

## EMERGENCY POWERS

Congress should

- amend the National Emergencies Act to
  - require affirmative congressional approval for new presidential emergency declarations,
  - provide that, unless authorized via joint resolution, such declarations—and the statutory powers they trigger—expire within 20 days (or a similarly brief period), and
  - limit renewal of authorized emergency declarations to one-year increments and require affirmative approval by Congress for each renewal;
- amend the International Emergency Economic Powers Act (IEEPA) to
  - provide that new IEEPA declarations expire within 90 days without affirmative authorization by Congress,
  - require yearly congressional reapproval of ongoing IEEPA programs,
  - prohibit the use of IEEPA authority to impose tariffs or import quotas,
  - require a warrant based on probable cause before Americans' assets can be frozen under the IEEPA, and
  - require meaningful due process for U.S. persons targeted by IEEPA sanctions; and
- appoint a standing committee in each house to conduct a comprehensive review of presidential emergency authorities and propose repeal or revision of those that are dangerously broad.

Emergency constitutionalism is the worldwide norm: 9 out of 10 countries have constitutions that formally empower their governments to declare national emergencies, specifying the conditions for declaring a “state of exception” to ordinary governance, the officials who can trigger a state of emergency, and the new powers thereby unlocked.

America's Constitution is exceptional in this regard: what crisis authorities the document grants are sparse, and they are vested in Congress. The legislative branch has the power to suspend habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it," and to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." The Constitution gives the president practically nothing in the way of emergency authorities. Aside from command of the militia "when called into the actual Service of the United States," he's vested only with the authority, via Article II, Section 3, to convene Congress on "extraordinary Occasions"—a provision that would only be necessary if he otherwise lacked powers sufficiently broad to deal with any conceivable crisis.

The Framers "knew what emergencies were, knew the pressures they engendered for authoritative action [and] knew too how they afford a ready pretext for usurpation," Justice Robert Jackson observed in his influential concurrence in the 1952 "steel seizure" case. Yet beyond the power to suspend habeas corpus, they declined to provide special powers for emergency rule, fearing that "emergency powers would tend to kindle emergencies."

## **The Normalization of Emergency Rule**

The lack of constitutional warrant for emergency rule hasn't kept America free from the dynamic that Justice Jackson warned against, however. In 1973, a Senate special committee charged with reining in presidential emergency powers declared that "a majority of the people of the United States have lived all of their lives under emergency rule." "There are now in effect four presidentially proclaimed states of national emergency," Senators Frank Church (D-ID) and Charles Mathias (R-MD) marveled: a banking emergency declared by President Franklin Roosevelt in 1933; a 1950 emergency proclamation issued by President Harry Truman during the Korean War; and two more declared by President Richard Nixon to deal with a postal strike and a balance-of-payments crisis. The statutory provisions unlocked by those declarations, Church and Mathias warned, would allow the president to "seize property . . . regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens." The time had come, they insisted, "to restore normalcy to the operations of our Government."

The fruits of the special committee's inquiry included the 1976 National Emergencies Act (NEA), a framework statute aimed at restoring congressional oversight and "returning the United States to normal peacetime processes." Title I of the NEA brought those four emergencies to a close, sunseting the authorities they relied on. Title II of the act imposed procedural strictures

designed to cabin presidential emergency powers. To invoke such powers, the president was required to formally declare a national emergency and specify the statutory provisions he intended to rely on. Emergency declarations would expire after one year unless renewed by the president, but they could be terminated earlier by presidential or congressional action.

Far from achieving its aims, however, the NEA had the unintended effect of normalizing emergency rule. More national emergencies have been declared since its passage than in the decades before it went into effect. In the 1970s, Senator Church and his colleagues considered four concurrent national emergencies appalling and absurd; but by 2022, Americans were living under no fewer than 40 presidential emergencies, including the now four-decades-old declaration related to the Iranian hostage crisis of 1979.

The reforms of the 1970s failed thanks in large part to a 1983 Supreme Court decision that effectively neutered the NEA's mechanism for terminating emergency declarations. As originally structured, the act allowed Congress to terminate presidential emergencies by majority vote via concurrent resolution. In *INS v. Chadha*, the Court struck down such legislative vetoes, holding that attempts to overturn executive action must themselves run the gauntlet of the ordinary legislative process and be presented to the president for signature or veto. In 1985, Congress amended the NEA accordingly; the law now requires termination via joint resolution. The upshot is that presidents now enjoy broad power to wield emergency authority as they please unless and until Congress can assemble a veto-proof supermajority to stop them.

Recent experience with emergency decrees shows how the process works—or fails to work—under the revised NEA. In late 2018, President Donald Trump forced a partial government shutdown by refusing to sign any spending bill that didn't include \$5.6 billion to “build the wall” on the U.S. southern border. On February 15, 2019, he invoked emergency powers to fund the project anyway, Congress be damned. “I didn't need to do this,” the president admitted as he issued the proclamation, “but I'd rather do it much faster.”

The statute Trump triggered, the Military Construction Codification Act of 1982, allows the president to divert funds to “military construction projects” supporting the use of the armed forces in a military emergency. It had been used only twice before—by George H. W. Bush in the run-up to the Gulf War and by George W. Bush after the September 11 attacks—both times in the sorts of circumstances for which it was clearly intended. It seems not to have occurred to any president before Trump that he could use the law to snatch funding for a pet project that Congress had repeatedly refused to support.

Yet that's precisely what President Trump did, and Congress proved powerless to stop him. Broad majorities in the House (248–181) and Senate (53–36)

voted to terminate Trump’s emergency declaration, only to fall short of the constitutional threshold of the two-thirds needed to overturn the president’s veto.

## "Many, Many Things He Could Do without Legislation"

The military construction law President Trump employed to do an end run around the legislature is hardly the broadest or most loosely drawn of the emergency authorities Congress has ceded to the president. Despite the post-Watergate reformers’ best efforts, the U.S. Code today remains honeycombed with overbroad delegations of emergency power to the executive branch. A 2019 Brennan Center report identifies 123 standby statutory powers the president can invoke in a self-declared national emergency, most requiring little more than the president’s signature on the emergency declaration. Some of the powers that can be triggered in that fashion are truly breathtaking, such as a provision of the 1934 Communications Act that could give the president power to seize control of U.S. communications infrastructure if he proclaims that a threat of war exists.

Surprisingly enough, presidential restraint has been a key factor in keeping our emergency powers regime from reaching its full potential for abuse. Of the extraordinary statutory authorities the Brennan report cataloged, nearly 70 percent have apparently never been invoked.

President Trump’s “norm-busting” on emergency powers shows how quickly all that could change. Shortly after he declared the border-wall emergency, Sen. Elizabeth Warren (D-MA) weighed in on Twitter: “Gun violence is an emergency. Climate change is an emergency. . . . Donald Trump’s ridiculous wall is not an emergency.” The progressive senator had a point with regard to Trump’s border-wall proclamation, but she sounded positively beguiled by the other possibilities.

Make no mistake, emergency rule is a *bipartisan* temptation. President Biden made that clear in August 2022, when he announced a scheme to cancel up to \$600 billion in student loan debt using emergency powers.

The plan relies on a post-9/11 statute, the Higher Education Relief Opportunities for Students Act of 2003, principally aimed at providing relief to U.S. soldiers deployed in Iraq and Afghanistan. But the act is loosely worded enough to invite abuse. It allows the secretary of education to “waive or modify” student loan requirements for “affected individuals,” including those who “suffered direct economic hardship as a direct result of a war or other military operation or national emergency.” The administration cites that language and the ongoing COVID-19 pandemic as justification for offering up to \$20,000 in relief for debtors making as much as \$125,000 a year.

In its potential cost to the taxpayer, Biden's student-loan jubilee dwarfs the cost of Trump's border wall. "As a progressive who was deeply disturbed by the Trump administration's abuse of [emergency] power," notes Fordham law professor Jed Shugerman, "it seems too convenient now for progressives to embrace emergency power references by a new president, when we were so troubled a few years ago."

Even so, there may be more progressive "emergencies" to come. Less than a week after President Biden's inauguration, Senate Majority Leader Charles Schumer (D-NY) called on the new president to "declare a climate emergency": there are "many, many things under the emergency powers . . . that he could do without legislation."

Progressives in the legal academy have fleshed out some of the "many things" President Biden could force through by declaring a climate emergency. He could unlock statutory powers allowing him to suspend federal oil leases; "support expansion of battery or electric vehicle production"; shift billions in Pentagon funds to update America's electrical grid; empower the secretary of transportation to impose new restrictions on automobile use; and deploy IEEPA to sanction "climate rogue states" or "companies trafficking in fossil fuels."

## **Weaponizing the International Emergency Economic Powers Act**

Of the many statutory powers a president can invoke in a national emergency, IEEPA offers the most tantalizing possibilities to any individual bent on autocratic rule.

Like the NEA, the International Emergency Economic Powers Act grew out of post-Watergate efforts to limit unilateral presidential power. Congress first amended the previously abused Trading with the Enemy Act (TWEA) so its authorities could be invoked by the president only "during a time of war." Then it passed a new statute, IEEPA, with stronger procedural checks than TWEA included, to give the president power to impose economic sanctions during a peacetime national emergency.

Even so, IEEPA gives the president an imposing array of unilateral powers to deploy against "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States" if he "declares a national emergency with respect to such threat." Moreover, as with national emergencies in general, the 1983 *Chadha* decision frustrated the original scheme for terminating IEEPA emergencies with a simple majority vote. The result is that national emergencies declared under IEEPA persist until the president or a congressional supermajority decides to end them.

Since its passage in 1977, IEEPA has served as an all-purpose statutory tool for economic sanctions, at first directed primarily against foreign governments and then, starting in the 1990s, increasingly deployed against various bad actors abroad, such as terrorists, drug kingpins, and computer hackers.

In the months following the border-wall declaration, President Trump envisioned even more novel possibilities for the statute: he twice threatened to weaponize IEEPA against major U.S. trading partners. In May 2019, the president warned that if Mexico didn't crack down on cross-border migration, he'd use the law to hammer that country (and U.S. consumers) with a series of escalating tariffs on Mexican goods. Then, in August, the president sent the markets into a tailspin by tweeting, "Our great American companies are hereby ordered to immediately start looking for an alternative to China," following up with a statutory citation: "try looking at the Emergency Economic Powers Act of 1977. Case closed!"

Had Trump followed through on those threats, it's far from certain the courts would have stopped him. IEEPA gives the president sweeping powers to block transactions and freeze assets in which any foreign government or foreign national has an interest. Those powers have been used for comprehensive sanctions against countries (such as Iran and Libya) that effectively shut off Americans' ability to do business there. Applying similar restrictions to trade with China would be unprecedented only in the amount of disruption that would ensue. And although the statute wasn't intended for use as a trade-war bludgeon, the president might well get away with using it as one. A Congressional Research Service report published two months before Trump threatened Mexico with IEEPA-based tariff hikes opined that such a use was unlikely but probably permissible.

More troubling still, although IEEPA has so far been used mostly against foreign targets, nothing in the statute bars it from being turned directly against American citizens. Less than two weeks after the 9/11 attacks, President George W. Bush issued an executive order invoking IEEPA and authorizing the Treasury Department to freeze the assets of anyone, including U.S. persons, providing "services" to, or "otherwise associated with," a designated terrorist group.

Added to the target list in November 2001 was naturalized U.S. citizen Garad Jama, who ran a money-wiring business catering to Somali immigrants in Minneapolis. Federal agents raided his office, seized documents, and sealed the room with a sign reading, "All property contained in this building is blocked pursuant to an executive order of the president on Sept. 23 of this year under the authority of the International Emergency Economic Powers Act." They also froze access to Jama's business and personal bank accounts, leaving him unable to pay rent or buy groceries for himself and his family. After "nine

months of hell” and a lawsuit challenging the designation, the government finally took Jama off the list for lack of evidence.

Even so, U.S. persons targeted under IEEPA have had only limited success with constitutional challenges to asset seizures. Federal courts are split on whether freezing assets via the act constitutes a “seizure” under the Fourth Amendment and whether a warrant is required. In two post-9/11 cases, federal courts found due process violations under the Fifth Amendment when Treasury’s Office of Foreign Assets Control denied the plaintiffs any access to the administrative record allegedly justifying the seizures. But as Andrew Boyle of the Brennan Center notes, the governing regulations “to this day include no requirement that OFAC provide any notice to designated U.S. persons of the reasons for their designation.” As one commentator put it, “The IEEPA designation of an American person . . . amounts to total incapacitation, while the designation of an American organization generally amounts to a death sentence.”

That’s a terrifying power, and one that recent history suggests is ripe for abuse. So it’s worth thinking about some nightmare scenarios: how might another norm-busting president wield this weapon against Americans?

The Brennan Center’s Elizabeth Goitein sketched one possible scenario, based on President Trump’s 2018 description of migrant caravans on the southern border as a “national emergency.” Faced with a similar border surge, she suggests, a future president in the Trump mold could decide “that any American inside the U.S. who offers material support to the asylum seekers—or, for that matter, to undocumented immigrants inside the United States—poses ‘an unusual and extraordinary threat’ to national security [under IEEPA], and authorize the Treasury Department to take action against them.”

Nor is there any reason to assume that the potential for abuse cuts in only one direction politically. A norm-busting *progressive* president might look north for inspiration. In early 2022, Canadian Prime Minister Justin Trudeau faced a mass protest against COVID-19 restrictions, in which Canadian truckers obstructed key border crossings and effectively shut down the capital city with their rigs. Instead of simply clearing out the protesters via conventional means, Trudeau invoked emergency powers broad enough to permit the financial “un-personing” of anyone participating in the protests, or even transacting with the protestors, locking targeted individuals out of the modern economy.

Canada’s 1988 Emergencies Act gave the Trudeau government staggering powers to pursue what one analyst termed “the de-banking of individuals” without due process. Deputy Prime Minister and Finance Minister Chrystia Freeland put it starkly in a February 2022 warning to the truckers: “As of today, a bank or other financial service provider will be able to immediately freeze or suspend an account without a court order. . . . We are today serving



notice: if your truck is being used in these protests, your corporate accounts will be frozen. The insurance on your vehicle will be suspended. Send your semi-trailers home.”

As noted above, similarly sweeping powers are available to an American president under IEEPA when he declares a national emergency stemming “in whole or substantial part” from sources outside the United States. Would a thin or pretextual claim of foreign interference or funding of an American protest movement be enough to get past an immediate challenge in the courts? If history is any guide, federal judges will be reluctant to second-guess “the wisdom of the President’s judgment concerning the nature and extent of [the] threat.” Instead of depending on the courts to check the president, Congress should itself bar the door to potential abuse.

## Ending Emergency Rule

Any serious attempt to check the president will have to address the structural deformities of the current emergency powers framework. As previously noted, under the current emergency powers regime, the president enjoys a free hand unless a veto-proof congressional supermajority can be assembled to stop him. To right the balance, what’s needed is a revised NEA that reverses that default setting so that presidential emergencies rapidly expire without affirmative approval from Congress.

A number of reform proposals, starting with Senator Mike Lee’s (R-UT) *Assuring That Robust, Thorough, and Informed Congressional Leadership Is Exercised Over National Emergencies (ARTICLE ONE) Act*, would do just that. Lee’s bill, which passed out of the Senate Homeland Security and Governmental Affairs Committee with 18 Republican cosponsors in 2019, amends the NEA to provide that a declared emergency expires after 30 days “unless and until Congress passes a joint resolution *approving* of the declared emergency.” The *Protecting Our Democracy Act*—a compendium of executive-power reforms that passed the House in December 2021—includes revisions to the NEA modeled on the ARTICLE ONE Act. It would set the time limit for presidential emergency declarations to 20 days before congressional approval is required.

Unfortunately, neither the *Protecting Our Democracy Act* nor the ARTICLE ONE Act adequately addresses IEEPA’s enormous potential for abuse. While the latter bill forbids the president from using the 1977 law “to impose duties or tariff-rate quotas”—as President Trump threatened to do against Mexico and China—it exempts IEEPA emergencies from the approve-or-expire framework otherwise imposed on presidential emergency declarations. They would remain renewable at will by the president unless affirmatively repealed by Congress over the president’s veto.



Any reform effort that exempts IEEPA leaves the vast bulk of emergency authority untouched. Eleven of President Trump's 13 national emergencies were IEEPA-based, and historically, over 90 percent of modern presidential emergency declarations have relied on the 1977 law.

The argument for exempting IEEPA from the approve-or-expire framework is, essentially, that it would demand a lot of fast-tracked congressional votes on fairly uncontroversial declarations like "Blocking Property with Respect to the Situation in Burma." It's true that most uses of IEEPA for traditional sanctions are in no sense "emergencies"; but for that reason, the Brennan Center's Andrew Boyle suggests, "The effect of including IEEPA as an emergency power under the NEA is to normalize the use of emergency powers in nonemergency situations." Instead, he suggests taking IEEPA out of the NEA framework, removing the requirement of a declared emergency to trigger the statute, and writing separate procedural strictures—including an approve-or-expire requirement—into IEEPA itself.

Under Boyle's proposal, new IEEPA declarations would run for 90 days before they'd need a majority vote by Congress to continue. Congressional reapproval would be required on a yearly basis, but to further minimize the legislative burden, all ongoing IEEPA sanctions programs would be packaged for a single vote. Under the revised procedures, "amendments would be considered germane only if they removed particular sanctions programs from the blanket approval"; thus, termination of individual programs would only require a majority vote.

Boyle also proposes several substantive amendments to the statute aimed at protecting the rights of U.S. persons. Before freezing the assets of any person or organization entitled to Fourth Amendment protection, the government should be required to obtain a warrant based on probable cause. Moreover, the law should require that American targets of IEEPA sanctions receive adequate notice of the charges against them and a meaningful opportunity to challenge their designation at an administrative hearing before seeking judicial review.

The reforms outlined here would provide some sorely needed protection against presidential abuse. But Congress can provide added security by pruning out open-ended, and therefore dangerous, delegations of such authority. In a 2019 bill, Senators Rand Paul (R-KY) and Ron Wyden (D-OR) proposed repealing the section of the 1934 Communications Act, discussed earlier, that could be used to seize control of internet and broadcast facilities. But Congress could undertake a more comprehensive review of emergency authorities delegated to the president by appointing standing committees to propose repeal or revision of those that are dangerously broad.

Congress should not rely on the courts—or, still less, on presidential restraint—to safeguard Americans from abuse of the vast authority it has delegated to the president. The “First Branch” has the power, and the responsibility, to reclaim that authority itself.

**Suggested Readings**

Boyle, Andrew. “Checking the President’s Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act.” Brennan Center for Justice, June 10, 2021.

Brennan Center for Justice. “A Guide to Emergency Powers and Their Use.” December 5, 2018.

Pearlstein, Deborah, and Ilya Somin, “State Emergency Power Run Amok,” *Cato Policy Report*, May–June 2019.

Relyea, Harold C. *A Brief History of Emergency Powers in the United States*. Washington: Government Printing Office, 1974. Reprint, Honolulu: University Press of the Pacific, 2005.

Sandberg-Zakian, Eric. “Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons under the International Emergency Economic Powers Act.” *Harvard Journal on Legislation* 48, no. 1 (2011): 95.

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