STATEMENT OF

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BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT

HEARING ON

NEVER ENDING EMERGENCIES – AN EXAMINATION OF THE NATIONAL EMERGENCIES ACT

MAY 24, 2023

Introduction

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

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

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

At the same time, we embarked on a set of research projects to examine the authorities governing domestic deployment of the military in emergency situations. This work led to the publication in 2020 of a report on martial law—i.e., the displacement of civilian government by

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

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

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

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

[5] 50 U.S.C. §§ 1701 *et seq.*

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

military authority—in which we concluded that current law would not authorize the imposition of martial law by the president.[7] In 2022, we followed up with a legislative proposal to reform the Insurrection Act,[8] a law that gives the president nearly unchecked discretion to deploy federal troops to suppress civil unrest or to enforce the law when it is being obstructed.

We also expanded our research focus to encompass non-statutory sources of emergency authority, examining the little-known phenomenon of "presidential emergency action documents," or PEADs.[9] The public record on these documents is scant, and the Brennan Center is working to supplement it through Freedom of Information Act requests. The available information, however, gives ample reason for concern about these shadowy claims to emergency power.[10]

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

The powers triggered by a national emergency declaration include authorities that are highly susceptible to abuse. They could be misused to undermine our democracy—and they already have been exploited, by presidents of both parties, to implement long-term policy goals in the face of congressional opposition or inaction. These powers must be subject to meaningful checks against abuse and overreach. In its current form, the NEA makes it far too easy for presidents to declare national emergencies and keep them in place indefinitely—and far too difficult for Congress to terminate them. Congress should amend the NEA to provide that presidential emergency declarations will terminate after 30 days unless approved by Congress, and to require congressional approval for any subsequent renewals of the declaration. Lawmakers have introduced several bills that would implement this basic reform.

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

In addition, Congress should reform the Insurrection Act in a manner that preserves the president's ability to deploy federal forces in crisis situations while establishing safeguards to

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

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

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

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

prevent abusive deployments. The Brennan Center's proposal would more clearly specify the circumstances under which troops may be deployed and the actions authorized during such deployment. It would also establish mechanisms for both congressional approval and judicial review, ensuring that the other branches of government are able to serve their constitutional role as a check on executive power.

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

I. Emergency Powers in the United States: What they Are—and Aren't

Emergency powers have existed in countries around the world for hundreds of years. They are based on a simple premise: Because emergencies are, by definition, unforeseeable and unforeseen, existing laws might not be sufficient to respond to them, and amending the law to provide greater powers might take too long or do damage to principles held sacrosanct in ordinary times. Emergency powers thus give the government—usually, the head of state—a temporary boost in power until the crisis passes or there is time to change the law through normal legislative processes.[11]

Unlike the modern constitutions of most countries,[12] the U.S. Constitution includes no separate regime for emergencies. It does include a handful of specific crisis-response provisions, but these powers are given to Congress, not to the president. Most notably, Congress may suspend the writ of *habeas corpus* "when in Cases of Rebellion or Invasion the public Safety may require it,"[13] and Congress has the power "to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."[14]

Although Article II confers no explicit emergency powers, there are implied powers accompanying some of its express provisions. Most notably, the Commander-in-Chief power entails the authority to defend the United States against sudden attack, even without prior congressional authorization,[15] and to manage the conduct of war. The Supreme Court has also asserted (somewhat controversially) that the president is the "sole organ of the federal government in the field of international relations,"[16] although the scope of this exclusive power in the international-relations field remains unclear.

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[11] *See generally* John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2 (2004): 210; Jules Lobel, "Emergency Power and the Decline of Liberalism," *Yale Law Journal* 98 (1989): 1385.

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

[13] U.S. Const. art. 1, § 9, cl. 2.

[14] U.S. Const. art. 1, § 8, cl. 15.

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

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

Broader claims that the president has inherent constitutional powers to do whatever he considers necessary in an emergency have been soundly rejected by the Supreme Court. The government advanced a version of this theory to justify President Truman's seizure of U.S. steel mills during the Korean War. The Supreme Court invalidated the president's action, and Justice Jackson, in his famous concurrence, observed: "[T]he Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants."[17]

Accordingly, since the founding of the nation, Congress has been the primary source of the president's emergency powers. It has periodically legislated standby authorities that the president may activate when certain types of emergencies occur.[18] These are akin to an advance medical directive; they represent Congress's best guess as to what authorities a president might need in a crisis that is unfolding too quickly for Congress to act in the moment. As such, they can be quite broad in the actions that they allow and in the discretion that they grant.

Several laws give the president or other executive branch officials the power to issue emergency declarations in specified situations, which in turn unlock resources and authorities as provided in the law. Notable examples include the Public Health Service Act[19] and the Stafford Act.[20] In addition to these statutes, each of which constitutes a self-contained grant of emergency authority, the National Emergencies Act (NEA) allows the president to declare a national emergency, which then unlocks more than 130 statutory authorities scattered throughout the U.S. Code. The NEA is discussed in detail in Part II of this testimony.

Finally, many laws that are available without an emergency declaration are properly viewed as emergency powers, because they confer extraordinary authorities that are clearly intended for use in extraordinary situations. A prime example of this type of "pseudo-emergency power" is the Insurrection Act,[21] one portion of which allows the president to deploy military forces domestically to suppress insurrections, domestic violence, and any "unlawful combination" or "conspiracy" that "opposes or obstructs" the execution of the law.[22] Similarly, multiple statutes allow the president to take certain actions—or set aside otherwise applicable limits on presidential action—when necessary for "national security."[23]

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[17] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) (emphasis in original).
[18] *See* Harold C. Relyea, Congressional Research Service, *National Emergency Powers*, report no. 98-505 (2007), 5, https://fas.org/sgp/crs/natsec/98-505.pdf.
[19] Pub. L. 78-410 (1944) (codified at 42 U.S.C. ch. 6A §§ 201 *et seq.*).
[20] Pub. L. 100-707 (1988) (codified at 42 U.S.C. ch. 68 §§ 5121 *et seq*.).
[21] 10 U.S.C. §251-55 (2018). For information about the Insurrection Act and its invocations throughout U.S. history, *see* Joseph Nunn, "The Insurrection Act Explained," Brennan Center for Justice, April 21, 2022, https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained; Joseph Nunn and Elizabeth Goitein, "Guide to Invocations of the Insurrection Act," Brennan Center for Justice, April 25, 2022, https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act.
[22] 10 U.S.C. §253 (2018).
[23] Section 232 of the Trade Expansion Act of 1962, for instance, allows the President to impose restrictions on certain imports when the Department of Commerce determines that the product "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. §1862.

Critically, none of these powers allows the president to make law in his own right—i.e., to create the alternative set of rules that will govern his actions. Under the statutory emergency powers regime, the president is strictly limited to the powers that Congress has granted to him in advance. The will of Congress thus remains the touchstone during emergencies as in other times. This scheme preserves the constitutional separation of powers, in contrast to some other countries whose constitutions allow the head of state to dissolve the legislature or take over its functions during times of emergency.[24]

II. The Origin and Purpose of the National Emergencies Act

Although statutory emergency powers have existed since the country's founding, the process by which presidents avail themselves of such powers has evolved over time. The current system for national emergencies—in which the president declares a national emergency, and the declaration unlocks statutory powers that would otherwise lie dormant—dates back to President Woodrow Wilson.[25] It developed organically, and for several decades there was no single law that governed the process. Presidents did not have to identify what powers they would invoke or keep Congress informed of their actions, and states of emergency could last indefinitely.

In the 1970s, several scandals involving executive branch overreach—including Watergate, the bombing of Cambodia, and domestic spying by the CIA—prompted Congress to take a hard look at executive power, and to enact several laws aimed at reasserting Congress's role as a coequal branch of government and a check on executive authority.[26] It was in this context that a special Senate committee was formed to examine presidential use of emergency powers.

The immediate impetus for the committee's formation was Republican Senator Charles Mathias's discovery that an emergency declaration issued in 1950, at the start of the Korean War, was still in place and was being used to prosecute the war in Vietnam. On closer examination, the committee learned that four clearly outdated states of emergency were still in effect, giving the president access to literally hundreds of statutory emergency powers. These included powers "to seize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens."[27]

The committee's work culminated in the introduction and passage of the National Emergencies Act of 1976.[28] The clear purpose of the law, evident in every facet of the legislative history, was to place limits on presidential use of emergency powers. As summarized by the committee in urging passage of the Act:

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[24] *See, e.g.*, Constitution of the Republic of Ecuador, 2015, ch. 3, § 1, art. 148.
[25] *See* Relyea, *National Emergency Powers*, 7.
[26] *See generally* Thomas E. Cronin, "A Resurgent Congress and the Imperial Presidency," *Political Science Quarterly* 95, no. 2 (1980): 209-37.
[27] S. Comm. On Government Operations and the Spec. Comm. On National Emergencies and Delegated Emergency Powers, *The National Emergencies Act (Pub. L. 94-412) Source Book: Legislative History, Text, and Other Documents* 20 (1976) (hereinafter "Spec. Comm. On National Emergencies Source Book").
[28] National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

> 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.[29]

The law employed several mechanisms to this end. It required the president to publish declarations of national emergency in the Federal Register;[30] to specify the powers he intended to invoke;[31] and to report to Congress every six months on expenditures related to emergency powers.[32] It provided that states of emergency would terminate after a year unless renewed by the president.[33] Most important, it *allowed* Congress to terminate states of emergency at any time through a concurrent resolution (a so-called "legislative veto" that would take effect without the president's signature),[34] and it *required* Congress to meet every six months while an emergency declaration was in effect to "consider a vote" on whether to end the emergency.[35]

As enacted, the law did not include a definition of "national emergency." Critically, however, this omission was not intended as a grant of unlimited discretion. Under an earlier draft of the legislation, the president was authorized to declare a national emergency "[i]n the event the President finds that a proclamation of a national emergency is essential to the preservation, protection and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States."[36] One committee report noted that "[t]he definition of an emergency has been deliberately cast in broad terms that makes it clear that a proclamation of a state of national emergency requires a grave national crisis."[37]

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

> [F]ollowing consultations with several constitutional law experts, the committee concluded that section 201(a) is overly broad, and might be construed to delegate additional authority to the President with respect to declarations of national emergency. In the judgment of the committee, the language of this provision was unclear and ambiguous and might have been construed to confer upon the

[29] Spec. Comm. On National Emergencies Source Book, 50.
[30] National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (codified at 50 U.S.C. § 1621).
[31] *Id.* § 301 (codified at 50 U.S.C. § 1631).
[32] *Id.* § 401(c) (codified at 50 U.S.C. § 1641(c)).
[33] *Id.* § 202(d) (codified at 50 U.S.C. § 1622(d)).
[34] *Id.* § 202 (codified as amended at 50 U.S.C. § 1622).
[35] *Id.* § 202(b) (codified at 50 U.S.C. § 1622(b)).
[36] S. 977, 94th Cong. § 201(a) (1975).
[37] Spec. Comm. On National Emergencies Source Book, 96.

> President statutory authority to declare national emergencies, other than that which he now has through various statutory delegations.
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> The Committee amendment clarifies and narrows this language. The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.[38]

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

III. National Emergencies from 1979 to the Present

The National Emergencies Act has not served as the strong check on executive action that Congress intended. The requirements that the president publish a declaration of national emergency in the Federal Register, identify publicly the powers he intends to use, and report to Congress on emergency-related expenditures have provided a modicum of transparency. It appears, however, that the executive branch stopped submitting the require expenditure reports twenty years ago.[39] And other key provisions of the law have proven toothless.

As noted, the decision not to define "national emergency," although intended to ensure the Act did not result in an expansion presidential authority, in practice meant there were no clearly articulated limits on the exercise of the president's discretion. In addition, renewal of emergencies after one year, intended to be the exception, has become the default. Most of the emergencies declared since the National Emergencies Act was passed are still in effect. The average length of emergencies has been close to a decade, with 29 emergencies lasting even longer. The longest-running state of emergency was issued by President Jimmy Carter in 1979 in response to the Iranian hostage crisis and remains in place today.[40]

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[38] S. Comm. On Gov. Operations, *Report to Accompany H.R. 3884*, S. Rep. No. 94-1168, 3 (1976) (reprinted in Spec. Comm. On National Emergencies Source Book, 292).
[39] *See* Gregory Korte, "A permanent emergency: Trump becomes third president to renew extraordinary post-9/11 powers," *USA Today*, September 14, 2017, https://www.usatoday.com/story/news/politics/2017/09/14/permanent-emergency-trump-becomes-third-president-renew-extraordinary-post-9-11-powers/661966001/.
[40] *See* "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 11, 2023, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.

Perhaps most significantly, Congress has not exercised its intended role as a check on presidential power. In 1983, the Supreme Court ruled that concurrent resolutions are unconstitutional.[41] Congress's solution was to substitute a joint resolution as the mechanism for terminating emergencies.[42] Like any other legislation, a joint resolution must be signed into law by the president. If the president vetoes the resolution, Congress can override the veto only with a two-thirds vote by both houses. This change greatly diluted the role of Congress as envisioned in the original Act.

Moreover, until recently, Congress demonstrated little interest in exercising the powers it gave itself. The Act requires Congress to meet every six months while an emergency is in place to consider a vote on whether to end the emergency. States of emergency have been in place throughout the 45 years the law has been in effect, which means Congress should have met 90 times to review existing states of emergency. Before 2019, however, only one resolution to end a state of emergency had ever been introduced, and the emergency declaration at issue was revoked before Congress could vote on it.[43]

After President Trump declared a national emergency in February 2019 to secure funding for constructing a wall along the southern border, Congress twice voted to terminate the declaration.[44] President Trump vetoed the resolution both times,[45] however, and Congress was unable to muster the two-thirds majority necessary to override the veto.[46] In March of this year, Congress voted to terminate the national emergency declaration regarding the COVID-19 pandemic.[47] President Biden, who had already pledged to end the declaration in May, signed the bill into law;[48] had he issued a veto, it is unlikely the House would have voted to override it.[49]

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

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[41] *See* INS v. Chadha, 462 U.S. 919, 954-55 (1983).
[42] *See* 50 U.S.C. § 1622(a)(1).
[43] *See* Tamara Keith, "If Trump Declares an Emergency to Build the Wall, Congress Can Block Him," *NPR,* February 11, 2019, https://www.npr.org/2019/02/11/693128901/if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him.
[44] H.J. Res. 46, 116th Cong. (Mar. 2019); S.J. Res. 54, 116th Cong. (Sep. 2019).
[45] Donald Trump, "Veto Message to the House of Representatives for H.J. Res. 46," March 15, 2019, https://trumpwhitehouse.archives.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/; Donald Trump, "S.J. Res. 54 Veto Message," October 15, 2019, https://trumpwhitehouse.archives.gov/presidential-actions/s-j-res-54-veto-message/.
[46] H.J. Res. 46, 116th Cong. (override failed in House, Mar. 26, 2019); S.J. Res. 54, 116th Cong. (override failed in Senate, Oct. 17, 2019).
[47] H.J. Res. 7, 118th Cong. (2023).
[48] White House, "Bill Signed: H.J. Res. 7," April 10, 2023, https://www.whitehouse.gov/briefing-room/legislation/2023/04/10/bill-signed-h-j-res-7/.
[49] The vote in the House was 220-210, which falls well short of the two-thirds majority necessary to override a veto. *See* Ben Leonard, "House votes to end Covid public health emergency," *Politico*, January 31, 2023, https://www.politico.com/news/2023/01/31/house-end-covid-public-health-emergency-00080507.

their use of statutory emergency powers, and there have been few clear misuses of the authority to declare national emergencies.

It might seem odd to describe presidential use of emergency powers as restrained, given that 76 states of national emergency have been declared in a 45-year period, 41 of which are in effect today. Sixty-nine of these declarations, however, were issued for the sole or primary purpose of imposing economic sanctions on foreign actors under the International Emergency Economic Powers Act (IEEPA) and related sanctions laws.[50] These declarations must be considered separately.

IEEPA is, in many ways, *sui generis*. Congress enacted it in 1977 to limit the powers conferred by the 1917 Trading With the Enemy Act (TWEA). It was Congress's sense that the TWEA, which gave presidents broad authority to "investigate, regulate . . . prevent or prohibit . . . transactions" in times of war or declared emergency,[51] had been improperly used to regulate domestic economic activity during peacetime. IEEPA thus limited the use of TWEA to wartime, and created a new framework for peacetime emergencies.[52] Under that framework, presidents could declare a national emergency based on an "unusual and extraordinary threat" to the U.S. national security, foreign policy, or economy "which has its source in whole or substantial part outside the United States."[53] The president could then authorize a range of economic actions to address the foreign threat.

Despite being tied to the mechanism of national emergency declarations, and despite the requirement of an "unusual and extraordinary threat," IEEPA has been used almost from the outset as a standard tool of foreign policy. Presidents issue declarations under IEEPA in situations where imposing sanctions on foreign actors would advance U.S. interests, regardless of whether the threat to those interests is truly "extraordinary."[54] IEEPA declarations create sanctions regimes that often become—and are intended to become—semi-permanent in nature. IEEPA thus underlies current U.S. economic policies toward governments or factions in Iran, Sudan, the Balkans, Zimbabwe, Iraq, Syria, Belarus, the Democratic Republic of the Congo, the Central African Republic, Burundi, Lebanon, North Korea, Venezuela, Somalia, Libya, Yemen, and Ukraine.[55]

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

[51] 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)).

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

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

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

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

This routinization of IEEPA use is problematic in many respects. Among other things, it cheapens the currency of national emergencies. When President Obama declared a national emergency to impose sanctions on Venezuela in 2015, finding that "the situation in Venezuela . . . constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States,"[56] Venezuelan president Nicolás Maduro's strong reaction prompted unusual public scrutiny of the declaration. The White House hastened to reassure the public that there was, in fact, no threat to U.S. national security, despite the president's words to the contrary. "[T]he United States does not believe that Venezuela poses some threat to our national security," said Deputy National Security Adviser Ben Rhodes. "We, frankly, just have a framework for how we formalize these executive orders."[57] State Department spokesperson Jen Psaki echoed his remarks: "This is how we describe the process of naming sanctions, and there are 20 to 30 other sanctions programs we have."[58]

Nonetheless, Congress has for decades acquiesced in, and arguably ratified, the use of IEEPA as a substitute for ordinary sanctions legislation. Indeed, there is some evidence that Congress, in passing IEEPA, expected that it would be used to fill gaps in legislative regimes. Presidents had previously invoked a provision of the TWEA to impose controls over certain types of exports when export-control legislation—the Export Administration Act—had lapsed. Congress imported the relevant language from the TWEA into IEEPA, and the legislative history shows that Congress anticipated it could be used in the same way if the Export Administration Act were to lapse again in the future.[59] (That is, in fact, exactly what happened in 1983.[60])

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

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

- Proclamation 6491 (1992)[61] – issued in response to Hurricanes Andrew and Iniki. The declaration was used to suspend minimum wage requirements with respect to reconstruction efforts in areas devastated by the hurricanes.

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[56] Exec. Order No. 13692, 80 Fed. Reg. 127467 (Mar. 8, 2015).
[57] 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/.
[58] Korte, "White House: States of emergency are just formalities."
[59] *See* Joel B. Harris and Jeffrey P. Bialos, "The Strange New World of United States Export Controls Under the International Emergency Powers Act," *Vanderbilt Journal of Transnational Law* 18 (1985): 78-80, 78 n. 16.
[60] Exec. Order No. 12444, 48 Fed. Reg. 48215 (Oct. 14, 1983).
[61] Although the proclamation stated that the hurricanes constituted a "national emergency" and invoked emergency powers, it did not formally declare an emergency under the National Emergencies Act. Accordingly, this proclamation is not included in the Brennan Center's list of national emergency declarations. It is referenced in this testimony to present a complete picture of how emergency powers have been used.

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

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

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

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

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

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

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

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

This is not to say that no misuses have occurred. Setting aside the border wall declaration and the use of emergency powers to forgive student loan debt, which are discussed in Part IV of this testimony, it is questionable whether Iraq's invasion of Kuwait constituted an emergency for the United States that justified invoking emergency military powers. And while Cuba's attack on American aircraft and the attacks of 9/11 constituted real emergencies, it is worrisome that those states of emergency remain in place today. Emergencies, of course, can result in long-term or permanent changes in external conditions necessitating new or different legal authorities. The solution is for Congress to enact the necessary changes in the law—not to permit indefinite emergency rule by the president. The Cuba and 9/11 emergencies have become, in effect,

"permanent emergencies," which is one of the phenomena the National Emergencies Act was designed to prevent.[62]

Among other dangers, "permanent emergencies" increase the likelihood that the declaration will be used for purposes unrelated to the original triggering emergency. The 9/11 state of emergency already has been pressed into service to deal with problems having nothing to do with 9/11. President George W. Bush relied on the 9/11 declaration to call up reservists and implement stop-loss in the Iraq War.[63] In 2017, President Trump relied on the 9/11 declaration to invoke emergency powers to fill a chronic shortage in Air Force pilots.[64]

Still, what is most notable about the record of presidential use of emergency powers (outside the unique context of IEEPA[65]) is what has *not* happened. Despite the lack of strong limits in National Emergencies Act, presidents generally have not declared national emergencies simply to grant themselves additional powers when convenient. In most cases, they have not renewed emergency declarations indefinitely, but revoked them or allowed them to expire when the threat had passed. And while nothing in the National Emergencies Act would prevent presidents from using emergency declarations to access dozens of special powers unrelated to the emergency at hand, presidents for the most part have not exploited that license. The Brennan Center's research indicates that nearly 70% of the powers available to the president when he invokes a national emergency have never been invoked.[66]

IV. Recent Misuses of Emergency Powers

Despite the norm of presidential reticence when it comes to statutory emergency powers, recent years have seen misuses by presidents of both parties. In particular, and as discussed below, President Trump abused the NEA when he declared a national emergency to secure

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

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

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

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

[66] *See* Elizabeth Goitein, "Trump's Hidden Powers," Brennan Center for Justice, December 5, 2018, https://www.brennancenter.org/blog/trump-hidden-powers; *see also* "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated February 8, 2023, https://www.brennancenter.org/analysis/emergency-powers.

funding for the border wall, while President Biden improperly deployed emergency powers to implement student loan debt forgiveness.

A. The Border Wall "Emergency"

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

First, the conditions at the border in February 2019 did not meet any common-sense definition of an emergency. Although Congress did not include a definition of "national emergency" in the National Emergencies Act, the word "emergency" is not meaningless. A quick sampling of prominent English-language dictionaries reveals some common elements. Merriam-Webster, for instance, defines "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action"[67]; the Oxford-English dictionary similarly defines it as "[a] serious, unexpected, and often dangerous situation requiring immediate action."[68]

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

It is possible to view unlawful immigration at the southern border as a significant problem and still acknowledge the simple reality that in February 2019, it had not taken an unexpected turn for the worse. Official government data leave no doubt on that point. At the time, illegal border crossings had been steadily declining since reaching a high of 1.64 million in 2000. In 2017, they reached their lowest point (303,916) in 40 years; they remained close to that historic low (396,579), and well within the fluctuation range for the preceding several years, in 2018.[69] The only change in circumstances the president was able to identify in his proclamation was a significant increase in families seeking asylum at the border.[70] This change, however, was not evidence of "unlawful migration"—the crisis identified in the proclamation—as these families were seeking admission to the United States through lawful means.

Moreover, it was clear from President Trump's own words and actions that the situation at the southern border did not require "immediate action." For the first two years of his administration, it apparently did not occur to the president to consider illegal border crossings a

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[67] Merriam-Webster, s.v. "emergency," accessed May 18, 2023, https://www.merriam-webster.com/dictionary/emergency?src=search-dict-hed.
[68] *Oxford English Dictionary*, s.v. "emergency," accessed May 18, 2023, https://en.oxforddictionaries.com/definition/emergency.
[69] *See* Lori Robertson, "Illegal Immigration Statistics," FactCheck.Org, last updated June 7, 2019, https://www.factcheck.org/2018/06/illegal-immigration-statistics/; U.S. Border Patrol, "Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year," accessed May 18, 2023, https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf.
[70] *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (February 15, 2019).

national emergency. He first dangled the idea that he might declare a national emergency in early January 2019.[71] Yet he waited a full six weeks before declaring the emergency. When he announced the declaration, he explicitly stated that quick action was not a necessity in this case, just a personal preference: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster."[72]

Even if illegal border crossings had spiked to an all-time high, President Trump's declaration would have been an abuse of authority. That's because President Trump sought funding from Congress to build a wall along the southern border, and Congress expressly refused to provide it. Indeed, Congress voted repeatedly not to give the president the authority and funds that he requested.[73] The president was thus invoking emergency powers to thwart the express will of Congress. President Trump did not try to hide this fact; in the weeks leading up to the declaration, he repeatedly stated that he would use emergency powers only if Congress refused to give him what he wanted.[74]

Although President Trump was the first president to declare a non-existent emergency to evade Congress's express will,[75] he was not the first to use emergency powers to bypass

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

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

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

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

[75] President Reagan issued a national emergency declaration in 1983, which he used to continue certain export controls under IEEPA after a statute authorizing such controls had lapsed. *See* Exec. Order No. 12444, 48 Fed. Reg.

Congress. Recent research by the Brennan Center uncovered an incident in which President Obama used emergency powers, albeit on a much smaller scale, to expand an overseas naval facility after Congress appropriated funds for the project but simultaneously withheld authorization. President Obama did not concoct a new national emergency for this purpose but relied on the 9/11 emergency proclamation.[76]

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

If Congress *does* have time to respond, there is no justification for bypassing the ordinary legislative process. (In the case of the border wall declaration, the president purposefully and explicitly gave Congress time to act.) And if Congress's response is to vote against the very action that the president seeks to take, that expression of Congress's will should control. Relying on emergency powers to move forward in such a case is like a doctor relying on advance medical

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48215 (October 14, 1983). As noted above, however, the legislative history of IEEPA indicates Congress's awareness that presidents would be able to use IEEPA for that very purpose. Importantly, that was not a case in which Congress voted to deny the president authority or funding for the very action he then took.

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

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

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

The abuse was particularly egregious in the case of the border wall declaration because the Constitution unambiguously prohibits spending that Congress has not approved. Article I states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[78] The president thus invoked emergency powers, not just to get around the will of Congress in general, but to evade an express limitation in the Constitution.

Even this clear abuse, however, proved extremely difficult to stem. Several lawsuits were brought. Some plaintiffs struggled to establish standing.[79] Judges who sided with the plaintiffs stayed their own rulings (or had their rulings stayed by appellate courts) pending appeal.[80] Overall, courts were unwilling to look behind the designation of a "national emergency," focusing instead on the applicability of the particular emergency power the president invoked—10 U.S.C. § 2808, which authorizes emergency reallocation of funding only for "military construction" projects—and on a provision of the 2019 Consolidated Appropriations Act that expressly forbade changes in the funding of projects unless the changes were approved in an appropriations act.[81] And the Supreme Court vacated the rulings against the Trump administration after President Biden terminated the emergency declaration and stopped construction of the border wall.[82]

Congress, too, was unable to assert its will. For the first time since the enactment of the NEA, Congress voted on a resolution to terminate a national emergency declaration.[83] The resolution passed both chambers, with twelve Republican senators crossing party lines to vote for it.[84] President Trump vetoed the resolution, however, and Congress was unable to muster the two-thirds supermajority necessary to override his veto.[85] Six months later, the process repeated itself; a majority of Congress rejected the emergency declaration, yet it stayed in place.[86]

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[77] *See* Elizabeth Goitein, "Trump Is Destroying His Own Case for a National Emergency," *Atlantic*, January 28, 2019, https://www.theatlantic.com/ideas/archive/2019/01/trump-has-no-case-national-emergency/581356/.
[78] U.S. Const. art. I, § 9, cl. 7.
[79] *See, e.g.,* U.S. House of Representatives v. Mnuchin, 379 F.Supp. 3d 8 (D.D.C. 2019).
[80] *See, e.g.,* Sierra Club v. Trump, No. 19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. 2019), *injunction stayed*, Trump v. Sierra Club, 140 S. Ct. 1 (2019); California v. Trump, 407 F.Supp. 3d 869 (N.D. Cal. 2019) (court stayed own injunction); El Paso County v. Trump, 408 F.Supp. 3d 840 (W.D. Texas 2019), *injunction stayed*, El Paso County v. Trump, No. 19-51144 (5th Cir. Jan. 8, 2020).
[81] *See* Pub. L. No. 116-6, div. D, § 739.
[82] *See* Petitioners' Motion to Vacate and Remand, Biden v. Sierra Club, S. Ct. No. 20-138 (2021), *granted*, 594 U.S. ____ (Jul. 2, 2021); Petition for a Writ of Certiorari, Yellen v. House of Representatives, S. Ct. No. 20-1738 (2021), *granted*, 595 U.S. ____ (Oct. 12, 2021) (vacating the lower court's judgment and remanding with instructions to dismiss as moot).
[83] *See supra* note 44 and accompanying text.
[84] *See* John Haltiwanger, "The 12 Senate Republicans who defied Trump and voted to terminate the border wall national emergency," *Business Insider*, March 14, 2019, https://www.businessinsider.com/12-gop-senators-voted-against-trumps-border-wall-national-emergency-2019-3.
[85] *See supra* notes 44-6.
[86] *See supra* notes 44-6.

B. Student Loan Debt Forgiveness

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

Unlike immigration patterns at the southern border in 2019, there can be no question that the onset of the COVID-19 pandemic was a sudden, unforeseen event that justified a declaration of national emergency. President Biden did not issue a national emergency declaration where no emergency existed; indeed, the COVID-19 emergency declaration was issued by President Trump. The crushing burden of student loan debt, however, has been a serious problem for years. Long before COVID-19 struck, Biden had spoken about this issue and his intent to find a solution. In 2015, he advocated for making public colleges free;[89] as a presidential candidate, he unveiled proposals to reform the byzantine system of student-loan repayment and to forgive $10,000 in student loan debt for graduates who devoted five years to national or community service.[90]

To be sure, the pandemic might well have made the problem of student loan debt abruptly and unexpectedly worse, creating a true emergency that required short-term adjustments in loan repayments. Both President Trump and President Biden had previously used the HEROES Act for that more limited purpose. President Trump first deployed the law to eliminate interest accrual and suspend repayments on student loans in March 2020.[91] Congress ratified President Trump's suspension of repayments in its flagship pandemic legislation,[92] and both President Trump and President Biden later extended the moratorium.[93]

At the time President Biden announced his plan to cancel student loan debt, however, the emergency declaration had been in place for nearly two and a half years. COVID was no longer a

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[87] White House, "Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most," August 24, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.
[88] 22 U.S.C. § 1098bb.
[89] *See* Inside Higher Ed, "Biden Backs Free College," October 21, 2015, https://www.insidehighered.com/news/2015/10/22/biden-opting-out-2016-run-backs-four-years-free-public-college.
[90] *See* Bianca Quilantan, "How Biden would make community college free and fix student loans," *Politico*, October 8, 2019, https://www.politico.com/news/2019/10/08/joe-biden-2020-election-community-college-student-loans-plan-041634.
[91] Federal Student Aid, *Fiscal Year 2020 Annual Report*, U.S. Department of Education, November 16, 2020, 38, https://www2.ed.gov/about/reports/annual/2020report/fsa-report.pdf
[92] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, § 3513 (2020).
[93] *See, e.g.,* Federal Student Aid Programs, 85 Fed. Reg. 79856 (Dec. 11, 2020); White House, "Statement by President Biden Extending the Pause on Student Loan Repayment Through August 31, 2022," April 6, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/statement-by-president-biden-extending-the-pause-on-student-loan-repayment-through-august-31st-2022/.

sudden and unexpected circumstance—indeed, there was every indication that it was a "new normal." Moreover, in contrast to the previous moratoriums and postponements, the cancellation of loan balances represented a permanent solution, not a stopgap measure to address the immediate impact of the crisis.

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

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

Like the border wall declaration, President Biden's use of emergency powers generated several lawsuits. While these lawsuits appear to be headed for a more definitive resolution—two are currently pending before the Supreme Court[96]—the outcome is unlikely to shed much light on the appropriate exercise of emergency authority. The main issues before the Court are whether the challengers have standing and whether the so-called "major questions doctrine" precludes the Biden administration's interpretation of the HEROES Act—an issue not specific to emergency powers.[97]

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

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

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

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

[97] That said, if the Court were to apply the "major questions doctrine" in this case, it could have significant implications for emergency powers in general, which are often deliberately written in broad terms to grant presidents maximal discretion. Many of these laws would presumably fail to pass muster under the "major questions doctrine." At the same time, given this Court's extreme deference to the president on matters of national security, it is hard to imagine the Court striking down a president's exercise of emergency powers that expand military or law enforcement authority, no matter how broadly worded the underlying statute. The result could be a system in which emergency powers designed to address the social or economic effects of crises would be neutered while those designed to increase the government's coercive powers would retain their full force.

already pledged to rescind the declaration in May, so the vote was more of a symbolic move than an actual reining in of presidential authority.

V. How—and Why—Congress Must Act

President Trump's border wall declaration created a worrisome precedent. It signaled that presidents can declare emergencies to address *any* problem they consider to be serious, however longstanding, and that they can use those emergency declarations to give themselves powers Congress has expressly withheld. President Biden opened that door a bit wider through his own questionable use of emergency powers.

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

While many of the authorities provided in these 135 provisions are measured and sensible, some seem like the stuff of authoritarian regimes. For example, merely by signing a declaration of national emergency, the president may take over or shut down radio stations;[99] if the president goes further and declares a "threat of war," he may take over or shut down facilities for wire communication—a provision that arguably could allow him to assert control over U.S.-based Internet traffic.[100] Other powers would allow the president or members of his administration to freeze Americans' assets and bank accounts (IEEPA),[101] to exercise broad and unspecified powers over domestic transportation,[102] to detail members of the U.S. armed forces to any country,[103] to prohibit or limit the export of any agricultural commodity[104]—even to suspend the prohibition on government testing of chemical or biological agents on unwitting human subjects.[105]

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[98] *See* Goitein, "Trump's Hidden Powers," Brennan Center for Justice; "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated February 8, 2023, https://www.brennancenter.org/analysis/emergency-powers.
[99] *See* 47 U.S.C. § 606(c).
[100] *See* 47 U.S.C. § 606(d); *see also* Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *Atlantic,* January/February 2019, https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.
[101] *See* 50 U.S.C. §§ 1701 *et seq*.
[102] *See* 49 U.S.C. § 114(g).
[103] *See* 10 U.S.C. § 712(a)(3).
[104] *See* 7 U.S.C. § 5712(c).
[105] *See* 50 U.S.C. § 1515.

Indeed, emergency powers could be deployed to undermine democracy itself. As reported by various outlets in 2022, allies of former President Trump advocated that he invoke a range of emergency powers to overturn the results of the 2020 presidential election. They urged the president to declare a national emergency and invoke IEEPA in order to seize voting machines; to invoke the Insurrection Act; and to declare martial law.[106] For reasons the Brennan Center has laid out, none of these suggestions would have provided a legal basis for overturning the election results.[107] Had President Trump nonetheless implemented these measures, they undoubtedly would have disrupted the transition of power even further, and created even greater chaos and (potentially) violence, than the insurrection of January 6 on its own. Moreover, while there are no emergency powers that allow a president to change the outcome of an election, some of the authorities that become available in a declared national emergency could be used to undermine the fairness of the election itself—e.g., by creating conditions that make it harder for people to vote.[108]

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

A. National Emergencies Act Reform

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

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

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

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

This approach, versions of which are used by many other countries,[109] is more consistent with the core purpose of emergency powers. It would give the president ready access to enhanced authorities when he needs them most—i.e., when the emergency is in progress and Congress has not had time to address it. Once Congress has had time to act, however—and history shows that Congress can act quite swiftly in the face of true emergencies[110]—it should be Congress's decision as to whether emergency authorities are a good fit for the crisis at hand. Critically, that would remove the perverse incentive that exists when the government actor who declares the emergency is the same one who receives additional powers.

A bill featuring this reform, the ARTICLE ONE Act, was reported out of the Senate Homeland Security and Government Affairs Committee in 2019.[111] It received broad bipartisan support: The bill was introduced by Senator Mike Lee (R-Utah) and cosponsored by 18 Republican Senators, yet every Democrat on the committee voted for it, and several Democrats signed a bipartisan letter to Senate party leaders urging them to bring the bill to the floor.[112] Subsequently, versions of the ARTICLE ONE Act were incorporated into two major Democratic reform packages—the Protecting Our Democracy Act (PODA), which was passed by the House in December 2021,[113] and the Congressional Power of the Purse Act (CPPA)[114]—as well as a bipartisan bill to reform national security powers, titled the National Security Powers Act (NSPA) in the Senate[115] and the National Security Reforms and Accountability Act (NSRAA) in the House.[116] All told, 26 sitting Democratic senators and 15 sitting Republican senators have sponsored or cosponsored NEA reform legislation that includes this core change.

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

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

[110] For instance, within weeks of the attacks of 9/11, Congress passed the USA PATRIOT Act, sweeping legislation that ran 342 pages and made changes to more than 15 different laws. Lisa Finnegan Abdolian and Harold Takooshian, "The USA PATRIOT Act: Civil Liberties, the Media, and Public Opinion," *Fordham Urban Law Journal* 30:4 (2003): 1429.

[111] S. Rep. No. 116-159, 116th Cong. (Nov. 2019).

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

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

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

[115] S. 2391, 117th Cong. (2021).

[116] H.R. 5410, 117th Cong. (2021).

temporary powers to effectively become permanent through routine renewals of emergency declarations.

Another provision would place two key limits on which statutory authorities a president may invoke during a declared national emergency. First, it would specify that the authorities invoked must relate to the nature of, and may be used only to address, that emergency. There is no reason why an emergency declaration should give the president access to dozens of powers that are facially irrelevant to the emergency at hand. This state of affairs presents an irresistible temptation to keep emergency declarations in effect as long as possible, as they may be used to address other problems—emergencies or otherwise—that might come up in the future. Second, the added provision would make very clear that emergency powers cannot be used to circumvent Congress. Specifically, it would prohibit the use of emergency powers to take a specific action if Congress, following the events giving rise to the emergency declaration, has withheld authorization or funding for that action.

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

Any of these bills would represent a significant improvement over the status quo, and each would honor the original intent behind the National Emergencies Act by allowing Congress to serve as a meaningful check on the executive branch.

B. IEEPA Reform

As noted above, Congress generally has acquiesced in presidents' use of IEEPA to impose economic sanctions in a wide range of circumstances, including situations that pose no imminent threat to U.S. security. Currently, there are 38 sanctions regimes that rely on IEEPA and that most lawmakers consider uncontroversial.[117] Reflecting that fact, many of the NEA reform bills discussed above include a carveout for national emergency declarations that invoke only IEEPA. In other words, under these bills, IEEPA invocations would not be subject to the requirement of congressional approval within 30 days of the declaration and yearly thereafter.

It would be a mistake, however, to leave IEEPA as-is. IEEPA provides some of the most potent authorities the president possesses in a national emergency. On its face, the law can be used to freeze the U.S.-based assets of nearly anyone, and to prevent people and entities under U.S. jurisdiction from engaging in any financial transactions with that person, as long as the president deems the action necessary to address a foreign threat.[118] Although IEEPA has largely

[117] *See* "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 11, 2023, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.
[118] *See* 50 U.S.C. §§ 1701-02.

been used to impose economic sanctions on hostile foreign actors, such as the government of Iran or international terrorist groups, nothing in the statute limits its application to such entities. President Trump, for instance, used IEEPA to impose sanctions on International Criminal Court staff in response to the Court's investigations of alleged war crimes committed by U.S. and allied personnel.[119]

Indeed, the law can be—and has been—used to target American citizens inside the United States and deny them access to their own property, with nothing resembling due process. After 9/11, for instance, several Muslim American charities and individuals were sanctioned based on suspicions that their activities benefited terrorist groups overseas. The targets were provided no notice of the reason for their designation, let alone the evidence on which the government relied, and were not afforded a hearing with the government. Several charities were forced to shut down without the government ever having to prove its case in court. As for the individuals, they endured several months in a terrifying limbo, unable to pay their bills or hold a job without the government's permission, before the government dropped the sanctions for lack of evidence.[120]

In addition, some sanctions regimes have had devastating impacts on innocent civilian populations overseas. IEEPA contains a humanitarian exemption, but it is relatively narrow, permitting only donations of certain types of goods. Moreover, the law allows presidents to waive the exemption, and they routinely do so. The executive branch has effectively replaced the statute's humanitarian exemption with regime-specific "general licenses" (i.e., licenses available without an individual application) that allow certain transactions for humanitarian purposes. These licenses, however, have proven insufficient. Fearing the dire financial consequences of being found in violation of sanctions, companies and financial institutions invariably "overcomply" and avoid even those transactions that are licensed.[121] There is mounting evidence that U.S. sanctions have significantly exacerbated humanitarian crises in Venezuela,[122] Afghanistan,[123] Iran,[124] and North Korea.[125]

Finally, IEEPA sanctions are marred by a lack of transparency in licensing, leading to the appearance (and perhaps the reality) of corruption. Individuals or companies may apply to the Treasury Department for "specific licenses" enabling them to conduct transactions that would otherwise be barred by sanctions. Such licenses can be highly lucrative and provide a competitive advantage to recipients. Yet there are no regulatory standards for issuing them, and recipients are not publicly identified. Investigative reporting in recent years has uncovered

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

multiple instances of licenses being granted to well-connected applicants, including campaign donors, after members of Congress or high-level executive officials intervened on their behalf.[126]

Congress should undertake reform of IEEPA that addresses the unique considerations it presents. The Brennan Center recommended several changes to the law in its 2021 report, *Checking the President's Sanctions Powers*. Most notably, IEEPA should be amended to build in due process protections, including meaningful notice and judicial review, for Americans who find themselves in sanctions' crosshairs. The law's humanitarian exception should be broadened and the waiver provision narrowed. The Treasury Department should be required to articulate standards for the issuance of specific licenses and make its licensing decisions available to Congress for review. And the role of Congress as a check on executive overreach should be strengthened. If Congress assesses that yearly approval of each individual sanctions regime would be overly burdensome, it should create an alternative approval process in which lawmakers vote on sanctions as a package, and any member may offer an amendment to strip out an individual sanctions regime.[127]

C. Insurrection Act Reform

One particularly dangerous statutory emergency authority falls outside the National Emergencies Act framework: the Insurrection Act. This law—in fact, an amalgamation of laws passed between 1792 and 1874[128]—authorizes the president to deploy the U.S. armed forces domestically and use them to quell civil unrest or enforce the law in a crisis. In this way, it operates as an exception to the Posse Comitatus Act,[129] the law that generally bars federal military personnel from participating in civilian law enforcement.[130]

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

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

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[126] *See* Boyle, *Checking the President's Sanctions Powers*, 16-17.
[127] *See* Boyle, *Checking the President's Sanctions Powers*, 20-24.
[128] *See* Elizabeth Goitein and Joseph Nunn, "An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse," *Journal of National Security Law and Policy* 13 (2023): 362.
[129] 18 U.S.C. § 1835.
[130] *See generally* Joseph Nunn, "The Posse Comitatus Act Explained," Brennan Center for Justice, October 14, 2021, https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained.
[131] *See* U.S. Const. art. I, § 8, cl. 15 (empowering Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").
[132] 10 U.S.C. § 253.

scenario would involve the use of troops to suppress an unpermitted but peaceful protest against a controversial executive order.

In such cases, the Insurrection Act allows the president to respond "by using the militia or the armed forces, or both, *or by any other means*" (emphasis added).[133] This alarming delegation of unlimited power explains why the Oath Keepers and similar groups believed that President Trump would draft them into service by invoking the Insurrection Act on January 6.[134] Congress has defined "militia" to include "all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard."[135] A substantial portion of white supremacist organizations' members would likely meet that definition, and at least in theory, the others could be mobilized under the "any other means" language.

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

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

That is not to say that military intervention in domestic crises is never appropriate. In the late 1950s and early 1960s, for instance, Presidents Dwight D. Eisenhower and John F. Kennedy both invoked the Insurrection Act to enforce federal court orders desegregating schools in the South. Other presidents, however, have used the law to break strikes and subdue labor movements.[139] And in the weeks leading up to January 6, President Trump's allies urged him to invoke the Insurrection Act as part of a strategy to overturn the election results.[140] Indeed, it

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[133] *Id.*
[134] Alan Feuer, "Oath Keepers Leader Sought to Ask Trump to Unleash His Militia," *New York Times*, May 4, 2022, https://www.nytimes.com/2022/05/04/us/politics/oath-keepers-jan-6-riot.html.
[135] 10 U.S.C. § 246.
[136] *See* Goitein and Nunn, "An Army Turned Inward," 363, 365.
[137] *See* Martin v. Mott, 25 U.S. 19, 30 (1827).
[138] *See* Goitein and Nunn, "An Army Turned Inward," 372.
[139] *See* Goitein and Nunn, "An Army Turned Inward," 367.
[140] *See* Jacqueline Alemany, Josh Dawsey, and Tom Hamburger, "Talk of martial law, Insurrection Act draws notice of Jan. 6 committee," *Washington Post*, April 27, 2022, https://www.washingtonpost.com/politics/2022/04/27/talk-martial-law-insurrection-act-draws-notice-jan-6-committee/.

would have been frighteningly easy for President Trump to invoke the law on January 6 to shut down Congress, thus delaying or preventing certification of the vote on the pretext of keeping the peace.

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

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

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

D. Disclosure of Presidential Emergency Action Documents

As noted in Part I of this testimony, the Constitution gives the president no explicit emergency powers. Nonetheless, modern presidents have increasingly claimed that the Constitution provides them with broad inherent powers to act during emergencies in ways that Congress need not authorize and cannot restrict. These radical claims, often set forth in Department of Justice memoranda that are not shared with Congress or the public,[143] find little

[141] *See* Goitein and Nunn, *Statement to the January 6th Committee on Reforming the Insurrection Act*. The proposal was subsequently published as a law review article. *See* Goitein & Nunn, "An Army Turned Inward."
[142] *See* Tim Lau and Joseph Nunn, "Martial Law Explained," Brennan Center for Justice, September 10, 2020, https://www.brennancenter.org/our-work/research-reports/martial-law-explained.
[143] For example, the so-called "torture memos" issued by the Department of Justice's Office of Legal Counsel, which opined that the statutory prohibition on torture could not constrain the president's Article II commander-in-

support in constitutional history[144] and have largely escaped testing in the courts. Yet they may well be at the center of a category of emergency planning tools known as "presidential emergency action documents," or PEADs.

PEADs are executive orders, proclamations, and messages to Congress that are prepared in anticipation of a range of emergency scenarios, ready for the president to sign and put into effect the moment one of those scenarios comes to pass. Created during the Eisenhower administration as part of continuity-of-government plans in the event of a nuclear attack,[145] PEADs have since been expanded for use in other emergency situations where the normal operation of government is impaired.[146] As one government document describes them, they are designed "to implement extraordinary presidential authority in response to extraordinary situations."[147]

PEADs may be the best-kept secret in Washington; none has ever been publicly released or even leaked. Indeed, it appears that they are not even subject to congressional oversight. Although the executive branch is required by law to report even the most sensitive covert military and intelligence operations to at least some members of Congress,[148] there is no such disclosure requirement for PEADs, and no evidence that the documents have ever been shared with relevant congressional committees.

Although PEADs themselves remain hidden from the public eye, various government records have become available over the years that discuss them. Through these records, we know that there were PEADs during the early decades of the Cold War designed to authorize the roundup and detention of "dangerous persons" within the United States; suspend the writ of *habeas corpus* by presidential order; provide for various forms of martial law; issue a general warrant permitting search and seizure of persons and property; establish military areas such as those created during World War II; restrict Americans' ability to travel overseas; and authorize censorship of news reports.[149]

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chief powers, were closely held even within the executive branch and became public only when one of the memos was leaked to the press. *See* Katherine Hawkins, "The Lies Hidden Inside the Torture Report," *Politico*, January 28, 2015, https://www.politico.com/magazine/story/2015/01/torture-report-lies-114693/.

[144] *See* Saikrishna Prakash, "The Imbecilic Executive," *Virginia Law Review* 99, no. 7 (Nov. 2013): 1361-1433; *but cf.* Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006).

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

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

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

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

[149] *See* Elizabeth Goitein and Andrew Boyle, "Trump Has Emergency Powers We Aren't Allowed to Know About," *New York Times*, April 10, 2020, https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html; "Presidential Emergency Action Documents," Brennan Center for Justice, last updated May 26, 2022, https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents.

There is far less public information about the contents of modern PEADs. We do know, however, that there were 56 PEADs in effect as of 2017, and that the Trump administration was engaged in a processing of reviewing them.[150] And last year, the Brennan Center procured the first glimpse into the contents of post-9/11 PEADs when it received 500 pages of records in response to a 2018 Freedom of Information Act request submitted to the George W. Bush Presidential Library. (An additional 6,000 pages of records were withheld in full because they are classified.)

The records pertain to reviews of PEADs that the Bush administration conducted in 2004, 2006, and 2008, with an eye toward refreshing the documents and ensuring that they provided adequate powers to address the threat of terrorism.[151] They reveal the existence of at least one PEAD—and the possible adoption of three additional PEADs—designed to implement the Communications Act, a World War II-era statute that grants the president authority to shut down or seize control of wire communications facilities upon proclamation "that there exists a state or threat of war involving the United States."[152] The Bush administration also appeared to review a preexisting PEAD concerning the suspension of habeas corpus, in light of a June 2008 Supreme Court decision recognizing Guantanamo Bay prisoners' constitutional right to seek judicial review of their detention.[153] (There is no indication that the administration withdrew or cancelled the PEAD.) And the administration at least considered restricting U.S. passports during a crisis, based on a 1978 law that allows the government to curtail international movement based on "war," "armed hostilities," or "imminent danger to the public health or the physical safety of United States travellers."[154]

Advance planning for emergencies is prudent, and there is nothing inherently problematic about drafting orders and directives in advance of foreseeable crises. But emergencies cannot justify unconstitutional measures, and *planning* to violate the Constitution or ignore statutory limitations is a grotesque abuse of power. Moreover, Congress, as an equal partner in matters of national security, has both the prerogative and the obligation to conduct oversight of the executive branch's emergency planning[155]—in part to ensure that the executive branch does not stray beyond the law.

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[150] *See* Commerce, Justice, Science and Related Agencies Appropriations for 2018, Hearing Before a Subcomm. Of the H. Comm. on Appropriations, 115th Cong. 625 (2017) (Department of Justice Justification of the Budget Estimates).

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

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

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

[154] 22 U.S.C. §211a.

[155] *See generally* Vicki Divoll, "The 'Full Access Doctrine': Congress's Constitutional Entitlement to National Security Information from the Executive," *Harvard Journal of Law and Public Policy* 34 (2011): 493. Although the Constitution assigns the president the role of Commander in Chief, *see* U.S. Const. art. 2, § 2, cl. 1, it grants Congress several equally significant powers in the areas of military, national security, and foreign affairs. *See, e.g.,* U.S. Const. art. 1, § 8, cls. 1 (power to "provide for the common Defence"), 11 (power to declare war), 12 (power to raise armies), 13 (power to "maintain a Navy"), 14 (power to regulate the armed forces), 15 (power to "call[] forth the Militia"); art. 2, § 2, cl. 2 (requiring Senate advice and consent for treaties and certain presidential appointments).

In 2020, Senator Ed Markey (D-Mass.) introduced a bill titled "Restraint of Executive in Governing Nation (REIGN) Act" that would require the president to disclose PEADs to the relevant oversight committees in Congress.[156] Versions of the bill were subsequently incorporated into PODA and the NSRAA. This is an extremely modest and tailored solution. Neither the REIGN Act nor PODA requires any disclosure to the public, and while the NSRAA mandates a declassification review, the executive branch retains the authority to decide what information, if any, to declassify. The legislation merely gives Congress the ability to serve its constitutionally-assigned oversight function. Lawmakers also should insist that the president share with Congress any legal analyses underpinning the PEADs. Among other things, such disclosure would enable Congress to correct, through legislation, any executive branch misinterpretations of statutory law.

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

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

Thank you again for this opportunity to testify.

[156] S. 4279, 116th Cong. (2020).