

“Examining Potential Reforms of Emergency Powers”

**Testimony Before
House Committee on the Judiciary**

**Subcommittee on the
Constitution, Civil Rights, and Civil Liberties**

Chairman Stephen I. Cohen

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Chairman Cohen, Ranking Member Johnson, and distinguished Members of the Committee:

Thank you for giving me the opportunity to appear before you today.

My name is GianCarlo Canaparo. I am a Senior Legal Fellow in the Meese Center for Legal & Judicial Studies at the Heritage Foundation.¹ I am a scholar of constitutional and administrative law. One of my main areas of study is the separation of powers, and today's topic goes right to the heart of that issue.

The question facing the committee today is: how can Congress regain control over the executive branch's expansive emergency powers? This is a profoundly important question, and there is agreement among scholars on both sides of the political aisle that it needs to be addressed. I agree, for example, with the conclusion of the liberal Brennan Center's *A Guide to Emergency Powers and Their Use* that many of the laws that give emergency powers to the executive branch "appear to be unnecessary and/or outdated" and "subject to abuse."² I likewise share the concerns of the bipartisan Special Committee on the Termination of the National Emergency that emergency powers are a threat to liberty and that Congress ought to vigorously monitor and check them.³ And I agree with Senator Mike Lee who has said that rule by executive emergency order "runs directly counter to the vision of our Founders and undermines the safeguards protecting our freedom."⁴

My testimony today aims to provide you with the constitutional provisions and logic that should guide you as you work towards reining in executive emergency power. To that end, I will provide an overview of the relevant constitutional provisions, discuss past efforts to rein in executive emergency powers, explain the state of judicial precedents on the topic and how they limit the options available to you, and offer several potential solutions for you to consider. Finally, I'll address several recent bills on this topic.

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² *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE, Dec. 5, 2018 (updated Mar. 4, 2022), <https://www.brennancenter.org/media/4976/download> (hereinafter *Guide to Emergency Powers*).

³ REPORT OF THE SPECIAL COMMITTEE ON THE TERMINATION OF THE NATIONAL EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. Rep. No. 93-549, 93d Cong. (1973) (hereinafter REPORT OF THE SPECIAL COMMITTEE).

⁴ Press Release: *Sen. Lee Introduces ARTICLE ONE Act to Reclaim Congressional Power*, Feb. 4, 2021, <https://www.lee.senate.gov/2021/2/sen-lee-introduces-article-one-act-to-reclaim-congressional-power>.

I. OVERVIEW & HISTORY

The Constitution includes no emergency powers clause. This is by design. The Framers, as Justice Robert Jackson once observed, “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.”⁵ Except for the Suspension Clause, which permits Congress to suspend the writ of habeas corpus during rebellion or invasion when public safety requires it, no other provision of the Constitution provides extraordinary powers or procedures during emergencies.⁶ Quite the contrary, many parts of the Constitution expressly contemplate emergencies and yet require the government to address them through the same procedures that it uses for normal business. Consider the following:

1. Even if a foreign army is rampaging across the country, Congress must re-appropriate money for the Army every two years.⁷
2. Before Congress passed a succession law, if both the president and vice-president had died, the executive branch would have been leaderless.⁸
3. Even if the country is at war, the President cannot conclude a peace treaty unless two-thirds of the Senate approve.⁹
4. If there are vacancies in high-level executive positions, no matter how important, they must be approved by the Senate, and even if the Senate is in recess, a temporary appointment will expire if not approved during the Senate’s next session.¹⁰
5. If there is “domestic violence” within a state, the federal government may intervene only if the state asks for Congress’s help or, if Congress “cannot be convened,” for the President’s help.¹¹
6. Finally, even if the country is at war, soldiers may be quartered in homes only in a manner that Congress proscribes by law.¹²

There is a theme here, and it is that even during emergencies, the federal government is supposed to react through its normal procedures. What is more, *Congress*—not the president—is supposed to take the lead. This presumption is made manifestly clear by the Extraordinary Occasions Clause, which provides that when the country is faced with “extraordinary Occasions,” the President may call special sessions of Congress.¹³ Extraordinary occasions, per Justice Joseph Story’s influential *Commentaries On the Constitution of the United States*, include the need “to repel foreign aggressions, depredations, and direct hostilities; to provide adequate means to mitigate, or overcome unexpected calamities; to suppress insurrections; and to provide for innumerable other important exigencies, arising out of the intercourse and revolutions among nations.”¹⁴ Precisely the sort of things we think of today when we imagine emergencies.

These various constitutional clauses show how the country is supposed to deal with emergencies: Congress takes the lead, and if it is out of session, then the president calls it back so that it may do so. This makes good sense because the if the president gets extra powers when there is an emergency, one might reasonably

⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

⁶ U.S. CONST., Art. I, § 9, cl. 2.

⁷ U.S. CONST., Art. I, § 8, cl. 12.

⁸ U.S. CONST., Art. II, § 1, cl. 6.

⁹ U.S. CONST., Art. II, § 2, cl. 2.

¹⁰ U.S. CONST., Art. II, § 2, cl. 3.

¹¹ U.S. CONST., Art. IV, § 4.

¹² U.S. CONST., Amend. III.

¹³ U.S. CONST., Art. II, § 3.

¹⁴ 3 JOSEPH STORY, COMMENTARIES 575–76.

worry that the president will go find some useful emergencies.¹⁵ This is especially true when Congress is unwilling to give him what he wants through the normal channels.¹⁶ It was for this reason that Justice Jackson said that “emergency powers are consistent with a free government only when their control is lodged elsewhere than in the Executive who exercises them.”¹⁷

Nowadays, however, the country does not deal with emergencies as the Constitution says it should. Over the years, Congress has delegated vast authority to the president to determine when emergencies exist and to react as he sees fit, even if it allows him to ignore other laws or redirect money that Congress has appropriated for other purposes.¹⁸ When the Special Committee on the Termination of the National Emergency issued its report in 1973, it counted 470 provisions of federal law that give the president emergency powers when a national emergency is declared.¹⁹ The Brennan Center’s survey counts 136 such provisions today.²⁰ Regardless what the correct number is, it is safe to say that declaring a national emergency gives the president a vast array of powers that he does not otherwise have. One such law gives the president the power to freeze foreign assets,²¹ many others allow him to spend money that Congress has not appropriated for his purposes,²² and still others allow him to suspend other laws for as long as he sustains his emergency declaration.²³

In 1976, following the Special Committee’s report, Congress passed the National Emergencies Act (NEA) to try to rein in the president’s runaway emergency powers.²⁴ That law imposed *procedural* limitations on the president’s use of emergency powers conferred by other statutes. Critically, it eliminated few grants of substantive power. As originally passed, the NEA allowed the president to declare a national emergency—

¹⁵ *Youngstown Sheet*, 343 U.S. at 650 (Jackson, J., concurring) (“We may also suspect that [the Framers] suspected that emergency powers would tend to kindle emergencies.”).

¹⁶ For instance, Senate Majority Leader Chuck Schumer has expressly urged the President to declare a national emergency with respect to climate change so that he can achieve policy results that Congress is not willing to give him. Ben German, *Schumer Suggests Biden Could Use Emergency Powers for Climate Policy*, AXIOS, Jan. 26, 2021, <https://www.axios.com/2021/01/26/biden-schumer-climate-change-emergency> (quoting Schumer as saying “Then [the president] can do many, many things under the emergency powers of the president . . . that he could do without legislation.”). And before him, President Trump used emergency powers to redirect funds apportioned elsewhere for the construction of a border wall even though Congress disapproved. Alex Leary & Kristina Peterson, *Trump Vetoes Congressional Disapproval of Emergency Declaration*, WALL ST. J., Mar. 15, 2019, <https://www.wsj.com/articles/trump-to-discuss-border-policy-as-he-prepares-first-veto-11552672395>.

¹⁷ *Youngstown Sheet*, 343 U.S. at 652 (Jackson, J., concurring).

¹⁸ See, e.g., *Guide to Emergency Powers*, *supra* note 2 (collecting statutes authorizing emergency actions); REPORT OF THE SPECIAL COMMITTEE, *supra* note 2 at III (“This vast range of powers, taken together, confer enough authority [on the president] to rule the country without reference to normal constitutional processes.”); Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835 (2006) (“[T]he United States has tended to normalize its emergencies. As a result, normal governance is at least in part always emergency governance, even when a crisis is not looming.”); Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE, Dec. 8, 2017, <https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency> (“[I]f the last four decades are any indication, some emergencies are here to stay.”).

¹⁹ SPECIAL REPORT OF THE COMMITTEE, *supra* note 2 at III.

²⁰ *Guide to Emergency Powers*, *supra* note 2 at 2.

²¹ International Emergency Economic Powers Act, Tit. II of Pub. L. 95-223, 91 Stat. 1626 (codified as amended at 50 U.S.C. § 1701 *et seq.*).

²² See, e.g., Stafford Disaster Relief and Emergency Assistance Act, Pub. L. 100-707, 102 Stat. 4689, (codified at 42 U.S.C. § 5121 *et seq.*); Public Health Services Act, Pub. L. 78-410, 58 Stat. 682 (codified at 42 U.S.C. ch. 6A § 201 *et seq.*); see also Justin Bogie, *Congress Must Stop the Abuse of Disaster and Emergency Spending*, HERITAGE FOUNDATION BACKGROUNDER No. 3380, Feb. 4, 2019, <https://www.heritage.org/budget-and-spending/report/congress-must-stop-the-abuse-disaster-and-emergency-spending> (explaining how emergency declarations allow the president to undermine the Budget Control Act by funneling vast sums of money through the act’s emergency loophole).

²³ See, e.g., 7 U.S.C. § 4208 (suspending farmland protection laws during an emergency); 33 U.S.C. § 1902(b)(3)(F) (suspending laws regulating waste disposal at sea near land); 50 U.S.C. § 1515 (suspending laws regulating chemical and biological weapons including a law prohibiting their testing on civilian populations).

²⁴ National Emergencies Act, Pub. L. No. 94-412, § 201(a), 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1621, 1622).

it did not define that term—and thus activate any of the many secondary laws that give him emergency power. It required, however, that he comply with certain procedural requirements like naming the laws that he intends to invoke and publishing the declaration in the Federal Register. Congressional oversight came in two parts of the act: one that allowed Congress to end an emergency declaration by concurrent resolution (a legislative veto), and another that required each house of Congress to meet and vote on those concurrent resolutions six months after the emergency declaration. The Supreme Court later held that legislative vetoes were unconstitutional,²⁵ and in response, Congress amended the NEA to replace concurrent resolutions with joint resolutions that could be vetoed by the president. This severely constrained Congress’s ability to procedurally restrain executive emergency powers. Thus, Congress today finds itself in almost the same position it was in before that law’s passage. Presidents continue to have vast emergency powers that allow them to circumvent Congress unless Congress has a veto-proof majority.

Like two opposing pendulums, members of both political parties swing from celebrating this situation to complaining bitterly about it.²⁶ Those with a longer view, however, who realize that we need rules of governance that each party can live with whether in or out of power, see the need to resolve this. They likewise appreciate that any limits that Congress imposes on the president’s emergency powers will be a double-edged sword. It will constrain a president of one party today, and a president of the other tomorrow. But the status quo is also a double-edged sword, granting tremendous power to one president today and another tomorrow. The status quo, however, suffers from the added side effects of being constitutionally suspect and ripe for abuse. Any set of rules will hurt one party and help the other depending on who the president is, but wise leaders accept this and strive to create stability over time. The unwise, on the other hand, try to exploit the present broken system for short-term political gain. For those who are serious about repairing the current system, I offer a few solutions.

II. SOLUTIONS

The effect of the Supreme Court’s decision in *INS v. Chadha* is to preclude Congress from imposing meaningful procedural restrictions on the president’s emergency powers.²⁷ That’s not a serious problem, however, because procedural restrictions are second-best solutions to this issue; substantive restrictions are better. There are three reasons for this. First, procedural limitations on the use of delegated emergency power do not address the underlying constitutional directive that Congress—not the president—should retain primary responsibility for reacting to emergencies. Second, because of the pendulum dynamic where the president’s party likes his emergency declarations and the party out of power does not, Congress is likely to exercise procedural oversight only when it is controlled by the opposite party. That only reinforces the partisan nature and perception of emergency declarations. And third, Congress is very rarely successful at binding future Congresses to carry out oversight functions when emergencies are concerned.²⁸

On this last point, recall that the NEA requires Congress to meet and vote on a joint resolution approving or disapproving of a president’s emergency declaration every six months. Congress has only ever done that once—when it disapproved of President Trump’s emergency declaration to redirect money for a border wall.²⁹ Until then, Congress ignored its own law.

²⁵ *INS v. Chadha*, 462 U.S. 919 (1983).

²⁶ See sources cited *supra* note 16.

²⁷ 462 U.S. 919.

²⁸ See generally Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2166-67 (2005); see also Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 648 (2006) (“Where emergencies provoke panic, unleash socially harmful motivations, and encourage legislators to defer to executive power, earlier framework legislation is most likely to be circumvented or repealed outright.”).

²⁹ See Leary & Peterson, *supra* note 16.

Therefore, rather than try to impose procedural restrictions, Congress should instead impose substantive limitations on the president's emergency powers. All emergency powers are delegated to the president by Congress.³⁰ What *INS v. Chadha* held was that once Congress has delegated those powers, they belong to the executive, and the legislature cannot veto his use of them unless the constitutional requirements of bicameralism and presentment are satisfied.³¹ But Congress still has complete control over whether the president has any emergency power at all and, if so, how much and for how long.

The question then is: how should Congress go about setting substantive guardrails around the president's emergency powers?

Thankfully the Constitution provides several useful reference points. Recall that even in the most extreme emergencies such as invasion, domestic violence, or other “extraordinary Occasions,”³² the Constitution anticipates that *Congress* will take the lead in responding, even if it is adjourned.³³ In only one case—domestic violence in a state—does the Constitution anticipate a presidential response, and then only if Congress “cannot be convened.”³⁴ This is not to say that Congress should give the president *no* emergency powers, but that Congress should give the president emergency powers only when Congress is convinced that it is incapable of reacting with the necessary speed. This will be a high bar because when the country has faced true emergencies in the past—events that are not just “emergencies” in the minds of partisans, but events that everyone agrees are true crises—Congress has reacted with great speed. For example, Congress declared war on Japan the day after the attack on Pearl Harbor³⁵ and authorized military force against al Qaeda only 14 days after 9/11.³⁶ In most situations, Congress can react quickly and does not need to give the president emergency powers. Thus, Congress' first step should be to reevaluate all the situations in which it gives the president emergency power and eliminate all but those that Congress believes require a speedier response than it can deliver. In all other situations, Congress should retain for itself the power to declare emergencies and tailor the response and the president's powers accordingly.

This first solution touches on an issue that is often front-and-center in political fights over emergency powers: whether there really is an emergency. Often when a president uses emergency power, his critics will say that he is abusing it because there is no real emergency. Some commentators, therefore, suggest that Congress should define the term “emergency” so that courts could review the president's declarations.³⁷ This approach, however, will not solve the problem for three reasons. First, the courts are very reluctant to second-guess a president's determination that there is an emergency.³⁸ Courts are not experts in foreign

³⁰ There is a scholarly debate about whether the president has any inherent emergency powers, but that's beyond the scope of this testimony. Here, I'm focused only on those secondary emergency statutes that give the president powers after he declares a national emergency.

³¹ 462 U.S. 919.

³² U.S. CONST., Art. II, § 3.

³³ *Id.*

³⁴ U.S. CONST., Art. IV, §4.

³⁵ S. J. Res. 116, 77th Cong., Pub. L. No. 328, ch. 561 (1941).

³⁶ S. J. Res. 23, 107th Cong., Pub. L. No. 107-40, 115 Stat. 224 (2001).

³⁷ See Jess Bravin, *Can Trump Build A Wall Under A National Emergency?*, WALL. ST. J., Jan. 10, 2019, <https://www.wsj.com/articles/when-is-it-legal-to-declare-a-national-emergency-11546943401> (quoting sources).

³⁸ See, e.g., *Martin v. Mott*, 25 U.S. 19 (1827) (Story, J.) (“We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object.”); *United States v. Amirmazmi*, 645 F.3d 564, 579 (3d Cir. 2011) (“Mindful of the heightened deference

policy, terrorist threats, infectious diseases, or the risks posed by other extraordinary occasions, and they are, by design, slow and thoughtful institutions ill-suited to quick action. Courts also know that no two emergencies are alike and that any ruling on an emergency today, threatens to reduce the president's flexibility to address a novel emergency tomorrow. A statutory definition of "emergency" will not change any of these facts, and so courts are likely to remain unwilling to second-guess an emergency declaration.

Second, any definition of "emergency" is likely to employ broad terms to preserve a flexible response to crises. Consequently, even if the courts considered a challenge to an emergency declaration, they would still likely end up deferring to the executive. For example, if Congress used Merriam-Webster's definitions—"an unforeseen combination of circumstances or the resulting state that calls for immediate action" or "an urgent need for assistance or relief"³⁹—courts would have to fix definitions to the vague conditions "calls for immediate action" or "urgent need." For all the same reasons that they refuse to second guess the president's determination that a particular situation is an emergency, they would remain unwilling to second guess his determination that either of those two conditions are satisfied.

Third, defining "emergency" does not cure the underlying problem that the executive branch should not have the power to both invoke and then wield emergency powers.⁴⁰ All it does is attempt to drag the judiciary into the political morass surrounding presidential emergency declarations. The correct approach is not to drag the judiciary into this mess, but to keep these determinations in Congress where they belong.

One might respond, at this point, to say that if Congress retained the power to decide whether something was an emergency, we would have fewer emergency declarations because both parties would have to agree to some extent that an emergency exists. That's exactly right and exactly the point. Presidents have invoked—and are implored to invoke⁴¹—emergency powers when reasonable people on both sides of the aisle disagree about whether something is an emergency. If Congress keeps for itself the ability to declare most emergencies, we are less likely to have fake partisan emergencies. That, in turn, preserves the rule of law, which is diminished when vast emergency powers are abused for partisan purposes.

The second solution is to impose a time limit on all emergencies and to prevent the president from re-upping an emergency declaration with respect to the same underlying causes after that deadline expires. How long should the time limit be? It might vary depending on the nature of the emergency or the powers conferred by a particular secondary emergency statute, but under no circumstances should any emergency be longer than two years. The Army Clause provides this outer limit.⁴² As mentioned above, that clause requires Congress to re-apportion money for the Army every two years with no exceptions. Not even in the case of an invasion. If the response to that emergency ends after two years without Congressional action, then no emergency need last longer.

accorded the Executive in this field, we decline to interpret the legislative grant of [emergency] authority parsimoniously."); *United States v. Spawr Optical Rsch., Inc.*, 685 F.2d 1076, 1080 (9th Cir. 1982) ("Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed 'the essentially political questions surrounding the declaration or continuance of a national emergency' . . .") (quoting *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 573 (C.C.P.A. 1975)); *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 31 (D.D.C. 2020) ("[Plaintiff's] claim raises one obvious question: was the President correct that a national emergency exists at the southern border? The trouble is that this is a quintessential political question.").

³⁹ Merriam-Webster Dictionary (definition of "emergency"), <https://www.merriam-webster.com/dictionary/emergency> (last visited May 5, 2022).

⁴⁰ *Youngstown Sheet*, 343 U.S. at 652 (Jackson, J., concurring) ("[E]mergency powers are consistent with a free government only when their control is lodged elsewhere than in the Executive who exercises them.").

⁴¹ See German, *supra* note 16.

⁴² U.S. CONST., Art. II, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;").

A third solution would be to give the president temporary emergency powers on a case-by-case basis at his request. Rather than create a vast array of powers that the president can activate by saying the magic words “national emergency,” Congress should make the president come, hat-in-hand so to speak, to ask for them. This eliminates the incentive for the president to find useful emergencies that let him get around Congress. It also restores the approach contemplated by the Extraordinary Occasions Clause.⁴³ Lastly, it encourages Congress to act before an emergency response is formulated, and thus is more likely to spark congressional action than the ex-post review period of the NEA, which Congress has used only once.

A few additional solutions apply specifically to emergencies declared under the Stafford Disaster Relief and Emergency Assistance Act.⁴⁴ As explained in more detail in a 2019 Heritage Foundation report,⁴⁵ that act has been used to circumvent the Budget Control Act of 2011 and has permitted emergency spending to balloon year after year. It also creates a perverse incentive for states not to spend their own money to prepare for disasters in advance, trusting instead that the federal government will pick up most of the tab after the fact.⁴⁶ A few reforms can improve this situation. Congress should, for example, put a time limit on how long Stafford Act funds can be spent. Emergencies require quick action, but billions of dollars of Stafford Act funds often sit unused for years or are earmarked for long-term projects rather than “immediate and critical needs.”⁴⁷ Congress should also index disaster thresholds to inflation so that the federal government does not pick up the tab for small-scale events within states. Additionally, Congress should reduce the share of disaster remediation paid for by the federal government from so that states have an incentive to prepare in advance for disasters and so that FEMA’s budget is not depleted when a real calamity occurs.⁴⁸

III. RECENT LEGISLATION

Last year, Senator Mike Lee introduced the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies (ARTICLE ONE) Act, which would amend the NEA to automatically terminate any emergency declarations and attendant emergency powers after 30 days unless Congress passes a joint resolution approving them.⁴⁹ It would set a one-year deadline on any emergencies unless, again, Congress approves a renewal. Lastly, it would require the president to provide periodic reports to Congress about ongoing emergencies. This act largely comports with the constitutional guidelines I articulated above and would be a step in the right direction. Although it leaves in place all the secondary emergency statutes without reviewing and revisiting them, it forces Congress to review and approve of specific invocations of emergency power and therefore improves the status quo.

Also last year, Senator Chris Murphy introduced the National Security Powers Act.⁵⁰ It includes several provisions; I focus here only on those dealing with reforming the NEA. It mirrors Senator Lee’s bill but includes the additional provision that “under no circumstances may a national emergency declared by the President under section 201(a) continue on or after the date that is five years after the date on which the national emergency was first declared.”⁵¹ Like the ARTICLE ONE Act, this would improve the NEA. Still,

⁴³ U.S. CONST., Art. II, § 3 (“[The President] may, on extraordinary Occasions, convene both Houses . . .”).

⁴⁴ Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified at 42 U.S.C. ch. 68 § 5121 *et seq.*).

⁴⁵ See Bogie, *supra* note 22.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ S.241, 117th Cong. (2021). It includes a limited exception: “If Congress is physically unable to convene as a result of an armed attack upon the United States or another national emergency, the 30-day periods . . . shall begin on the first day Congress convenes for the first time after the attack or other emergency.” *Id.* at § 201(c)(3).

⁵⁰ S.2391, 117th Cong. (2021).

⁵¹ *Id.* at § 202(b).

a five-year deadline is longer than necessary. As discussed above, there is no reason an emergency should last longer than two years.

In the House, Representative Adam Schiff introduced the Protecting Our Democracy Act, which is less a serious piece of legislation and more a platform for partisan talking points.⁵² Again, I'll focus only on that part of it addressing the NEA. Like Senator Lee's bill, it includes a deadline (20 session days) on any emergencies unless Congress grants an extension by joint resolution. It also includes a provision prohibiting the president from re-declaring a national emergency with respect to the same circumstance if Congress does not approve of his declaration. And like Senator Murphy's bill, it includes a five-year deadline on all emergencies. Divorced from the rest of the bill, these are improvements over the current NEA.

Lastly, in 2020, Senator Edward Markey introduced the Restraint of Executive In Governing Nation (REIGN) Act.⁵³ This act would require the president to turn over to Congress all "presidential emergency action documents," a defined term.⁵⁴ Although disclosure of such documents is probably good in the abstract, the bill does nothing to solve the underlying issue.

IV. CONCLUSION

There is broad agreement that the current state of executive emergency powers is out of whack. Congress has given the president too much latitude to declare national emergencies and thus to give himself extraordinary powers that allow him to circumvent Congress. Congress's ability to impose procedural checks on these powers is limited, but it can and should impose substantive checks. First, Congress should, in most circumstances, retain for itself the power to declare national emergencies. Second, it should set a deadline on any emergencies not longer than two years. And third, it should generally give the president temporary emergency powers on a case-by-case basis upon his request instead of giving him a vast array of powers to be used whenever he sees fit.

⁵² H.R.5314, 117th Cong. (2021).

⁵³ S.4279, 116th Cong. (2020).

⁵⁴ *Id.* § 2(c)(2).