

NISKANEN C E N T E R

Economic Development, Public Buildings and Emergency Management House Transportation and Infrastructure Committee

“Never Ending Emergencies: An Examination of the National Emergencies Act”

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

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

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

However, the Supreme Court's 1983 decision in *INS v. Chadha*¹ removed that tool when it determined that Congress could not use a so-called “legislative veto” on decisions made pursuant to powers Congress had delegated to the executive. This meant that Congress's built-in check on

¹ 462 U.S. 919 (1983).

national emergency powers was no longer viable and transformed its delegation of emergency powers into something far broader than intended.

Indeed, since *Chadha*, there have been virtually no checks on the president's national emergency powers. Typically, members of both parties complain about perceived abuse of executive powers by the president of a different party, and more recently with emergency powers. Fortunately, there are simple reforms that Congress can institute to ensure a proper balance of power between Congress and the president on national emergencies — and to restore Congress's original intent when it developed a fail-safe to address executive overreach.

The core structure of the reform is straightforward: the president gives clear declarations of the use of delegated authorities, the authorities sunset automatically, and expedited procedures give Congress the ability to extend those authorities in a timely manner. These reforms have broad bicameral and bipartisan support, and would restore the kind of necessary checks that Congress originally enacted in its original 1976 bill.

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

The Structure and Context of the National Emergencies Act of 1976

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

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

By the mid-1970s, there were well-established frameworks to enable the executive branch to make flexible decisions, ensure that Congress was informed, and empower Congress to disagree

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

with certain actions. The NEA, along with statutes regarding war powers and arms sales, employed just one of several different forms of legislative veto. These bills were the strongest, requiring concurrent action by both chambers of Congress. There were also single-chamber vetoes and even veto actions taken by the chairs and ranking members of committees.

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

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

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

How the Executive Branch Gained Power After *Chadha*

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

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

Under the statutes where Congress required a concurrent resolution—namely for the NEA, War Powers Resolution, and Arms Export Control Act—Congress modified the statute to require a joint resolution. The difference, of course, is that the president would have to sign a joint resolution of termination of his action or his veto would need to be overruled. The threshold for Congress exerting its will over a president who disagreed went from a simple majority to a

³ Immigr. & Nat'y Act § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).

⁴ Cong. Budget & Impoundment Control Act of 1974 §§ 1012-13, 31 U.S.C. §§ 1402-03 (1974).

⁵ *Id.* § 1012(b), 2 U.S.C. § 683(b); *id.* § 1013(b), 31 U.S.C. § 1403(b) (1974).

two-thirds supermajority in both chambers, effectively neutering Congress's ability to push-back against executive action.

Some informal checks on executive overreach still remained. After *Chadha*, some agencies voluntarily adopted policies or even regulations to follow the previous procedures if they didn't require a full body of Congress to act, merely a full committee or the chair or ranking member of a committee. For example, a 2021 Congressional Research Service report on Department of Defense (DOD) transfer and reprogramming authorities noted:

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

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

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

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

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

Congress has made particular progress on the national emergency front in two ways: it has started to exercise Congressional review of national emergencies and worked towards a bipartisan consensus for reforms.

⁶ Brendan McGarry, Cong. Rsch. Serv., IF11243, *Defense Primer: DOD Transfer and Reprogramming Authorities 2* (2021), <https://sgp.fas.org/crs/natsec/IF11243.pdf>.

⁷ *Id.* (emphasis omitted).

Congress has started to review emergencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reforms to the National Emergency Structure and Beyond

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

I believe that the American Bar Association was correct in telling the Senate Judiciary Committee that sunset legislation “is an idea whose time has come, gone, and [in light of the *Chadha* decision] returned.”¹⁵

Sen. Biden actually proposed a reform that sunset certain authorities in S.2384, the Arms Export Reform Act of 1986.¹⁶ Sen. Chuck Grassley was an original cosponsor.

And months after the *Chadha* decision, then First Circuit Judge Stephen Breyer suggested a “special fast track for special confirmatory laws”—in other words, creating expedited procedures to approve or confirm executive branch actions.¹⁷ Perhaps the most detailed proposal was from John Hart Ely, a professor of constitutional law at Harvard. In his 1993 book *War and Responsibility*, Ely laid out detailed procedures for the legislative and executive branches around

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

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

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

war powers.¹⁸ Proposed reforms to the NEA are a somewhat stripped down version of what Ely proposes, as emergencies don't implicate the kinds of Article II powers that war powers do.

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

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

That is, the core of any reform is the “sunset” that then-Sen. Biden proposed alongside the “fast track ... confirmatory law” that Breyer proposed—with some reporting added so that Congress can have the appropriate information to act quickly on underlying executive action and follow its implementation.

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

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

- In February 2019, a House Judiciary Subcommittee held a hearing on this subject and showed the urgent need for reforms.¹⁹
- A number of bills offering relatively similar fixes to the national emergency situation were introduced, including the bipartisan Guarding Congressional Authority Act (H.R.1410),²⁰ the Limiting Emergency Powers Act (H.R.1720), and a bicameral bill, the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act (ARTICLE ONE) Act (H.R.1755 and S.764). The ARTICLE ONE Act became the basis for subsequent legislating. It did the following:
 - Automatically sunsetted a national emergency declaration after 30 days. It also sunsetted national emergencies after one year.

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

¹⁹ *The National Emergencies Act of 1976: Hearing Before the Subcomm. on the Const., Civ. Rts., and Civ. Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019), <https://tinyurl.com/3v927mwx>.

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

- Required a “joint resolution of approval” to extend the emergencies after the sunset.
- Added some reporting requirements about authorities, monies spent, and similar issues.
- In July 2019, the Senate Homeland Security and Governmental Affairs Committee (HSGAC) held a markup on the ARTICLE ONE Act and reported it out of committee on an 11-2 vote, with all of the Democrats voting in favor.²¹ The most important substantive change was removing international economic emergencies under the International Economic Emergency Powers Act (IEEPA) from the reform. This is primarily because many of our international sanctions, such as those now being imposed nearly daily on Russia, are issued under IEEPA.
- In October 2019, 15 Senators, comprising 9 Republicans and 6 Democrats, asked leadership for floor time to move forward on this legislation.²²
- In early 2020, House and Senate Democratic members of the Budget and Appropriations Committees introduced the Congressional Power of the Purse Act (CPPA).²³ This legislation included the NEA reforms that had been approved by HSGAC the preceding year with some small technical improvements and the addition of House expedited procedures. (The CPPA was also included as Title V of the Protecting Our Democracy Act.²⁴)
- The HSGAC bill was offered as an amendment to the 2020 National Defense Authorization Act in the Senate with bipartisan support, including from Sens. Portman, Peters, Leahy, Lee, Udall, Toomey, Cornyn, and Johnson.²⁵ It did not receive a vote.
- In 2021, the ARTICLE ONE Act was included in an omnibus national security reform package called the National Security Reforms and Accountability Act (H.R.5410)²⁶ in the House, led by Chairman McGovern and Rep. Peter Meijer. In the Senate, Sens. Murphy

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

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

²³ Cong. Power of the Purse Act, H.R. 6628, 116th Cong. (2020), <https://tinyurl.com/52me9ptm>; see Staff of H. Comm. on the Budget, 116th Cong., *Section-by-Section Analysis: Congressional Power of the Purse Act* (2020), <https://tinyurl.com/4ja2zmz8> (noting that CPPA § 301 “provides that, with the exception of emergencies under the International Emergency Economic Powers Act (IEEPA), an emergency declared by the President shall automatically cease after 30 days unless Congress expressly approves the declaration. This will require both Houses affirmatively to approve of an emergency, flipping the current default that resulted from the Supreme Court’s decision in *INS v. Chadha* in which both Houses must affirmatively disapprove of an emergency with sufficient votes to override a veto. This section also provides that individual statutory emergency authorities associated with a non-IEEPA emergency declaration shall cease unless approved by Congress during the 30-day period, even if Congress approves the underlying declaration.”).

²⁴ Protecting Our Democracy Act, H.R. 8363, 116th Cong., tit. V (2019), <https://tinyurl.com/ykvkr58f>.

²⁵ S. Amdt. 2477 to S. Amdt. 2301 to Nat’l Def. Authorization Act for Fiscal Year 2021, S. 4049, 116th Cong. (2020), <https://tinyurl.com/2p842ksf>.

²⁶ Press Release, Rep. Jim McGovern, McGovern, Meijer Lead Introduction of Sweeping New Legislation to Reassert Congressional Power Over National Security (Sept. 30, 2021), <https://tinyurl.com/54z5zpyj> (noting that “[t]heir bipartisan bill aims to recalibrate the balance of power between the president and congress by reclaiming congressional oversight of arms sales, emergency declarations, and the use of military force”).

and Lee introduced a nearly identical version of that bill as the National Security Powers Act (S.2391).²⁷

- The Protecting Our Democracy Act was re-introduced in October 2021²⁸ A bipartisan amendment offered by Reps. McGovern, Meijer, and DeFazio was adopted to bring the national emergency provisions of the Protecting Our Democracy Act and the National Security Reforms and Accountability Act into closer alignment.²⁹
- In 2022, a House Judiciary Subcommittee held another hearing.³⁰

It's clear that there is a strong bipartisan consensus on this important issue.

Thank you Chairman Perry and Ranking Member Titus for calling this hearing and I urge you and all members to work to translate that support into legislative action and pass national emergency reform this year.

²⁷ Press Release, Sen. Chris Murphy, Murphy, Lee, Sanders Introduce Sweeping, Bipartisan Legislation to Overhaul Congress's Role in National Security (July 20, 2021), <https://tinyurl.com/mw3y9xtt>.

²⁸ Press Release, Rep. Adam Schiff, House Democrats Introduce the Protecting Our Democracy Act to Restore, Strengthen, and Protect Our Democracy (Sept. 21, 2021), <https://tinyurl.com/2p8f5d5x> (noting that NEA reform text in bill “[i]mposes a limit on Presidential declarations of emergencies and any powers triggered by such declarations unless extended by a vote of the Congress”).

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

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