root of American exceptionalism—and to keep it from being sacrificed on the altar of expediency.

We who have served where you serve now call on you to honor your oath of office and to protect the Constitution and the responsibilities it vested in Congress. We ask that you pass a joint resolution terminating the emergency declared by the President on February 15, 2019.

Steve Bartlett

United States House of Representatives (R-TX), 1983-1991

Douglas Bereuter

United States House of Representatives (R-NE), 1979-2004

Sherwood Boehlert

United States House of Representatives (R-NY), 1983-2007

Rodney Chandler

United States House of Representatives (R-WA), 1983-1993

William Clinger Jr.

United States House of Representatives (R-PA), 1979-1997

Tom Coleman

United States House of Representatives (R-MO), 1976-1993

John Danforth

United States Senate (R-MO), 1977-1995

Mickey Edwards

United States House of Representatives (R-OK), 1977-1993

David F. Emery

United States House of Representatives (R-ME), 1975-1983

Chuck Hagel

United States Senate (R-NE), 1997-2009

Gordon Humphrey

United States Senate (R-NH), 1979-1990

Nancy Johnson

United States House of Representatives (R-CT), 1983-2007

James Kolbe

United States House of Representatives (R-AZ), 1985-2007

James Leach

United States House of Representatives (R-IA), 1977-2007

John LeBoutillier

United States House of Representatives (R-NY), 1981-1983

Richard Lugar

United States Senate (R-IN), 1977-2013

Pete McCloskey

United States House of Representatives (R-CA), 1967-1983

John R. McKernan, Jr.

United States House of Representatives (R-ME), 1983-1987

Thomas Petri

United States House of Representatives (R-WI), 1979-2015

Claudine Schneider

United States House of Representatives (R-RI), 1981-1991

John J.H. Schwarz, MD

United States House of Representatives (R-MI), 2005-2007

Christopher Shays

United States House of Representatives (R-CT), 1987-2009

Peter Smith

United States House of Representatives (R-VT), 1989-1991

Olympia Snowe

United States Senate (R-ME), 1995-2013

United States House of Representatives (R-ME), 1979-1995

Alan Steelman

United States House of Representatives (R-TX), 1973-1977

Peter G. Torkildsen

United States House of Representatives (R-MA), 1993-1997

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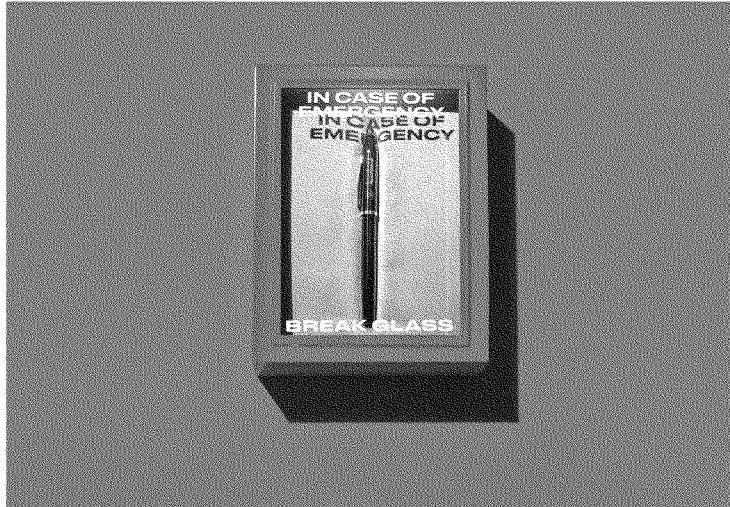
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PROJECT ON GOVERNMENT OVERSIGHT



The Alarming Scope of the President's Emergency Powers

From seizing control of the internet to declaring martial law, President Trump may legally do all kinds of extraordinary things.



The Voothes

ELIZABETH GOITEIN

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SIGN UP

IN THE WEEKS leading up to the 2018 midterm elections, President Donald Trump reached deep into his arsenal to try to deliver votes to Republicans.

Most of his weapons were rhetorical, featuring a mix of lies and false inducements—claims that every congressional Democrat had signed on to an “open

weren't), that a 10 percent tax cut for the middle class would somehow pass while Congress was out of session (it didn't). But a few involved the aggressive use—and threatened misuse—of presidential authority: He sent thousands of active-duty soldiers to the southern border to terrorize a distant caravan of desperate Central American migrants, announced plans to end the constitutional guarantee of birthright citizenship by executive order, and tweeted that law enforcement had been “strongly notified” to be on the lookout for “ILLEGAL VOTING.”

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These measures failed to carry the day, and Trump will likely conclude that they were too timid. How much further might he go in 2020, when his own name is on the ballot—or sooner than that, if he's facing impeachment by a House under Democratic control?

More is at stake here than the outcome of one or even two elections. Trump has long signaled his disdain for the concepts of limited presidential power and democratic rule. During his 2016 campaign, he praised murderous dictators. He declared that his opponent, Hillary Clinton, would be in jail if he were president, goading crowds into frenzied chants of “Lock her up.” He hinted that he might not accept an electoral loss. As democracies around the world slide into autocracy, and nationalism and antidemocratic sentiment are on vivid display among segments of the American populace, Trump's evident hostility to key elements of liberal democracy cannot be dismissed as mere bluster.

The moment the president declares a “national emergency”—a decision that is entirely within his discretion—he is able to set aside many of the legal limits on his authority.



It would be nice to think that America is protected from the worst excesses of Trump's impulses by its democratic laws and institutions. After all, Trump can do only so much without bumping up against the limits set by the Constitution and Congress and enforced by the courts. Those who see Trump as a threat to democracy comfort themselves with the belief that these limits will hold him in check.

But will they? Unknown to most Americans, a parallel legal regime allows the president to sidestep many of the constraints that normally apply. The moment the president declares a "national emergency"—a decision that is entirely within his discretion—more than 100 special provisions become available to him. While many of these tee up reasonable responses to genuine emergencies, some appear dangerously suited to a leader bent on amassing or retaining power. For instance, the president can, with the flick of his pen, activate laws allowing him to shut down many kinds of electronic communications inside the United States or freeze Americans' bank accounts. Other powers are available even without a declaration of emergency, including laws that allow the president to deploy troops inside the country to subdue domestic unrest.

This edifice of extraordinary powers has historically rested on the assumption that the president will act in the country's best interest when using them. With a handful of noteworthy exceptions, this assumption has held up. But what if a president, backed into a corner and facing electoral defeat or impeachment, were to declare an emergency for the sake of holding on to power? In that scenario, our laws and institutions might not save us from a presidential power grab. They might be what takes us down.

1. "A LOADED WEAPON"

THE PREMISE underlying emergency powers is simple: The government's ordinary powers might be insufficient in a crisis, and amending the law to provide greater ones might be too slow and cumbersome. Emergency



powers are meant to give the government a temporary boost until the emergency passes or there is time to change the law through normal legislative processes.

Unlike the modern constitutions of many other countries, which specify when and how a state of emergency may be declared and which rights may be suspended, the U.S. Constitution itself includes no comprehensive separate regime for emergencies. Those few powers it does contain for dealing with certain urgent threats, it assigns to Congress, not the president. For instance, it lets Congress suspend the writ of habeas corpus—that is, allow government officials to imprison people without judicial review—“when in Cases of Rebellion or Invasion the public Safety may require it” and “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”

Nonetheless, some legal scholars believe that the Constitution gives the president inherent emergency powers by making him commander in chief of the armed forces, or by vesting in him a broad, undefined “executive Power.” At key points in American history, presidents have cited inherent constitutional powers when taking drastic actions that were not authorized—or, in some cases, were explicitly prohibited—by Congress. Notorious examples include Franklin D. Roosevelt’s internment of U.S. citizens and residents of Japanese descent during World War II and George W. Bush’s programs of warrantless wiretapping and torture after the 9/11 terrorist attacks. Abraham Lincoln conceded that his unilateral suspension of habeas corpus during the Civil War was constitutionally questionable, but defended it as necessary to preserve the Union.

The Supreme Court has often upheld such actions or found ways to avoid reviewing them, at least while the crisis was in progress. Rulings such as *Youngstown Sheet & Tube Company v. Sawyer*, in which the Court invalidated President Harry Truman’s bid to take over steel mills during the Korean War, have been the exception. And while those exceptions have outlined important limiting principles, the outer boundary of the president’s constitutional authority during emergencies remains poorly defined.



Presidents can also rely on a cornucopia of powers provided by Congress, which has historically been the principal source of emergency authority for the executive branch. Throughout the late 18th and 19th centuries, Congress passed laws to give the president additional leeway during military, economic, and labor crises. A more formalized approach evolved in the early 20th century, when Congress legislated powers that would lie dormant until the president activated them by declaring a national emergency. These statutory authorities began to pile up—and because presidents had little incentive to terminate states of emergency once declared, these piled up too. By the 1970s, hundreds of statutory emergency powers, and four clearly obsolete states of emergency, were in effect. For instance, the national emergency that Truman declared in 1950, during the Korean War, remained in place and was being used to help prosecute the war in Vietnam.

Aiming to rein in this proliferation, Congress passed the National Emergencies Act in 1976. Under this law, the president still has complete discretion to issue an emergency declaration—but he must specify in the declaration which powers he intends to use, issue public updates if he decides to invoke additional powers, and report to Congress on the government’s emergency-related expenditures every six months. The state of emergency expires after a year unless the president renews it, and the Senate and the House must meet every six months while the emergency is in effect “to consider a vote” on termination.

By any objective measure, the law has failed. Thirty states of emergency are in effect today—several times more than when the act was passed. Most have been renewed for years on end. And during the 40 years the law has been in place, Congress has not met even once, let alone every six months, to vote on whether to end them.


As a result, the president has access to emergency powers contained in 123 statutory provisions, as recently calculated by the Brennan Center for Justice at NYU School of Law, where I work. These laws address a broad range of matters, from military composition to agricultural exports to public contracts. For the most



require that the powers invoked relate to the nature of the emergency. Even if the crisis at hand is, say, a nationwide crop blight, the president may activate the law that allows the secretary of transportation to requisition any privately owned vessel at sea. Many other laws permit the executive branch to take extraordinary action under specified conditions, such as war and domestic upheaval, regardless of whether a national emergency has been declared.

Pablo Martinez Monsivais / AP

This legal regime for emergencies—ambiguous constitutional limits combined with a rich well of statutory emergency powers—would seem to provide the ingredients for a dangerous encroachment on American civil liberties. Yet so far, even though presidents have often advanced dubious claims of constitutional authority, egregious abuses on the scale of the Japanese American internment or the post-9/11 torture program have been rare, and most of the statutory powers available during a national emergency have never been used.

But what's to guarantee that this president, or a future one, will show the reticence of his predecessors? To borrow from Justice Robert Jackson's dissent in *Korematsu* 

Japanese Americans, each emergency power “lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

2. AN INTERNET KILL SWITCH?

LIKE ALL EMERGENCY POWERS, the laws governing the conduct of war allow the president to engage in conduct that would be illegal during ordinary times. This conduct includes familiar incidents of war, such as the killing or indefinite detention of enemy soldiers. But the president can also take a host of other actions, both abroad and inside the United States.

These laws vary dramatically in content and scope. Several of them authorize the president to make decisions about the size and composition of the armed forces that are usually left to Congress. Although such measures can offer needed flexibility at crucial moments, they are subject to misuse. For instance, George W. Bush leveraged the state of emergency after 9/11 to call hundreds of thousands of reservists and members of the National Guard into active duty in Iraq, for a war that had nothing to do with the 9/11 attacks. Other powers are chilling under any circumstances: Take a moment to consider that during a declared war or national emergency, the president can unilaterally suspend the law that bars government testing of biological and chemical agents on unwitting human subjects.

The president could seize control of U.S. internet traffic, impeding access to certain websites and ensuring that internet searches return pro-Trump content as the top results.

One power poses a singular threat to democracy in the digital era. In 1942, Congress amended Section 706 of the Communications Act of 1934 to allow the president to shut down or take control of “any facility or station for wire



provided Woodrow Wilson during World War I. At the time, “wire communication” meant telephone calls or telegrams. Given the relatively modest role that electronic communications played in most Americans’ lives, the government’s assertion of this power during World War II (no president has used it since) likely created inconvenience but not havoc.

We live in a different universe today. Although interpreting a 1942 law to cover the internet might seem far-fetched, some government officials recently endorsed this reading during debates about cybersecurity legislation. Under this interpretation, Section 706 could effectively function as a “kill switch” in the U.S.—one that would be available to the president the moment he proclaimed a mere threat of war. It could also give the president power to assume control over U.S. internet traffic.

The potential impact of such a move can hardly be overstated. In August, in an early-morning tweet, Trump lamented that search engines were “RIGGED” to serve up negative articles about him. Later that day the administration said it was looking into regulating the big internet companies. “I think that Google and Twitter and Facebook, they’re really treading on very, very troubled territory. And they have to be careful,” Trump warned. If the government were to take control of U.S. internet infrastructure, Trump could accomplish directly what he threatened to do by regulation: ensure that internet searches always return pro-Trump content as the top results. The government also would have the ability to impede domestic access to particular websites, including social-media platforms. It could monitor emails or prevent them from reaching their destination. It could exert control over computer systems (such as states’ voter databases) and physical devices (such as Amazon’s Echo speakers) that are connected to the internet.

Video: Trump’s Emergency Powers Are “Ripe for Abuse”



To be sure, the fact that the internet in the United States is highly decentralized—a function of a relatively open market for communications devices and services—would offer some protection. Achieving the level of government control over internet content that exists in places such as China, Russia, and Iran would likely be impossible in the U.S. Moreover, if Trump were to attempt any degree of internet takeover, an explosion of lawsuits would follow. Based on its First Amendment rulings in recent decades, the Supreme Court seems unlikely to permit heavy-handed government control over internet communication.

But complacency would be a mistake. Complete control of internet content would not be necessary for Trump's purposes; even with less comprehensive interventions, he could do a great deal to disrupt political discourse and hinder effective, organized political opposition. And the Supreme Court's view of the First Amendment is not immutable. For much of the country's history, the Court was willing to tolerate significant encroachments on free speech during wartime. "The progress we have made is fragile," Geoffrey R. Stone, a constitutional-law scholar at the University of Chicago, has written. "It would not take much to upset the current understanding of the First Amendment." Indeed, all it would take is five



Supreme Court justices whose commitment to presidential power exceeds their commitment to individual liberties.

3. SANCTIONING AMERICANS

NEXT TO WAR POWERS, economic powers might sound benign, but they are among the president's most potent legal weapons. All but two of the emergency declarations in effect today were issued under the International Emergency Economic Powers Act, or IEEPA. Passed in 1977, the law allows the president to declare a national emergency "to deal with any unusual and extraordinary threat"—to national security, foreign policy, or the economy—that "has its source in whole or substantial part outside the United States." The president can then order a range of economic actions to address the threat, including freezing assets and blocking financial transactions in which any foreign nation or foreign national has an interest.

In the late 1970s and '80s, presidents used the law primarily to impose sanctions against other nations, including Iran, Nicaragua, South Africa, Libya, and Panama. Then, in 1983, when Congress failed to renew a law authorizing the Commerce Department to control certain exports, President Ronald Reagan declared a national emergency in order to assume that control under IEEPA. Subsequent presidents followed his example, transferring export control from Congress to the White House. President Bill Clinton expanded IEEPA's usage by targeting not just foreign governments but foreign political parties, terrorist organizations, and suspected narcotics traffickers.

President George W. Bush took matters a giant step further after 9/11. His Executive Order 13224 prohibited transactions not just with any suspected foreign terrorists, but with any foreigner *or any U.S. citizen* suspected of providing them with support. Once a person is "designated" under the order, no American can legally give him a job, rent him an apartment, provide him with medical services, or even sell him a loaf of bread unless the government grants a license to allow the



to trigger these consequences merely by opening an investigation into whether a person or group should be designated.

Designations under Executive Order 13224 are opaque and extremely difficult to challenge. The government needs only a “reasonable basis” for believing that someone is involved with or supports terrorism in order to designate him. The target is generally given no advance notice and no hearing. He may request reconsideration and submit evidence on his behalf, but the government faces no deadline to respond. Moreover, the evidence against the target is typically classified, which means he is not allowed to see it. He can try to challenge the action in court, but his chances of success are minimal, as most judges defer to the government’s assessment of its own evidence.

Americans have occasionally been caught up in this Kafkaesque system. Several Muslim charities in the U.S. were designated or investigated based on the suspicion that their charitable contributions overseas benefited terrorists. Of course if the government can show, through judicial proceedings that observe due process and other constitutional rights, that an American group or person is funding terrorist activity, it should be able to cut off those funds. But the government shut these charities down by freezing their assets without ever having to prove its charges in court.

In other cases, Americans were significantly harmed by designations that later proved to be mistakes. For instance, two months after 9/11, the Treasury Department designated Garad Jama, a Somalian-born American, based on an erroneous determination that his money-wiring business was part of a terror-financing network. Jama’s office was shut down and his bank account frozen. News outlets described him as a suspected terrorist. For months, Jama tried to gain a hearing with the government to establish his innocence and, in the meantime, obtain the government’s permission to get a job and pay his lawyer. Only after he filed a lawsuit did the government allow him to work as a grocery-store cashier and pay his living expenses. It was several more months before the government



and the stigma of having been publicly labeled a terrorist supporter continued to follow him and his family.

Despite these dramatic examples, IEEPA's limits have yet to be fully tested. After two courts ruled that the government's actions against American charities were unconstitutional, Barack Obama's administration chose not to appeal the decisions and largely refrained from further controversial designations of American organizations and citizens. Thus far, President Trump has followed the same approach.

That could change. In October, in the lead-up to the midterm elections, Trump characterized the caravan of Central American migrants headed toward the U.S. border to seek asylum as a "National Emergency." Although he did not issue an emergency proclamation, he could do so under IEEPA. He could determine that any American inside the U.S. who offers material support to the asylum seekers—or, for that matter, to undocumented immigrants inside the United States—poses "an unusual and extraordinary threat" to national security, and authorize the Treasury Department to take action against them.

Americans might be surprised to learn just how readily the president can deploy troops inside the United States.

Such a move would carry echoes of a law passed recently in Hungary that criminalized the provision of financial or legal services to undocumented migrants; this has been dubbed the "Stop Soros" law, after the Hungarian American philanthropist George Soros, who funds migrants'-rights organizations. Although an order issued under IEEPA would not land targets in jail, it could be implemented without legislation and without affording targets a trial. In practice, identifying every American who has hired, housed, or provided paid legal representation to an asylum seeker or undocumented immigrant would be impossible—but all Trump would need to do to achieve the desired political effect would be to make high-



and find their bank accounts frozen and their health insurance canceled. The battle in the courts would then pick up exactly where it left off during the Obama administration—but with a newly reconstituted Supreme Court making the final call.

4. BOOTS ON MAIN STREET

THE IDEA OF tanks rolling through the streets of U.S. cities seems fundamentally inconsistent with the country's notions of democracy and freedom. Americans might be surprised, therefore, to learn just how readily the president can deploy troops inside the country.

The principle that the military should not act as a domestic police force, known as “posse comitatus,” has deep roots in the nation's history, and it is often mistaken for a constitutional rule. The Constitution, however, does not prohibit military participation in police activity. Nor does the Posse Comitatus Act of 1878 outlaw such participation; it merely states that any authority to use the military for law-enforcement purposes must derive from the Constitution or from a statute.

The Insurrection Act of 1807 provides the necessary authority. As amended over the years, it allows the president to deploy troops upon the request of a state's governor or legislature to help put down an insurrection within that state. It also allows the president to deploy troops unilaterally, either because he determines that rebellious activity has made it “impracticable” to enforce federal law through regular means, or because he deems it necessary to suppress “insurrection, domestic violence, unlawful combination, or conspiracy” (terms not defined in the statute) that hinders the rights of a class of people or “impedes the course of justice.”

Presidents have wielded the Insurrection Act under a range of circumstances. Dwight Eisenhower used it in 1957 when he sent troops into Little Rock, Arkansas, to enforce school desegregation. George H. W. Bush employed it in 1992 to help stop the riots that erupted in Los Angeles after the verdict in the Rodney King case.



Katrina, but opted against it when the governor of Louisiana resisted federal control over the state's National Guard. While controversy surrounded all these examples, none suggests obvious overreach.

And yet the potential misuses of the act are legion. When Chicago experienced a spike in homicides in 2017, Trump tweeted that the city must "fix the horrible 'carnage'" or he would "send in the Feds!" To carry out this threat, the president could declare a particular street gang—say, MS-13—to be an "unlawful combination" and then send troops to the nation's cities to police the streets. He could characterize sanctuary cities—cities that refuse to provide assistance to immigration-enforcement officials—as "conspiracies" against federal authorities, and order the military to enforce immigration laws in those places. Conjuring the specter of "liberal mobs," he could send troops to suppress alleged rioting at the fringes of anti-Trump protests.

Mandel Ngan / AFP / Getty

How far could the president go in using the military within U.S. borders? The Supreme Court has given us no clear answer to this question. Take *Ex parte*



to try a civilian during the Civil War. The case is widely considered a high-water mark for judicial constraint on executive action. Yet even as the Court held that the president could not use war or emergency as a reason to bypass civilian courts, it noted that martial law—the displacement of civilian authority by the military—would be appropriate in some cases. If civilian courts were closed as a result of a foreign invasion or a civil war, for example, martial law could exist “until the laws can have their free course.” The message is decidedly mixed: Claims of emergency or necessity cannot legitimize martial law ... until they can.

Presented with this ambiguity, presidents have explored the outer limits of their constitutional emergency authority in a series of directives known as Presidential Emergency Action Documents, or PEADS. PEADS, which originated as part of the Eisenhower administration’s plans to ensure continuity of government in the wake of a Soviet nuclear attack, are draft executive orders, proclamations, and messages to Congress that are prepared in advance of anticipated emergencies. PEADS are closely guarded within the government; none has ever been publicly released or leaked. But their contents have occasionally been described in public sources, including FBI memorandums that were obtained through the Freedom of Information Act as well as agency manuals and court records. According to these sources, PEADS drafted from the 1950s through the 1970s would authorize not only martial law but the suspension of habeas corpus by the executive branch, the revocation of Americans’ passports, and the roundup and detention of “subversives” identified in an FBI “Security Index” that contained more than 10,000 names.

Less is known about the contents of more recent PEADS and equivalent planning documents. But in 1987, *The Miami Herald* reported that Lieutenant Colonel Oliver North had worked with the Federal Emergency Management Agency to create a secret contingency plan authorizing “suspension of the Constitution, turning control of the United States over to FEMA, appointment of military commanders to run state and local governments and declaration of martial law during a national crisis.” A 2007 Department of Homeland Security report lists “martial law” and



should be able to perform in emergencies. In 2008, government sources told a reporter for *Radarr* magazine that a version of the Security Index still existed under the code name Main Core, allowing for the apprehension and detention of Americans tagged as security threats.

Since 2012, the Department of Justice has been requesting and receiving funds from Congress to update several dozen PEADS first developed in 1989. The funding requests contain no indication of what these PEADS encompass, or what standards the department intends to apply in reviewing them. But whatever the Obama administration's intent, the review has now passed to the Trump administration. It will fall to Jeff Sessions's successor as attorney general to decide whether to rein in or expand some of the more frightening features of these PEADS. And, of course, it will be up to President Trump whether to actually use them—something no previous president appears to have done.

5. KINDLING AN EMERGENCY

WHAT WOULD THE Founders think of these and other emergency powers on the books today, in the hands of a president like Donald Trump? In *Youngstown*, the case in which the Supreme Court blocked President Truman's attempt to seize the nation's steel mills, Justice Jackson observed that broad emergency powers were "something the forefathers omitted" from the Constitution. "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation," he wrote. "We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

In the past several decades, Congress has provided what the Constitution did not: emergency powers that have the potential for creating emergencies rather than ending them. Presidents have built on these powers with their own secret directives. What has prevented the wholesale abuse of these authorities until now is a baseline commitment to liberal democracy on the part of past presidents. Under a



Imagine that it's late 2019. Trump's approval ratings are at an all-time low. A disgruntled former employee has leaked documents showing that the Trump Organization was involved in illegal business dealings with Russian oligarchs. The trade war with China and other countries has taken a significant toll on the economy. Trump has been caught once again disclosing classified information to Russian officials, and his international gaffes are becoming impossible for lawmakers concerned about national security to ignore. A few of his Republican supporters in Congress begin to distance themselves from his administration. Support for impeachment spreads on Capitol Hill. In straw polls pitting Trump against various potential Democratic presidential candidates, the Democrat consistently wins.

Trump reacts. Unfazed by his own brazen hypocrisy, he tweets that Iran is planning a cyber operation to interfere with the 2020 election. His national-security adviser, John Bolton, claims to have seen ironclad (but highly classified) evidence of this planned assault on U.S. democracy. Trump's inflammatory tweets provoke predictable saber rattling by Iranian leaders; he responds by threatening preemptive military strikes. Some Defense Department officials have misgivings, but others have been waiting for such an opportunity. As Iran's statements grow more warlike, "Iranophobia" takes hold among the American public.

Proclaiming a threat of war, Trump invokes Section 706 of the Communications Act to assume government control over internet traffic inside the United States, in order to prevent the spread of Iranian disinformation and propaganda. He also declares a national emergency under IEEPA, authorizing the Treasury Department to freeze the assets of any person or organization suspected of supporting Iran's activities against the United States. Wielding the authority conferred by these laws, the government shuts down several left-leaning websites and domestic civil-society organizations, based on government determinations (classified, of course) that they are subject to Iranian influence. These include websites and organizations that are focused on getting out the vote.



The Voorhes

Lawsuits follow. Several judges issue orders declaring Trump's actions unconstitutional, but a handful of judges appointed by the president side with the administration. On the eve of the election, the cases reach the Supreme Court. In a 5-4 opinion written by Justice Brett Kavanaugh, the Court observes that the president's powers are at their zenith when he is using authority granted by Congress to protect national security. Setting new precedent, the Court holds that the First Amendment does not protect Iranian propaganda and that the government needs no warrant to freeze Americans' assets if its goal is to mitigate a foreign threat.

Protests erupt. On Twitter, Trump calls the protesters traitors and suggests (in capital letters) that they could use a good beating. When counterprotesters oblige, Trump blames the original protesters for sparking the violent confrontations and deploys the Insurrection Act to federalize the National Guard in several states. Using the Presidential Alert system first tested in October 2018, the president sends a text message to every American's cellphone, warning that there is "a risk of violence at polling stations" and that "troops will be deployed as necessary" to keep order. Some members of opposition groups are frightened into staying home on



voting. With turnout at a historical low, a president who was facing impeachment just months earlier handily wins reelection—and marks his victory by renewing the state of emergency.

THIS SCENARIO MIGHT sound extreme. But the misuse of emergency powers is a standard gambit among leaders attempting to consolidate power. Authoritarians Trump has openly claimed to admire—including the Philippines' Rodrigo Duterte and Turkey's Recep Tayyip Erdoğan—have gone this route.

Of course, Trump might also choose to act entirely outside the law. Presidents with a far stronger commitment to the rule of law, including Lincoln and Roosevelt, have done exactly that, albeit in response to real emergencies. But there is little that can be done in advance to stop this, other than attempting deterrence through robust oversight. The remedies for such behavior can come only after the fact, via court judgments, political blowback at the voting booth, or impeachment.

By contrast, the dangers posed by emergency powers that are written into statute can be mitigated through the simple expedient of changing the law. Committees in the House could begin this process now by undertaking a thorough review of existing emergency powers and declarations. Based on that review, Congress could repeal the laws that are obsolete or unnecessary. It could revise others to include stronger protections against abuse. It could issue new criteria for emergency declarations, require a connection between the nature of the emergency and the powers invoked, and prohibit indefinite emergencies. It could limit the powers set forth in PEADS.

Congress, of course, will undertake none of these reforms without extraordinary public pressure—and until now, the public has paid little heed to emergency powers. But we are in uncharted political territory. At a time when other democracies around the world are slipping toward authoritarianism—and when the president seems eager for the United States to follow their example—we would be wise to shore up the guardrails of liberal democracy. Fixing the current system of



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WHITE HOUSE

Trump's Emergency Declaration Is Contemptuous of the Rule of Law

By DAVID FRENCH | February 15, 2019 6:29 PM



President Trump declares a national emergency at the U.S.-Mexico border while speaking about border security at the White House, February 15, 2019. (Carlos Barria/Reuters)

This is no *Trump v. Hawaii*; the president's discretion is dramatically limited.

One thing that is abundantly clear from reading the full text of President Trump's declaration of a national emergency on the southern border — he's barely even deigning to explain why there is a particular crisis

today, or why that crisis is so grave that it requires the military to combat it. At its heart it's a contemptuous document. It's the proclamation of a monarch, not an argument by a president. And it should fail in court.

Before today, legal writers were guessing at the statutes the president would use to justify defying the will of Congress and using the military to build his border wall. Now we know. In his declaration, he's exclusively using 10 U.S.C. 2808 to reallocate up to \$3.6 billion from Department of Defense construction projects — more than double the amount that Congress allocated for wall construction in its border compromise. (He intends to use other funds as well for wall construction, but those aren't applicable to the emergency declaration.)

This statute bears virtually no resemblance to the sweeping congressional grants of presidential discretion that allowed Trump to lawfully implement his travel ban or that allow presidents to declare national emergencies. Instead, it's a much more carefully drafted law, with carefully defined terms. A court that does its job — applying the plain meaning of the words on the page — should have little patience for the Trump administration's arguments.

I do not dispute that Trump likely can declare a national emergency, in large part because Congress has placed few meaningful restraints on that power, but such declarations don't allow him to do anything he wants; they mainly serve to unlock *other* statutes which grant him *other* powers. In this case it unlocks Section 2808:

In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total

amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

As statutes go, that's relatively clearly and cleanly written. For Trump to use his \$3.6 billion for the wall, he has to show that the emergency "requires the use of the armed forces" and that the relevant funds are being used to "undertake military construction projects . . . that are necessary to support such use of the armed forces."

First, let's consider whether Trump's national emergency actually "requires the use of the armed forces." In this regard, the declaration itself damages Trump's case. He claims it "threatens core national security interests" yet then goes on to describe *civilian* challenges. Here's the key language:

The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate.

Look at the list carefully. He's listing criminal challenges. He's listing humanitarian challenges. He's listing the problems on the border that have existed for decades and that Congress has enacted comprehensive statutory schemes (including funding *civilian* wall construction and *civilian* immigration authorities) to combat. Gang activity and drug-smuggling are grave problems, but they are *crimes*, not acts of war. The declaration doesn't even try to argue that there is a precise, unique challenge that only the military can counter —

such as a national disaster that would require the use of the military's unrivaled heavy-lift capabilities or its immediate access to manpower.

Instead, the declaration cites the wasteful 2018 border deployment, but that is only evidence that the military *has* been used, not that it *must* be used. If the mere fact of a deployment were proof of the necessity of military intervention, then there would be no limiting principle on a president's action. The message is clear — the military is “required” simply because he says it is required.

NOW WATCH: 'McConnell Says Trump Will Sign Bill and Declare National Emergency'

But let's suppose that a court decides to grant even that degree of deference to the president. Let's suppose that even in the total absence of armed conflict or the prospect of armed conflict that courts will buy Trump's argument that the armed forces must deploy to the border. Even then, the statute limits their use. They can only “undertake military construction projects . . . that are necessary to support such use of the armed forces.”

The border wall does not fit that definition. How do we know? Because Congress has defined these terms. Let's turn over to 10 U.S.C. 2801. It defines "military construction" as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road."

The intent is clear — to grant the military the power to build out military installations, and a "military installation" is a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or . . . without regard to the duration of operational control." Each of the precisely described forms of installation represents facilities that support the troops. Under basic rules of statutory construction, the "other activity" must also fulfill that same purpose. As the Supreme Court held in *Circuit City Stores v. Adams*, when "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."

A border wall, by contrast, is a civilian structure to be manned by civilian authorities to perform a civilian mission. The troops would not be creating a military fortification for military use. Not only is it not "military construction," it's also not "necessary" in order to support the use of the armed forces — unless one wants to make the fantastical argument that the wall somehow "protects" the troops who are building the wall. They are not defending the border from actual invasion as defined by the law of armed conflict or relevant American law. They are assisting in a law-enforcement mission that is mainly designed to prevent the commission of federal misdemeanors, not to stop an army that intends to take and hold American territory.

We've grown sadly accustomed to presidents' abusing poorly drafted statutes to stretch their power well beyond the Founders' intent. It's strangely comforting to read a statute like Section 2808 that's competently written and precisely

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drafted. While a court isn't likely to overturn the emergency declaration itself, it is unlikely to believe the administration's fiction that a civilian wall is true "military construction" or that it is any way "necessary" to support the use of the armed forces. Indeed Trump's declaration hardly even tries to make the case.



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Why Trump's Emergency Declaration is Illegal

The strongest legal argument against Trump's attempt to use emergency powers to build the wall is that declaring an emergency does not authorize him to spend money and condemn property for that purpose. But he also lacks grounds to declare an emergency in the first place.

Ilya Somin|Feb. 23, 2019 5:35 pm



The strongest legal argument raised in the various lawsuits against President Trump's attempt to use emergency powers to build his border wall is that declaring an emergency does not authorize him to spend money and condemn private property to build the wall. That's the conventional wisdom among most legal scholars and commentators. But it is also important to recognize that it is illegal to for Trump to declare a "national emergency" over this issue in the first place. That point is important for reasons that go far beyond the the specific case of the border wall. If the president can declare an emergency and tap a vast range of special emergency powers anytime he wants for any reason he wants, that makes a hash of the whole concept of an emergency, raises serious constitutional problems, and creates a dangerous concentration of power in the hands of a single person.

It makes much more sense to interpret the National Emergencies Act as only allowing an emergency declaration in a situation where an emergency actually exists - defined as some sudden crisis that cannot be addressed swiftly enough through ordinary political processes. By that interpretation, the situation at the border doesn't even come close to qualifying.

Why the President Cannot Just Declare a "National Emergency" Whenever he Wants

The relevant section of the NEA, 50 USC Section 1621, says that "With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency." The Act does not define what counts as a "national emergency." But the fact that president is authorized to declare one does not mean he can do so at any time for any reason. It makes much more sense to interpret the Act as allowing the president to declare a legal state of emergency only in situations where an emergency actually exists.

The whole point of emergency powers is to enable the government to respond to a sudden crisis that cannot be addressed fast enough by ordinary political processes, not to give the president a blank check to use that authority whenever it might be politically convenient. One of the most basic rules of legal interpretation is that words used in laws must be understood in terms of their "ordinary meaning." The ordinary meaning of "emergency" is a sudden crisis of some sort, not just any issue of any kind.

If the term "national emergency" is interpreted broadly enough to allow the president to declare one anytime he wants, that would make Section 1621 unconstitutional. Declaring a national emergency allows the president to exercise a wide range of powers that normally belong to Congress, including spending money and imposing regulations on private parties. The "nondelegation" doctrine restricts Congress' ability to delegate its powers to another branch of government. For many years, the Supreme Court has taken a very permissive approach to delegation. All the Court requires is for the delegation to be constrained by an "intelligible principle." But allowing the president to tap congressional powers by declaring an emergency for any reason he wants runs afoul of even that weak restriction. There can be no "intelligible principle" when the whole question is entirely left up to executive discretion.

At the very least, interpreting "national emergency" to give total discretion to the president raises serious constitutional problems. And the Supreme Court has repeatedly ruled that judges must try hard to avoid interpreting statutes in ways that risk rendering them unconstitutional. The most famous recent example is *NFIB v. Sebelius*, where Chief Justice John Roberts famously reinterpreted the Obamacare individual health insurance mandate as a tax in order to save it from unconstitutionality, even though he admitted that was not the "most natural reading" of the law. He concluded that courts must adopt any available "reasonable" interpretation of a statute that would make it constitutional, even if it is not actually the best interpretation.

I am no great fan of this "avoidance canon." But as long as the Supreme Court requires federal judges to follow it, they must interpret "national emergency" in a way that doesn't give the president unconstrained discretion to declare one anytime he wants. Interpreting "emergency" to mean something like "sudden crisis" is at least a "reasonable" interpretation of the word, and it neatly avoids any possible constitutional problems.

Ironically, conservatives and libertarians are the ones who have long argued for stronger enforcement of the nondelegation doctrine, while most liberals have generally been hostile to the idea. Trump's national emergency declaration might perhaps lead the latter to reconsider their position.

Judges may face difficult decisions in situations where it is hard to tell whether the problem at hand really is a suddenly emerging crisis or not. But difficult borderline questions are common in judicial decision-making, particularly when interpreting imprecise terms like "emergency." When it comes to laws intended to trigger dangerous powers that circumvent the normal political process, it makes sense to put the burden of proof on the executive to show that a genuine emergency actually exists.

But even if courts should defer to the president's judgment in relatively close cases, that does not mean they should give him a blank check to declare an emergency anytime he wants. The current situation is not a close case at all.

The Situation at the Border is Not a Sudden Crisis - and therefore Cannot be Declared a National Emergency

If a "national emergency" can only be declared in the event of a sudden crisis, Trump's declaration clearly doesn't qualify. Quite simply, there is no crisis at the border. To the contrary, crime and terrorism risks in the border area are very low, and the number of illegal border crossings has been dropping. The vast majority of undocumented immigration is a result of visa overstays, not illegal border crossings at all. Trump also cites the flow of illegal drugs as a justification for the declaration. But 80 to 90 percent such drugs are brought in through legal ports of entry that would not be affected by his proposed wall.

Moreover, it is implausible to claim that the president had declare an emergency because there is no time for ordinary legislative processes to work. To the contrary, Congress has been considering Trump's demand for a wall for over two years now. The issue is not that they haven't had time to authorize one, but that they simply disagree with Trump about the need for it. Disagreement between the legislature and the executive is not an emergency. It's a normal part of our system of separation of powers. If the president can't get Congress to pass the laws he wants, that doesn't justify circumventing it by declaring an "emergency."

The above assumes that current immigration restrictions and the War on Drugs are beneficial rather than harmful. I myself oppose both. Most of the real problems at the border arise from the grave injustices caused by these policies. But even observers more sympathetic to status quo policies than I am should be able to recognize that Trump's emergency declaration does not address any sudden crisis. Even Trump himself seems to understand that. He admits he "didn't need to do this" and only declared a national emergency because he'd "rather" build the wall "much faster" than Congress is willing to authorize.

The claim that the border situation is an emergency is also belied by the nature of Trump's proposed remedy for the supposed problem. Even setting aside delays likely to be caused legal challenges, the wall will probably take years to build. Any problem for which the wall is a plausible solution is by definition not an emergency. To claim otherwise is much like saying that we can put out a raging fire by building a new fire station over the course of several years.

The administration can argue that there is an emergency because illegal border crossings and drug flows still persist and are unlikely to be completely eliminated anytime soon, if ever. But by

that standard, there is an emergency any time any federal law is not perfectly enforced and some violations continue to occur. And that's true of almost every law on the books.

For example, surveys show that over 50 percent of adult Americans admit to violating federal laws banning possession of marijuana. Only a small fraction of them have ever been caught or prosecuted. Can the president declare a national emergency and start spending unauthorized money and condemning property to go after pot smokers?

If Trump's desire to build a wall qualifies as an emergency, then pretty much anything does. The president would have unlimited power to declare any real or imagined problem an emergency, and thereby tap a wide range of emergency powers.

The Perils of Setting a Dangerous Precedent

If courts conclude that the president can declare any emergency for virtually any reason he wants, it would set a dangerous precedent that goes far beyond wall-building. The National Emergencies Act allows the president to use an emergency declaration to trigger a wide range of powers, including such extremely dangerous ones as shutting down electronic media (potentially including the internet), and even testing chemical and biological weapons on unwilling human subjects.

Even the wall-building situation is itself deeply problematic. After all, Trump is claiming not just the authority to spend money on the wall, but also the power to use eminent domain to seize the property of thousands of people. If he can do that to build a border wall, other presidents can do the same thing to take property for a wide range of other purposes.

No one person - especially a politician - can be trusted with such vast, nearly unconstrained power. Conservatives who may be comfortable trusting Trump with it are unlikely to be so happy when the next liberal Democratic president inherits the same authority and uses it to promote left-wing causes.

Some suggest we need not worry too much about setting a precedent, because there have already been numerous questionable emergency declarations, including some that have lasted for many years.

I won't try to go through all of the previous 58 emergency declarations issued since the NEA was enacted in 1976. But virtually all of them did in fact involve crises that emerged suddenly and at least plausibly required a swift response that did not leave time for ordinary political processes to react quickly enough. All or nearly all were also invoked to take measures to address the problem quickly, not ones like Trump's wall, that would take years to have any effect. And none involved the president appropriating and seizing private property for a project Congress had repeatedly refused to support on the scale the president wanted, as is the case with the wall.

It is admittedly problematic that many previous emergencies have lasted for years, without any additional congressional authorization. The NEA does not impose any time limit on an emergency declaration. So one can potentially go on indefinitely, if the president wants it to.

The NEA states that a declaration can be ended by Congress if it passes a resolution disapproving it, as congressional Democrats are now attempting to do. But any such resolution is subject to veto by the president. And he can almost always count on sufficient support from his own party to prevent his veto from being overridden by the necessary two-thirds majority in both houses of Congress.

But the failure of the NEA to effectively limit the duration of emergency declarations does not mean it also imposes no constraints on their initiation. The difficulty of terminating an emergency once it has been declared makes it all the more important to enforce legal constraints on declaring one in the first place, to ensure these powers cannot be used unless there is an actual emergency.

It is certainly possible that some previous emergency declarations were legally dubious. Trump is far from the first president to abuse his authority. But the fact that some of his predecessors may have acted illegally is no reason to let Trump get away with it, too. To the contrary, it is all the more reason to crack down on such abuses of power, so they will not be repeated.

Ilya Somin is Professor of Law at George Mason University and the author of *Democracy and Political Ignorance: Why Smaller Government Is Smarter* and *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*.

Donald Trump can call a 'national emergency,' but that doesn't mean he can build the wall

Ilya Somin, Opinion contributor Published 3:15 a.m. ET Jan. 21, 2019 | Updated 2:15 p.m. ET Jan. 22, 2019

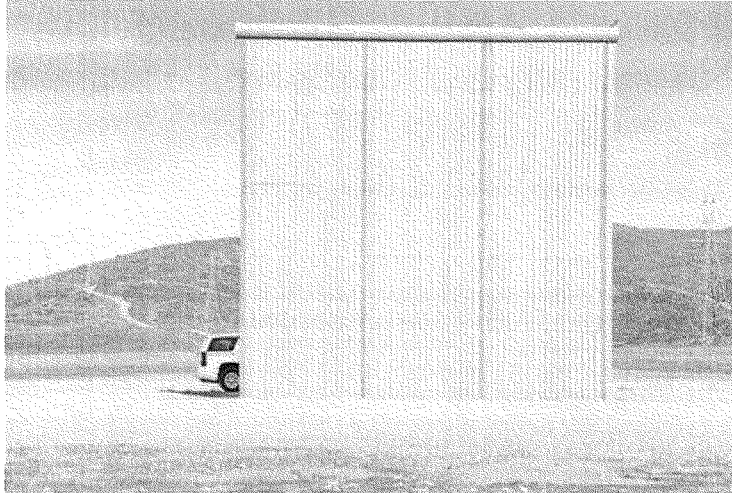
Opinion: The partial government closure is mostly due to impasse in negotiations between President Donald Trump, Democrats and Republicans but other emergencies cannot go unnoticed while debate over the wall rages on. USA TODAY

Trump wants to divert military funds and take private property without congressional authorization. That's a dangerous precedent for future presidents.

President Donald Trump recently said that he will “almost ... definitely” resort to emergency powers to build a wall on the Mexican border if Congress does not give in to his demands. That might be his way out of this government shutdown if Democrats, unmoved so far by his televised address Saturday, continue to hold the line. But it should not get him that wall.

In order to build it, Trump would need not only funds but also the power to seize property from unwilling owners through the use of eminent domain. Allowing him to do so would set a dangerous precedent and threaten the property rights of thousands of Americans.

Poorly drafted laws give the president a wide range of easily abused emergency powers. Even if he can declare a “national emergency,” however, that does not mean he can use it to pay for and build a wall.



Border wall prototype (Photo: Daniel Ochoa de Olza/AP)

Some point to [10 U.S.C. 2808](#) and [33 U.S.C. 2293](#) as possible justifications. But Section 2808 states that, during a “national emergency” that “requires the use of the armed forces,” the president can reallocate defense funds to “undertake military construction projects ... that are necessary to support such use of the armed forces.” No threat posed by undocumented immigration “requires the use of the armed forces,” and it is hard to see why a wall is “necessary to support such use.”

In fact, as Yale Law School professor Bruce Ackerman [explains](#), longstanding laws bar the use of troops for domestic law enforcement (including enforcing immigration law).

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[Donald Trump’s weak negotiation skills caused this record government shutdown](#)

[5 reasons Trump may want a shutdown that have nothing to do with a wall](#)

[Trump should declare 'emergency' to get the wall built over Democrats' objections](#)

Section 2293 also only applies to a war or emergency that “requires or may require use of the armed forces.” Another federal law allows the military to condemn property for various purposes, such as “fortifications.” But that only extends to projects for which funding has been appropriated by Congress.

Arguments that Trump can use disaster relief funds to build the wall are even more implausible.

The outcome of a legal battle over emergency powers is hard to predict. Clever administration lawyers may come up with creative new legal arguments. Too often, courts give presidents undue deference on security and immigration issues. But judges should keep in mind the importance of rigorously enforcing legal constraints on dangerous exercises of emergency powers.

Eminent domain on massive scale to build wall

Even if the president can use emergency powers to get funds, that does not mean he can seize property by eminent domain. The Supreme Court has long held that the use of eminent domain must be expressly authorized by law. No emergency law expressly permit the use of eminent domain for border walls not otherwise authorized by Congress.

Building Trump's wall requires using eminent domain on a massive scale. A third of the needed land is owned by the federal government. The rest would have to be taken from private owners, Native American tribes and state governments, many of whom are unlikely to sell voluntarily.

The result would be one of the largest federal condemnations in modern U.S. history. In Texas alone, there are almost 5,000 privately owned lots in the likely path of the wall. Securing the land and building on it is likely to be costly and time-consuming. Construction and legal battles over compensation can drag on for years.

This reality underscores the absurdity of claiming that a wall is needed to combat an "emergency." Emergency powers are intended to address immediate threats that cannot be dealt with by slow-moving legislative processes. If the supposed emergency can be fixed by a wall that takes years to build, this means it was not an emergency in the first place. In reality, there is no genuine crisis that a wall could fix. It would not even meaningfully reduce undocumented immigration.

Democrats could declare their own emergencies

Far from alleviating a crisis, building the wall through eminent domain would actually create one by imperiling the property rights of thousands of landowners along the border. The Department of Homeland Security has a terrible record of violating procedural rights and undercompensating property owners in earlier takings for smaller border barriers. Such abuses would likely be repeated on a much larger scale if we try to build Trump's wall.

If Trump succeeds in using emergency powers to build the wall and seize property through eminent domain, future presidents could exploit this dangerous precedent. They, too, could declare a "national emergency," and then divert military funds and take private property without congressional authorization.

Republicans who cheer Trump now will regret it if the next Democratic president uses the same powers to declare that climate change is a "national emergency" and then allocate funds and take land for the gigantic "Green New Deal" program many progressives advocate. Climate change is a more plausible menace to national security than undocumented immigration.

If Trump succeeds, presidents could use the same ploy almost any time they want funds or seek to condemn private property for purposes Congress has not authorized, so long as there is some vague security pretext. To their credit, conservative commentators Philip Klein and David French have highlighted the risks of going down this very slippery slope. No one person, whether Democrat or Republican, can be trusted with such sweeping power.

Ilya Somin is a law professor at George Mason University, an adjunct scholar at the Cato Institute and author of "The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain." Follow him on Twitter: @IlyaSomin

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The Washington Post

Opinions

To build the wall, Trump might make thousands of Americans suffer

By Ilya Somin

Ilya Somin is a law professor at George Mason University, an adjunct scholar at the Cato Institute and author of "The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain."

In his speech on Saturday, President Trump reiterated his determination to build his border wall. Much of the debate over this issue focuses on whether Trump can get the funding he wants.

But even if congressional Democrats agree to give him the funds in exchange for concessions on other immigration issues, that would be only the beginning of the drama over the wall. Trump cannot acquire the land he needs without forcibly displacing large numbers of property owners by using eminent domain. That inevitably threatens the property rights of hundreds, perhaps thousands, of Americans.

Less than one-third of the needed land is currently owned by the federal government. The rest — as much as 1,300 miles — is held by private owners, Native American tribes and state governments, many of whom are unlikely to sell voluntarily. Even if the wall does not cover the full 2,000 miles because it excludes some areas, such as those that have "natural" barriers, many property owners will have to be displaced. There is no way to build an extensive continuous wall without that.

To get that land, the government would have to resort to eminent domain: a power that allows the state to seize property from unwilling owners. The result would be one of the largest federal condemnations in modern U.S. history. In Texas alone, there are some 4,900 parcels of privately owned land within 500 feet of the probable route of the wall. In Arizona, some 62 miles of the route is owned by the Tohono O'odham Nation, which opposes the wall because it would damage the tribe's land and impede ties with members across the border. No one knows exactly how many homes, businesses and tribal properties would have to be condemned. But it is likely that thousands of people would suffer.

Under Supreme Court precedent, owners of condemned property are entitled to "fair market value" compensation: roughly, the price the land would go for if sold on the open market. But studies show that owners often don't get the compensation that the law requires. That is particularly true of those who are poor or lack legal sophistication. Government officials often shortchange such people by using pressure tactics to get them to sell at below-market prices.

Such abuses were common in takings for previous, much smaller border barriers. A 2017 investigation conducted by ProPublica and the Texas Tribune analyzed more than 400 condemnations undertaken under the Secure Fence Act of 2006. They found that the Department of Homeland Security routinely "circumvented laws designed to help landowners receive fair compensation" and instead "issued low-ball offers based on substandard estimates of property values." As a result, "larger, wealthier property owners who could afford lawyers negotiated deals that, on average, tripled the opening bids from Homeland Security." But "smaller and poorer landholders took whatever the government offered — or wrung out small increases." Thus, retired teacher Juan Cavazos concluded he could not afford a lawyer and accepted \$21,500 for a two-acre plot of land that was actually probably worth far more than that.

Even when owners do secure market-value compensation, that often fails to fully offset their losses. Many understandably value their property above its market value. Often, that's why they hold on to it in the first place. Consider, for example, longtime homeowners or businesspeople who have developed close ties with customers and neighbors in a community. Those losses remain largely uncompensated.

Or consider the case of the Texas butterfly sanctuary likely to be destroyed to build a portion of the wall. Market-value payments can hardly compensate for the loss to owners and researchers who have devoted so much to the sanctuary, which is the nation's most diverse. As National Butterfly Center outreach coordinator and Trump voter Luciano Guerra puts it, "by backing the wall, my party has abandoned the conservative principles I treasure: less government, less spending, and respect for the law and private property."

In 2005, the Supreme Court generated widespread outrage when it ruled in *Kelo v. City of New London* that the government could condemn homes to promote private “economic development.” The project fell through, and today the site of Susette Kelo’s house is used only by feral cats. Trump is a long-standing defender of *Kelo*, in large part because he himself has a history of benefiting from eminent domain abuse, including the notorious 1998 condemnation of elderly widow Vera Coking’s home to build a parking lot for one of his casinos.

As legal scholar Gerald S. Dickinson notes, “The Great Wall of Trump could leave hundreds of Cokings and Kelos at risk of losing their property” — vastly more than in *Kelo*. They would lose their land to build a structure that is not justified by any genuine security crisis, is likely to cost more than \$20 billion in taxpayer money and probably would not significantly reduce undocumented immigration. Even seizing land for feral cats seems a better deal than that.

Mr. COHEN. I want to thank the members of the panel, our witnesses. Y'all were a great panel. I think in all my—this is my 13th year in Congress—I haven't had a better panel that discussed the issues and probably brought the two sides together. I think we hopefully will have some legislation as a result of this hearing, and so I think it was very productive and very worthwhile.

Ms. Alvarez, you are most appreciated for coming here. Very few people have been amongst such legal talent, and you have been a star here as a citizen telling us about the situation on the border, and I thank you for that. So I thank our witnesses.

Without objection, all members have five legislative days to submit additional written questions for the witnesses and additional materials for the record. And I also want to thank C-SPAN, because this was better than Michael Cohen.

This hearing is adjourned.

[Whereupon, at 2:22 p.m., the subcommittee was adjourned.]

