



Testimony of

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“Restoring Congressional Oversight over Emergency Powers”

Chairman Peters, Ranking Member Paul, and distinguished members of the Homeland Security and Governmental Affairs Committee, thank you for the opportunity to testify today. My name is Gene Healy. I'm the Senior Vice President for Policy at the Cato Institute, an independent, nonpartisan public policy research organization dedicated to advancing the principles of individual liberty, limited government, free markets, and peace.

My work at Cato focuses on executive power and the role of the presidency. For that reason, I'm especially grateful for this opportunity to offer testimony on the distinct dangers unchecked presidential emergency power represents to constitutional government, civil liberties, and the rule of law.

Those dangers are substantial: research by the Brennan Center for Justice has identified over 130 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.¹ Some of the powers that can be triggered in that fashion are truly breathtaking: Section 606 of the 1934 Communications Act, for instance, allows the president to seize or shut down "any facility or station for wire communication" upon his proclamation "that there exists a state or threat of war involving the United States," a provision that's been described as a potential internet "kill switch."² And the suite of authorities available under the International Emergency Economic Powers Act (IEEPA), the all-purpose statutory tool for economic sanctions against rogue states, Russian oligarchs, and terrorists, could easily be turned against American citizens.

One of my fellow witnesses on this panel has suggested using the metaphor of a "vault" to think about the emergency powers Congress has ceded to the president.³ The National Emergencies Act of 1976 (NEA) was designed to safeguard that vault and time-limit access to the arsenal it contains. But the collapse of the original NEA framework has, for several decades now, left the vault door open, with access to its weapons unrestricted but for the only remaining check on abuse: the president's self-restraint.

In that light, we should be surprised—and grateful—that our luck has held out as long as it has. Despite the lack of meaningful safeguards, America's emergency powers regime hasn't yet

¹ "A Guide to Emergency Powers and Their Use," Brennan Center for Justice, last updated February 8, 2023, <https://www.brennancenter.org/analysis/emergency-powers>.

² See 47 U.S.C. § 606(d); see also Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *Atlantic*, January/February 2019, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418>.

³ "Never Ending Emergencies—An Examination of the National Emergencies Act," United States House of Representatives, Committee on Transportation & Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, 118th Congress (May 24, 2023) (Satya Thallam, Policy Advisor, Arnold & Porter): <https://www.congress.gov/118/meeting/house/115858/witnesses/HHRG-118-PW13-Wstate-ThallamS-20230524.pdf>

reached its full potential for abuse. Of the extraordinary statutory authorities the Brennan Center has cataloged, nearly 70 percent have apparently never been triggered.⁴

But recent presidents’ “norm-busting” on emergency powers shows how quickly our luck could change. Before 2019, no president seems to have imagined that he could tap an obscure Reagan-era statute on military construction to do an end-run around Congress in a budget fight. But that’s precisely what President Trump did on February 15, 2019, when he declared a national emergency in order to “build the wall” on the U.S.-Mexico border. And when he began shifting billions of dollars Congress appropriated for other purposes toward a project it had refused to fund, Congress proved powerless to stop him. Similarly, before 2022, no president saw the post-9/11 HEROES Act, aimed at providing debt relief to U.S. soldiers then deployed in Iraq and Afghanistan, as authority to declare a student-loan jubilee, permanently canceling some \$600 billion in debt for tens of millions of borrowers. Yet that’s what President Biden attempted with another emergency proclamation in August 2022.⁵

At this point, presidents are well aware that the vault door is open—and they’re increasingly eager to put the arsenal therein to creative use.

The Normalization of Emergency Rule

In 1976, a Senate special committee charged with reining in presidential emergency powers marveled that, “there are now in effect four presidentially proclaimed states of national emergency,” dating as far back as 1933.⁶ The time had come, the committee insisted, “to restore normalcy to the operations of our government.”

The fruits of that committee’s inquiry included the 1976 National Emergencies Act, a framework statute aimed at restoring congressional oversight and “returning the United States to normal peacetime processes.”⁷ Title I of the NEA brought those four emergencies to a close, sunseting the authorities they relied upon. 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

⁴ See Elizabeth Goitein, “Trump’s Hidden Powers,” Brennan Center for Justice, December 5, 2018, <https://www.brennancenter.org/blog/trump-hidden-powers>; see also “A Guide to Emergency Powers and Their Use,” Brennan Center for Justice, last updated February 8, 2023, <https://www.brennancenter.org/analysis/emergency-powers>.

⁵ Congressional Research Service, “Supreme Court Invalidates Student Loan Cancellation Policy Under the HEROES Act,” July 5, 2023: <https://crsreports.congress.gov/product/pdf/LSB/LSB10997#:~:text=By%20finding%20that%20the%20cancellation,loan%20discharges%20under%20that%20policy>.

⁶ S. Rep. No. 94-922, 94th Cong., 2d Sess. 3 (1976): <https://www.senate.gov/about/resources/pdf/report-national-emergencies-1976.pdf>.

⁷ *Ibid.*

intended to rely on. Emergency declarations would expire after one year unless renewed by the president, but could be terminated earlier by presidential or congressional action.

Nearly 50 years after the NEA's passage, it's clear that those well-intentioned efforts to "restore normalcy" have failed. In 1976, the Senate special committee found it appalling that four national emergencies were then in effect. Today, there are 43.⁸ Under the NEA, emergency governance has become regularized and normalized.

The failure of the NEA framework is 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*, however, 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.⁹ In 1985, Congress amended the NEA accordingly: the law now requires termination via joint resolution.¹⁰ The upshot is that presidents now enjoy broad power to wield emergency authority however they please unless and until Congress can assemble a veto-proof supermajority to stop them. That turns the constitutional process for lawmaking on its head: the president proposes and the president disposes.

Recent years have seen growing bipartisan consensus for righting the constitutional balance and restoring congressional control over presidential emergency powers. The general framework for restoring congressional checks post-*Chadha* is clear, and reflected in emergency-power reform legislation over the past several Congresses. It involves:

- time-limiting presidential emergency declarations so that any powers unlocked sunset in a matter of weeks, not years; and
- providing that use of extraordinary authorities beyond that limited period must be approved by Congress via joint resolution.

The rising threat of emergency governance should lend new urgency to the Committee's efforts at reform.

⁸ "Declared National Emergencies Under the National Emergencies Act," Brennan Center for Justice, last updated May 11, 2023, <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act>.

⁹ *INS v. Chadha*, 462 U.S. 919 (1983); see also Richard H. Pildes, "How the Supreme Court Weakened Congress on Emergency Declarations," *Washington Post*, March 14, 2019: <https://www.washingtonpost.com/opinions/2019/03/14/how-supreme-court-weakened-congress-emergency-declarations/>.

¹⁰ 99 Stat. 405, 448.

The Need for IEEPA Reform

Any truly comprehensive effort to put presidential emergency powers back under congressional control will also require reforms to the International Emergency Economic Powers Act of 1977. That statute has served as the basis for the overwhelming majority of presidential emergency declarations historically as well as nearly all those still operative today. More importantly, of the emergency authorities available to the president, IEEPA represents one of the broadest delegations of power—and thus, one of the broadest potential sources of presidential mischief.

Leaving IEEPA reform off the table would leave the vast bulk of presidential emergency authority untouched. That statute has underwritten 69 of 78 presidential emergency declarations since 1977; 11 of 13 presidential emergencies during the Trump administration; and 39 of the 42 national emergencies currently in effect.¹¹

When the Brennan Center published its initial list of emergency-powers statutes in 2018, few who perused it would have singled out the Military Construction Codification Act or the HEROES Act as recklessly broad delegations of power.¹² Yet recent emergency-power practice reveals that even relatively narrow authorities are susceptible to novel abuses.

If that's the case, then anyone concerned about emergency-power risk ought to be alarmed about the statute that contains some of the most dangerous weapons in the emergency-powers arsenal. 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.” Once triggered, the executive branch enjoys sweeping authority to block transactions, freeze assets, and seize property.

In the months following his border-wall declaration, President Trump twice threatened to weaponize IEEPA against major U.S. trading partners. First, 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, rising to 25 percent across-the-board. Then, in August of that year, the president sent the markets into a brief tailspin by tweeting, “Our great American companies are hereby ordered to immediately start

¹¹ Christopher A. Casey, et al., “The International Emergency Economic Powers Act and the National Emergencies Act: Key Facts,” *CRS Reports for Congress*, October 25, 2023: <https://crsreports.congress.gov/product/pdf/IG/IG10012/9>.

¹² For instance, the statute President Trump invoked for the border-wall emergency, 10 USC § 2808, had been used only twice before, by George H.W. Bush in the run-up to the Gulf War, and by his son in the aftermath of the 9/11 attacks—the sort of circumstances it was clearly designed to address. See Michael J. Vassalotti and Brendan W. McGarry, *CRS Reports for Congress*, “Military Construction Funding in the Event of a National Emergency,” January 11, 2019: <https://sgp.fas.org/crs/natsec/IN11017.pdf>.

looking for an alternative to China,” following up with a statutory citation: “try looking at the Emergency Economic Powers Act of 1977. Case closed!”¹³

“Case closed” may somewhat overstate the strength of the legal claim, but had President Trump followed through on those threats, it’s far from certain the courts would have stopped him. IEEPA’s powers have been used for comprehensive sanctions against countries (such as Iran and Libya), effectively shutting 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.¹⁴

Emergency rule is a bipartisan temptation, and IEEPA is an equal-opportunity weapon for partisans on either side of the aisle. Progressives in the legal academy have identified IEEPA as a key source of authority for activist presidents bent on making climate policy without Congress. In a self-declared climate emergency, the statute could be deployed to sanction “climate rogue states” or “companies trafficking in fossil fuels.”¹⁵

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. Shortly after the 9/11 attacks, President George W. Bush invoked it to issue an executive order 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.¹⁶

¹³ Donald J. Trump, Twitter, August 23, 2019, 10:59 a.m., <https://x.com/realdonaldtrump/status/1164914960046133249?s=61&t=wltSt2NLWgvUGsYTpC8Smw>; Donald J. Trump, Twitter, August 23, 2019, 11:58 p.m., <https://x.com/realdonaldtrump/status/1165111122510237696?s=61&t=wltSt2NLWgvUGsYTpC8Smw>.

¹⁴ Christopher A. Casey, et al., “The International Emergency Economic Powers Act: Origins, Evolution, and Use,” *CRS Reports for Congress*, Congressional Research Service R45618, March 20, 2019, pp. 26-27: https://www.everycrsreport.com/files/20190320_R45618_e985c38bdba3d48769a70bd27efdeb95390c9216.pdf. See also Scott R. Anderson and Kathleen Claussen, “The Legal Authority Behind Trump’s New Tariffs on Mexico,” *Lawfare*, June 13, 2019, <https://www.lawfaremedia.org/article/legal-authority-behind-trumps-new-tariffs-mexico>: There’s “some precedent for using IEEPA-like authorities to impose tariffs.” In 1971, President Nixon used a predecessor statute with similar language, the Trading with the Enemy Act, to hike tariffs on all imports by 10 percent, and a federal appeals court upheld the move.

¹⁵ See Mark Nevitt, “Is Climate Change a National Emergency?” *55 UC Davis Law Review* 591 (2021), Available at SSRN: <https://ssrn.com/abstract=3803655>; Daniel Farber, “Declaring a Climate Change Emergency: A Citizen’s Guide, Part II,” Center for Progressive Reform, July 20, 2022: <https://progressivereform.org/cpr-blog/declaring-a-climate-change-emergency-a-citizens-guide-part-ii/>.

¹⁶ Executive Order 13224, “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism,” September 25, 2001: <https://www.federalregister.gov/documents/2001/09/25/01-24205/blocking-property-and-prohibiting-transactions-with-persons-who-commit-threaten-to-commit-or-support>.

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.¹⁷

America’s neighbor to the north offers a cautionary tale about the risks that broad emergency powers could be turned inward against political dissent. 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 and punishing them via conventional legal 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 subject individual protesters to “de-banking” without due process.¹⁸ 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.”¹⁹

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.”²⁰ Instead of depending on the courts to check the president, Congress should itself bar the door to potential abuse.

¹⁷ Jake Tapper, “A post-9/11 American nightmare,” *Salon.com*, September 5, 2002: <https://www.salon.com/2002/09/05/jama/>

¹⁸ <https://laws-lois.justice.gc.ca/PDF/E-4.5.pdf>

¹⁹ “Full text of Chrystia Freeland’s remarks during Emergencies Act announcement,” *Toronto Star*, February 14, 2022: https://www.thestar.com/news/canada/full-text-of-chrystia-freeland-s-remarks-during-emergencies-act-announcement/article_8a799e84-ab28-5757-8ae7-1d98f4b632dd.html.

²⁰ See, e.g., *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1195 (D. Mass. 1986).

One way to do that is by directly eliminating IEEPA’s potential use as a trade-war weapon. In the 116th Congress, for example, Senator Carper introduced legislation making clear that IEEPA “does not include the authority to impose duties or tariff-rate quotas or... other quotas on articles entering the United States.”²¹ In similar fashion, Congress could prevent the statute being weaponized against Americans by statutorily barring its use against United States persons. At a minimum, Congress should shore up due process protections for any US person caught up in the statute’s sweep.²²

Rising Partisan Hatred Makes Limiting Unilateral Power Even More Vital

It was never a wise idea to depend on presidential benevolence to prevent the abuse of unilateral powers. But emerging political trends over the last two decades make the sorts of reforms the Committee is examining even more necessary than they were in the post-Watergate era.

We’ve entered “an acute era of polarization,” the Stanford political scientists Shanto Iyengar and Masha Krupenkin report, one in which “partisans’ mild dislike for their opponents has been transformed into a deeper form of animus.”²³ Increasingly, Americans aren’t just cold to the other team: they *hate* and *fear* them. Majorities of highly politically engaged Republicans (62 percent) and highly politically engaged Democrats (70 percent) tell pollsters that the other party makes them feel “afraid.”²⁴ In a 2019 study with the arresting title “Lethal Mass Partisanship,” researchers found that over 42 percent of Republicans and Democrats agreed with the statement that members of the other party “are not just worse for politics—they are downright evil.”²⁵

In an important 2022 article, “Presidential Polarization,” the legal scholars John O. McGinnis and Michael B. Rappaport observe that, in all the public discussion of polarization, a key factor “has gone largely undiscussed: the deformation of our federal governing structure.”²⁶ The growth of presidential power both intensifies partisan fury and makes it more dangerous, they argue: it “raises the stakes of any presidential election, making each side fear that the other will enjoy largely unchecked and substantial power in many areas of policy.”

²¹ S.2413 - Trade Certainty Act of 2019: <https://www.congress.gov/bill/116th-congress/senate-bill/2413/text>.

²² See: Andrew Boyle, “Checking the President’s Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act.” Brennan Center for Justice, June 10, 2021: <https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers>.

²³ Shanto Iyengar and Masha Krupenkin, “The Strengthening of Partisan Affect,” *Advances in Political Psychology*, Vol. 39, Suppl. 1, 2018.

²⁴ “Partisanship and Political Animosity in 2016,” Pew Research Center, June 22, 2016:

<https://www.pewresearch.org/politics/2016/06/22/partisanship-and-political-animosity-in-2016/>

²⁵ Nathan P. Kalmoe and Lilliana Mason, “Lethal mass partisanship: Prevalence, correlates, and electoral contingencies,” National Capital Area Political Science Association American Politics Meeting, 2019: https://www.dannyhayes.org/uploads/6/9/8/5/69858539/kalmoe___mason_ncapsa_2019_-_lethal_partisanship_-_final_lmedit.pdf.

²⁶ John O. McGinnis, and Michael B. Rappaport, “Presidential Polarization,” *Ohio St. L.J.* 83 (2022): https://moritzlaw.osu.edu/sites/default/files/2022-06/11.McGinnisRappaport_v83-1_pp5-60.pdf.

Committed partisans have always insisted that any upcoming presidential election is the “Most Important Election in History”; but Americans used to take that claim with the requisite grain of salt. In 2000, for example, only 45 percent told pollsters they thought it really mattered who won that year’s presidential contest. It went up from there: 63 percent in 2012; 74 percent in 2016—83 percent in 2020.²⁷ Maybe Americans have grown to think it matters who wins because, increasingly, *it matters too much*. In this highly charged environment, allowing the president vast, unchecked emergency power isn’t just constitutionally dubious, it’s potentially catastrophic. The fear McGinnis and Rappaport identify encourages the dangerous sentiment that *every* election is a so-called “Flight 93 Election”—charge the cockpit, do or die.

We should be heading in the opposite direction: lowering the stakes of presidential elections and limiting the damage presidents can do—and that we can do to each other in the fog of partisan war. Relimiting presidential emergency powers is an essential step towards that end.

²⁷ Thomas B. Edsall, “‘Gut-Level Hatred’ Is Consuming Our Political Life,” *New York Times*, July 19, 2023: <https://www.nytimes.com/2023/07/19/opinion/polarization-nationalism-patriotism-history.html?smid=nytcore-ios-share&referringSource=articleShare>.