Testimony on:

Never Ending Emergencies – An Examination of the National Emergencies Act

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*The views expressed here are my own and not those of Arnold & Porter Kaye Scholer LLP

Introduction

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

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

Let me discuss each of these briefly in greater detail.

The Conceptual Structure

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

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

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

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[1] National Emergencies Act, 50 U.S.C. § 1601–1651 (1976).
[2] Patrick A. Thronson, *Note: Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. Mich. J. L. Reform 745 (Winter 2013) (quoting S. Rep. No. 94-922, at 1 (1974)).
[3] See J. Reuben Clark Jr., comp., Emergency Legislation Passed Prior to December 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare, Presidential Proclamations and Executive Orders Thereunder, to and Including January 31, 1918, to Which Is Added a Reprint of Analogous Legislation Since 1775 (Washington: Government Publishing Office [GPO], 1918), pp. 201-228.
[4] Edward S. Corwin, The President: Office and Powers, 1787-1957, p. 3.
[5] U.S. Congress, Senate Special Committee on the Termination of the National Emergency, National Emergency, hearings, 93rd Cong., 1st sess., April 11-12, 1973 (Washington: GPO, 1973), p. 279.

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

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

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

The NEA's Origin

It is worth considering how the *National Emergency Act* came to be. The special bipartisan committee which ended up proposing the idea started with much more modest intentions. The 1972 committee, which "was the only congressional committee of its time to have membership comprised of an equal number of Republicans and Democrats,"[9] was intended only to "assess the

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[6] See Brennan Ctr. For Justice, A Guide to Emergency Powers and Their Use (Feb. 13, 2019), https://www.brennancenter.org/sites/default/files/legislation/AGuideToEmergencyPowersAndTheirUse_2.13.19.pdf.
[7] *Ibid*.
[8] *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
[9] Patrick A. Thronson, Note: Toward Comprehensive Reform of America's Emergency Law Regime, 46 U. Mich. J.L. Reform 737, 744 (Winter 2013).

consequences of terminating" a specific emergency, that which was "initially declared by President Truman on the eve of the Korean War in 1950."[10]

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

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

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

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

Recent Interest

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

Though the public controversies around recent emergencies tend to focus on the perceived (il)legitimacy around the declaration itself, as alluded to earlier, the declaration is only the means to exercise the policies which affect individuals. The declaration in a way is a statement about the state of the world, and what follows are the actions which are either appropriate or not. That said, because of the unforeseeable nature of emergencies, Congress should focus in the first

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[10] *Ibid*.
[11] S. Rep. 116-159, at 2 (2019) (quoting Patrick A. Thronson, Note: Toward Comprehensive Reform of America's Emergency Law Regime, 46 U. Mich. J.L. Reform 737, 744 (Winter 2013) and S. Rep. No. 94–922, at 3 (1974)).
[12] S. Rep. No. 94–922, at 1 (1974).
[13] *Supra,* note 11, at 3.

instance on the declaration of an emergency and how to (1) create a presumption of limitation, premised on the idea that emergencies are by definition time-limited in nature, and (2) reassert Congress's active role in determining whether an emergency merits the exercise of extraordinary powers to which it is claiming necessity.

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

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

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

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