



Committee on Transportation and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

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Chairman

Rick Larsen  
Ranking Member

Jack Ruddy, Staff Director

Katherine W. Dedrick, Democratic Staff Director

May 19, 2023

**SUMMARY OF SUBJECT MATTER**

**TO:** Members, Subcommittee on Economic Development, Public Buildings, and  
Emergency Management  
**FROM:** Staff, Subcommittee on Economic Development, Public Buildings, and  
Emergency Management  
**RE:** Subcommittee Hearing on “*Never Ending Emergencies – An Examination of the  
National Emergencies Act*”

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**I. PURPOSE**

The Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure will meet on Wednesday, May 24, 2023, at 10:00 a.m. ET in 2167 of the Rayburn House Office Building to receive testimony on “*Never-Ending Emergencies – An Examination of the National Emergencies Act.*” The hearing will provide a background on the intent of the *National Emergencies Act (NEA)* (P.L. 94-412) and examine the Presidential powers made available under an *NEA* declaration to inform whether reforms are needed to improve the oversight and accountability of such powers. At the hearing, Members will receive testimony from subject matter experts: Soren Dayton from the Niskanen Center, Satya Thallam from Arnold & Porter, and Elizabeth Goitein from the Brennan Center for Justice.

**II. BACKGROUND**

**The Different Emergency Statutes**

*Non-NEA Emergencies*

The scope of this hearing is limited to emergency powers made available under the *NEA*. However, it should be noted that Federal law authorizes a number of different types of “emergencies.” There are three places in the United States Code that provide guidelines for different types of non-*NEA* emergencies, which include: public health emergencies, Department of Defense (DOD) peacekeeping efforts to foreign countries and international organizations, and emergencies and major disasters.<sup>1</sup> First, the *Public Health Service Act* (P.L. 78-410) allows the

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<sup>1</sup> See BRENNAN CENTER FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE, (Feb. 8, 2023), available at <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

Secretary of Health and Human Services (HHS) to make an emergency declaration if a disease presents a public health emergency or if there is threat of a significant outbreak of infectious diseases or bioterrorist attacks.<sup>2</sup> Second, the President can direct the drawdown of defense articles from the DOD if “an unforeseen emergency exists which requires immediate military assistance to a foreign country of international organization; and the emergency requirement cannot be met under the authority of the Arms Export Control Act [22 U.S.C. 2751 et seq.] or any other law except this section.”<sup>3</sup>

Third, specifically within the Committee’s jurisdiction, are Emergency and Major Disaster declarations pursuant to the *Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)* (P.L. 100-707, as amended).<sup>4</sup> These provide for Federal assistance and support to states in responding to and recovering from natural and man-made disasters.<sup>5</sup> Under the *Stafford Act*, the Federal Emergency Management Agency (FEMA) is responsible for coordinating and providing supplemental Federal assistance following a *Stafford Act* declaration.<sup>6</sup> This declaration occurs when the President determines “Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”<sup>7</sup>

### **The NEA Distinguished**

Unlike the above authorities, the *NEA* is distinct as a statutory framework intended to provide accountability to additional Presidential emergency powers scattered throughout the United States Code.<sup>8</sup> The *NEA* states, “with respect to acts of Congress authorizing the exercise, during the period of a National emergency or any special or extraordinary power, the President is authorized to declare such an emergency.”<sup>9</sup> Notably, there are no statutory definitions of what type of event qualifies as a National emergency – so the President has discretion to determine if an event qualifies as an emergency, until a co-equal branch of government reviews the National emergency declaration.<sup>10</sup>

During the 94<sup>th</sup> Congress (1975-1976) concern was raised regarding “the continuous nature of invoked emergency authorities and the absence of Congressional review after their activation.”<sup>11</sup> The Senate Special Committee on the Termination of the National Emergency (Special Committee) was created to examine the statutory powers associated with Presidentially

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<sup>2</sup> 42 U.S.C. § 247d.

<sup>3</sup> 22 U.S.C. § 2318 (a)(1).

<sup>4</sup> *Stafford Act*, Pub. L. No. 93-288, 88 Stat. 143.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 42 U.S.C. § 5122.

<sup>8</sup> H. COMM. ON THE JUDICIARY, REP. TO ACCOMPANY H.R. 3884, 94th Cong. (1975) (H. Rept. 94-238).

<sup>9</sup> 50 U.S.C. §§ 1601–1651 [hereinafter *National Emergencies Act*].

<sup>10</sup> See CONG. RSCH. SERV. (LSB10267), DEFINITION OF NAT’L EMERGENCY UNDER THE NAT’L EMERGENCIES ACT, (Mar. 1, 2019), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10267> [hereinafter DEFINITION OF NAT’L EMERGENCY].

<sup>11</sup> See MICHAEL GREENE, CONG. RSCH. SERV. (R46567) NAT’L EMERGENCIES ACT: EXPEDITED PROCEDURES IN THE HOUSE AND SENATE, (Oct. 14, 2020), available at <https://crsreports.congress.gov/product/pdf/R/R46567/2> [hereinafter EXPEDITED PROCEDURES].

declared National emergencies.<sup>12</sup> In particular, the Special Committee was concerned about four existing emergency declarations, including emergencies related to the 1950 conflict in Korea, the Banking Crisis of 1933, the Post Office Strike in 1970, and foreign trade currency restrictions in 1971.<sup>13</sup> As a result, the *NEA* was enacted to terminate the existing National emergencies and create a mechanism for Congressional oversight of future Presidential emergency declarations, including: a framework for expedited procedures to terminate Presidentially declared emergencies, continuous six-month review periods of declarations by Congress, and requirements for emergency spending expenditure reports to be submitted to Congress.<sup>14</sup>

The President's ability to veto Congressional action to terminate a declaration was restricted by the original 1976 law, which only required a concurrent resolution to be passed.<sup>15</sup> Concurrent resolutions do not require the President's signature to be enacted.<sup>16</sup> In 1983, the United States Supreme Court decision in *Immigration and Naturalization Service (INS) v. Chadha*, 462 U.S. 919 (1983), concluded that legislative vetoes are unconstitutional.<sup>17</sup> Thus, in 1985 Congress amended the *NEA* to require a joint resolution requiring signature by the President.<sup>18</sup> This effectively removed Congress's ability to terminate an emergency absent a veto-proof majority or agreement by the President.<sup>19</sup>

## Ongoing Emergency Declarations

Since the enactment of the *NEA* in 1976, there have been 76 National emergency declarations.<sup>20</sup> Of the 76 declarations, 41 declarations are still active and the earliest dates back to a 1979 action to block Iranian Government Property.<sup>21</sup> Notably, only one of the 35 terminated declarations was the result of Congressional action.<sup>22</sup> H. J. Res. 7 (P.L. 118-3) related to the COVID-19 declaration, which was signed into law on April 10, 2023, was the first time Congress effectively exercised its termination power over the President's emergency powers.<sup>23</sup>

## NEA Reforms

In recent years there have been several bills introduced which have sought to reform the *NEA*, but to date, legislation has not been signed into law. On December 9, 2021, the House

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<sup>12</sup> See DEFINITION OF NAT'L EMERGENCY, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> See EXPEDITED PROCEDURES, *supra* note 11.

<sup>15</sup> JENNIFER K. ELSEA, ET. AL., CONG. RSCH. SERV. (R46379), EMERGENCY AUTHORITIES UNDER THE NAT'L EMERGENCIES ACT, STAFFORD ACT, AND PUBLIC HEALTH SERVICE ACT, (July 14, 2020), *available at* <https://crsreports.congress.gov/product/pdf/R/R46379> [hereinafter ELSEA CRS].

<sup>16</sup> *Id.*

<sup>17</sup> ELSEA CRS, *supra* note 15; *see also* INS. V. Chadha, 462 U.S. 919 (1983).

<sup>18</sup> ELSEA CRS, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> See *National Emergencies Act*, *supra* note 9; BRENNAN CENTER FOR JUSTICE, DECLARED NAT'L EMERGENCIES UNDER THE NAT'L EMERGENCIES ACT, (Apr. 10, 2023), *available at* <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [hereinafter DECLARED EMERGENCIES].

<sup>21</sup> See DECLARED EMERGENCIES, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> Pub. L. 118-3, 137 Stat. 6.

passed H.R. 5314, the *Protecting Our Democracy Act*, which included a limitation on Presidential powers under the *NEA*.<sup>24</sup> Additionally, the Senate Committee on Homeland Security and Governmental Affairs Committee marked up S. 764, the *Article One Act*, on June 19, 2019.<sup>25</sup> S. 764 requires Congress to approve each National emergency proclamation.<sup>26</sup> S. 764 would direct that without Congressional approval, the President is prohibited from declaring a different emergency for the same issues in their tenure.<sup>27</sup> It would also terminate each declaration after 30 days unless Congress enacted a joint resolution of approval and would automatically terminate each National emergency after one year unless it is renewed by the President and approved by a joint resolution from Congress.<sup>28</sup> The President would additionally be required to provide evidence of the need for the declaration and periodic updates on the emergency's status.<sup>29</sup>

However, the majority of proposed reforms do not include reforms to the *International Emergency Powers Act (IEEPA)* (P.L. 95-223) – the most commonly used emergency power.<sup>30</sup> *IEEPA* is a statutory power that may be triggered by a declaration under the *NEA*, upon which 65 of the 71 declarations rely.<sup>31</sup> *IEEPA* allows the President to impose economic sanctions on a person or entity when there is an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the National security, foreign policy, or economy of the United States.”<sup>32</sup>

Of the six *NEA* declarations that did not invoke *IEEPA*, three are still active today: regulation of the anchorage and movement of vessels with respect to Cuba, a 9/11 declaration for terrorist attacks, and the regulation of the anchorage and movement of Russian-affiliated vessels to United States ports.<sup>33</sup>

### **III. POTENTIAL FOR PRESIDENTIAL ABUSE OF POWER**

There are over 120 enhanced statutory powers granted to the President under a *NEA* National emergency and an additional 13 powers that become available when Congress declares a National emergency.<sup>34</sup> These emergency powers span across the government, and currently cannot be terminated without a veto-proof super majority.<sup>35</sup> Examples of emergency powers the President may invoke range from removing biological or chemical agents bans for testing such weapons on human subjects; closing borders and expelling foreigners; taking over communication channels as well as production and distribution of goods seized; and determining

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<sup>24</sup> See *Protecting Our Democracy Act*, H.R. 5314, 117th Cong. (2021).

<sup>25</sup> See *Article One Act*, S. 764, 116th Cong. (2019).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> CHRISTOPHER A. CASEY ET. AL., CONG. RSCH. SERV. (R45618), THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE, (Mar. 25, 2022), available at <https://crsreports.congress.gov/product/pdf/R/R45618>.

<sup>31</sup> See Andrew Boyle, *Checking the President's Sanctions Powers*, BRENNAN CENTER FOR JUSTICE, (June 10, 2021), available at <https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers>.

<sup>32</sup> *Id.*

<sup>33</sup> See DECLARED EMERGENCIES, *supra* note 20.

<sup>34</sup> See ELSEA CRS, *supra* note 15.

<sup>35</sup> *Id.*

the government should control the domestic transportation network.<sup>36</sup> While many of these powers have never been exercised, they remain at the President's disposal with little ability by Congress to provide accountability. This hearing is not only intended to examine the purpose for the *NEA*, but also analyze Congressional oversight of Presidential emergency powers and potential solutions to ensure accountability to prevent abuses of power.

**IV. WITNESSES**

**Mr. Soren Dayton**  
Director of Governance  
Niskanen Center

**Mr. Satya Thallam**  
Policy Advisor  
Arnold & Porter

**Ms. Elizabeth Goitein**  
Senior Director, Liberty & National Security Program  
Brennan Center for Justice at New York University School of Law

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<sup>36</sup> See e.g., 50 U.S.C. § 1515; 19 U.S.C. § 1318; 42 U.S.C. § 265; 47 U.S.C. § 606; 19 U.S.C. § 1318; 49 U.S.C. § 114.