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Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on The National Emergencies Act of 1976
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Introduction

Good afternoon, Chairman Nadler, Ranking Member Collins, Chairman Cohen, Ranking Member Johnson, and Members of the Committee. Thank you for calling this important hearing and inviting me to testify.

I am a lifelong Republican and a devoted constitutional conservative. I served in a senior role in the Justice Department as an Assistant Attorney General during President George H.W. Bush's Administration, and have advised in the campaigns and transitions of several Republican Presidents and have been the outside general counsel to the National Republican Senatorial Committee during several election cycles. As a counterpoint, I also was the Acting Attorney General of the United States during the early part of the Clinton Administration. Early in my career, I was an Assistant United States Attorney and, before that, a counter-intelligence officer in the U.S. Air Force.

It is with first allegiance to the country I have served and to the Constitution that has held it together and allowed it to prosper and become an economic leader and bastion of freedom in the world at large that I come here to explain why the President's so-called emergency proclamation presents a dangerous violation of the separation of powers that the Framers correctly intended to the core principle of a viable and effective American Constitution.

Although I believe that the President's policy is flawed and that his proposal as to a border wall is ill considered, I also believe that the Congress unwisely has, over time, surrendered its own powers in its inability to fashion a truly coherent and effective immigration policy and in its passage of laws that ambiguously deal with the Executive. But I testify here today, not as a politician, but in support of a Constitution that is under threat. Indeed, I have supported the Trump Administration enthusiastically with respect to judicial nominations and to its policies that are directed at reducing unnecessary regulatory burdens and the power of the un-elected administrative agencies. These positions might not be popular with some members of this Committee and some of my fellow panelists, but they align with my fundamentally conservative beliefs about the Constitution, the rule of law, and the role of the different branches of government in our constitutional system. My position here also squares with those of many constitutional conservatives including those who have joined with me in the organization known as "Checks and Balances," which is dedicated to promoting the rule of law.

Based on my considered constitutional views, I have joined with the non-profit organizations Protect Democracy and the Niskanen Center, as well as the distinguished constitutional scholar Laurence Tribe and others, on behalf of the County of El Paso, Texas and the Border Network for Human Rights, in filing a lawsuit challenging the President's action. Although I am honored to be part of this legal team representing our clients, pro bono, in standing up for the Constitution, I am here today only to speak on my own behalf and not that of other persons or organizations.

The Constitutional Separation of Powers Gives Congress, not the President, the Power of the Purse

The separation of powers is at the core of our constitutional structure. The Framers understood that if too much power were concentrated in one person or one branch of government, it would inevitably lead to tyranny. The American Revolution was premised on the rejection of the right of a unitary person or body to control all of the affairs of government. And so in crafting the Constitution, while correcting for the flaws in the failed Articles of Confederation, the Framers were keenly aware of the need to limit government and to disperse the powers of government among coordinate branches that, in the event of irreconcilable disagreement, could act as checks and balances amongst one another. As James Madison cautioned in Federalist No. 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[1]

Thus, the Framers created, and the States ratified, a Constitution that grants the Congress, not the Executive, the power to make laws. The President may propose measures to Congress,[2] and he must sign bills for them to go into law,[3] unless his veto is overridden. But otherwise the President's role in our system of checks and balances is to faithfully execute the laws Congress has enacted.[4] It is not to make the laws himself.

The fundamental "check" assigned to the Congress is the exclusive power to decide how the government spends money. The Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[5] And the Spending Clause grants Congress alone the "Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States."[6]

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[1] The Federalist No. 47 (James Madison).
[2] U.S. Const. art. II, § 3.
[3] U.S. Const. art. I, § 7.
[4] U.S. Const. art. II, § 3.
[5] U.S. Const. art. I, § 9, cl. 7.
[6] U.S. Const. art. I, § 8, cl. 1.

As James Madison wrote in The Federalist Papers, "[the] power over the purse may [be] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[7] Indeed, with respect to the matter at hand, this power may be the only real and effective means of restraining the power of the Executive when the two political branches of the government are at loggerheads.

In short, any reasonable notion of the constitutionally fundamental separation of powers must carry with it a necessary limitation on the power of the Executive. If the Executive can declare himself the maker of laws and override the will of Congress on how money is spent, it is an affront on the constitutional structure.

Here, the President proposed to Congress that it enact certain laws and appropriate certain funds for constructing a wall at the Southern border. The American people and their representatives in Congress debated that proposal extensively. Congress considered the President's proposal in great detail. And Congress decided ultimately to restrict the amount of money that could be spent on border barriers and the ways that money could be spent, effectively rejecting the President's proposal.

On February 15, 2019, President Trump signed into law the 2019 consolidated appropriations bill containing those appropriations and restrictions. And yet, on the very same day, he issued an executive Proclamation declaring that he would ignore the laws Congress had passed and spending decisions it had made under our constitutional system and instead usurp the purse by attempting to supersede that which the Congress specifically had appropriated for a stated purpose by redirecting funds appropriated by the Congress other purposes.

The current case is therefore one in which the President is defying Congress. In his famous concurrence in the Youngstown steel seizure case, Justice Robert Jackson put this type of action in the category of disputes in which the Constitution most stringently restrains the power of the Executive. Indeed, there are some striking similarities between the Proclamation and that case. For *Youngstown* also involved the President seeking to deploy military resources for civilian domestic purposes—without the consent of Congress. In that case, Justice Jackson observed that no doctrine could be "more sinister and alarming" than to allow a President to "vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[8] Here, there is not even a "foreign venture" motivating the President; he simply wishes to ignore the will of Congress in carrying out his own civilian domestic policy preferences. What the President has done reflects just the type of

[7] The Federalist No. 58 (James Madison).
[8] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

aggrandizement of all powers in the hands of one person that the Framers feared. And it is why I and so many other conservatives oppose this emergency declaration on constitutional grounds.

The National Emergencies Act Does Not Allow the President to Override Congress on Long-running Policy Disagreements. Neither does the Constitution nor Common Sense.

The constraints of this hearing do not allow wading deeply into the minutiae of the statutes that the President has invoked in his Emergency Proclamation. But I do want to explain briefly why they do not apply here.

As the Committee is aware, the President has purported to act under the National Emergencies Act ("NEA"). Congress enacted the NEA in 1976 out of a widely-shared recognition that Presidents were overusing the powers that Congress had granted them to act quickly in situations where Congress lacked adequate time to respond. The NEA terminated existing emergencies (some of which had persisted for decades) and created a new framework to cabin the President's authority.[9] The NEA's primary purpose was therefore to *prevent* the President from exercising unbounded authority to declare emergencies and to continue states of emergency in perpetuity.

A state of emergency is something that should describe an objectively demonstrable exigency that time doesn't allow for inter-branch resolution, not merely a bothersome situation that not only has persisted for years but is diminishing. That is all the more so when this long-running situation has been the subject of extended congressional debate and action. As Senator Blunt accurately put it, "I don't think that the emergency declaration law was written to deal with things that the President asked the Congress to do, and then the Congress didn't do. It's never been used that way before."[10] Indeed, as I've suggested, the Constitution doesn't allow it.

As George Mason Scalia School of Law Professor Ilya Somin has explained, and as textualists like I am agree, the NEA must be read to give the word "emergency" its ordinary meaning, which requires some sudden sort of crisis. As Somin puts it: "Disagreement between the legislature and the executive is not an emergency. It's a normal part of our system of separation of powers. If the president can't get Congress to pass the laws he wants, that doesn't justify circumventing it by declaring an 'emergency.'"[11]

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[9] 50 U.S.C. § 1601 *et seq*.
[10] *Full Transcript of "Face the Nation" on February 24, 2019*, CBS News (Feb. 24, 2019, 5:36 AM), https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-february-24-2019/.
[11] Ilya Somin, *Why Trump's Emergency Declaration Is Illegal*, Reason Foundation (Feb. 23, 2019, 5:35 PM), https://reason.com/volokh/2019/02/23/why-trumps-emergency-declaration-is-ille.

Any other reading of the term "emergency" in the NEA would threaten to turn the Act into an override on the separation of powers at the core of our Constitution. If the President could wave a magic "emergency" wand to override Congress in any episode of disagreement, it would render all the rest of the Constitution without meaning. The NEA does not give the President any such power.

The Military construction statute does not allow mobilizing the armed forces to fund civilian construction projects

As I have explained, the separation of powers at the core of our constitutional system of government prohibits turning a long-running political debate into an "emergency" in order to override that constitutional system. But there is yet another legal flaw in the Emergency Proclamation. The principal funding statute referenced in the President's Proclamation is 10 U.S.C. § 2808, a provision of the Military Construction Codification Act.[12] This statute, however, does not permit the President to fund border-barrier construction that Congress has not authorized. Instead, it provides a narrow exception to the requirement of congressional authorization for military construction projects. As explained above, an abiding disagreement with Congress is not an "emergency," so this statute is not implicated in the first place. And even were there a bona fide emergency declaration, because the 2019 Consolidated Appropriations Act that the President signed specifically addresses border fencing, section 2808 simply does not apply.

But section 2808 does not authorize border-barrier construction for civilian law enforcement on its own terms. Under the NEA, in the event the President declares war or a national emergency that "requires use of the armed forces," the Secretary of Defense "may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."[13] In other words, the military construction statutes permits construction to support the military in a situation where the military's use is required. It does not permit the president to deploy the military or its construction funds to support civilian law enforcement operations.

The Proclamation does not satisfy either of section 2808's two statutory requirements: first, there is no emergency that "requires use of the armed forces," and second, there are no "military construction projects" or projects "necessary to support such use of the armed forces."

[12] 10 U.S.C. §§ 2801-2885. The White House issued a Fact Sheet alongside the Proclamation referencing two other sources of funds—the Pentagon's counter-drug funds and the Treasury Forfeiture Fund. These also do not permit overriding specific congressional appropriations.
[13] 10 U.S.C. § 2808(a).

As to the first, the Proclamation itself counters the claim that an emergency "requires use of the armed forces." The Proclamation describes criminal law and humanitarian challenges, as well as long-standing civilian problems on the border—but no situation that requires the use of the armed forces.

With respect to the second, the construction of a border wall does not qualify as "military construction" as defined by the statute. Subsection (a) of 10 U.S.C. § 2801 describes "military construction" as a project "carried out with respect to a military installation." And in subsection (c)(4), "military installation" refers to "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." Those criteria are not met here. It reads the statute entirely backwards to say that because a wall will be built using Department of Defense funds, it is "necessary" to support the armed forces. As conservative lawyer and commentator David French put it in the *National Review*, "[a] border wall, by contrast, is a civilian structure to be manned by civilian authorities to perform a civilian mission. The troops would not be creating a military fortification for military use."[14] The Proclamation turns the statute on its head, seeking to mobilize the armed forces to engage in a civilian construction project; not to engage in a construction project necessary to support the mobilization of the armed forces.

Conclusion

Mr. Chairman, I have focused my testimony up to this point on some of the principal constitutional and legal flaws of the Declaration. But I would like for a moment to turn to the substance of what the President is attempting. My previous positions have given me more than a passing view of the nature of border security and the technical means by which it might be achieved. This starts with the assumption that the political branches ultimately fashion a comprehensive and effective immigration policy for the nation. But it follows with an understanding of the impracticability of a largely contiguous border wall and of the under-reliance of surveillance technologies that DARPA began developing in the Vietnam era and that have been refined and significantly improved in recent times. Moreover, it seems clear that attempting to redirect a portion of the defense budget from the purposes for which Congress appropriated it to the President's own political project would, in fact, weaken the national defense. This is not just my view. Now, more than 60 leading former national security officials who have served across Republican and Democratic Administrations take the same view—that redirecting money from defense budget "will undermine U.S. national security and foreign policy interests."[15] I believe that none of these security officials or the former legislators who

[14] David French, *Trump's Emergency Declaration Is Contemptuous of the Rule of Law*, National Review (Feb. 15, 2019), https://bit.ly/2TWwY56.
[15] Ellen Nakashima, *Former Senior National Security Officials Issue Declaration on National Emergency*, Wash. Post (Feb. 25, 2019, 1:31 PM),

similarly oppose the President favors a completely “open border.” Nor do I. However, the expressed views of all of these people, many of whom are traditional conservative Republicans, make it clear that the President cannot justifiably claim that his action is somehow required by national security.

Finally, with respect to policy considerations, I know the Committee may consider legislative reforms to the NEA and other statutes. Given arguable vagueness of some of its language, I recommend it. It is always wise for Congress to revisit and revise legislation. But there should be no doubt that the Constitution, as well as statutory law as currently written, precludes what the President has done in issuing the Proclamation.

Some defenders of the President have argued that Republicans should come together to support the President’s Proclamation. In declining to do so, I harken back to a comment that President George H.W. Bush made to me when I asked him if he had any reservations about my acting as Attorney General in the administration of his successor. He simply stated: “Country comes before party.” I echo that statement today and ask that you and persons of all political persuasions stand behind the Constitution.

At the conclusion of the Constitutional Convention, the 81-year-old Benjamin Franklin was asked what sort of government the delegates had created. He answered famously: "A republic, if you can keep it." This is one of those times when all of us, members of Congress and private citizens alike, must remember how much of the nation’s continued existence as a country free from tyranny depends upon us and what it takes to “keep it.”

Thank you, Mr. Chairman and Members of the Committee.

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https://www.washingtonpost.com/world/national-security/former-senior-national-security-officials-to-issue-declaration-on-national-emergency/2019/02/24/3e4908c6-3859-11e9-a2cd-307b06d0257b_story.html?utm_term=.be8bfd00a566.