

Brennan Center Calls for Fundamental Reform of the National Emergencies Act of 1976

On May 10, 2019, the Brennan Center joined a coalition calling on Congress to enact fundamental reforms to the National Emergencies Act of 1976.

May 10, 2019

VIEW

The Honorable Mitch McConnell, Senate Majority Leader

The Honorable Chuck Schumer, Senate Minority Leader

The Honorable Nancy Pelosi, Speaker of the House

The Honorable Kevin McCarthy, House Minority Leader

Dear Senators McConnell and Schumer and Representatives Pelosi and McCarthy:

As a bipartisan group of organizations, all of which work to safeguard and strengthen our democratic institutions, we write to urge you to enact fundamental reform of the National Emergencies Act of 1976 (NEA). Such reform is critical to preventing future abuses of emergency powers that could be disastrous for our democracy, irrespective of who occupies the White House.

For the past 100 years, U.S. presidents have been able to access extraordinary powers by virtue of declaring a national emergency—including powers to shut down communications facilities, seize property, organize and control the means of production, assign military forces abroad, and restrict travel. Until the 1970s, presidents were able to invoke such emergency powers with essentially no congressional oversight and no limit on how long a state of emergency could last.

Realizing the danger in this situation, Congress enacted the NEA to bolster its own role and to create protections against the abuse of emergency powers. The law contained three primary safeguards: (1) states of emergency would expire after a year unless presidents renewed them; (2) Congress could terminate states of emergency at any time using a "legislative veto" (a concurrent resolution that did not require the president's signature to become law); and (3) Congress was required to meet every six months while a state of emergency was in effect to consider a vote on whether to end it.

The law, however, has not worked as Congress intended. The one-year expiration period, which was supposed to be the default, has become the exception. There are 32 states of emergency in effect today, with the longest dating back to the Iranian hostage crisis of 1979. Additionally, in 1983, the Supreme Court ruled that concurrent resolutions are unconstitutional. To terminate an emergency, Congress must instead pass a joint resolution, which becomes law only if the president signs it—or if Congress can muster a supermajority to override his veto. And Congress has simply ignored the requirement to consider a vote on existing emergencies every 6 months.

In the absence of meaningful statutory safeguards, we must instead rely on presidents to exercise self-restraint in the use of these incredibly potent powers. But President Trump's issuance of Proclamation 9844, in which he declared a national emergency to build a wall along the southern border after Congress had refused to appropriate the funds he requested for that purpose, has demonstrated that we need additional guardrails.

Regardless of one's view on whether there should be a physical barrier along our nation's southern border, and in spite of the fact that we view the President's action as illegal under the statute as it now stands, Proclamation 9844 dramatically illustrates some of the NEA's flaws. Most significantly, it highlights the fatal weakness of the role the NEA gives Congress. A majority of Congress clearly opposed the emergency declaration: Both Houses of Congress—including 12 Republicans in the Senate—took the unprecedented step of voting to terminate it. But the president was able to veto the resolution, and the emergency remains in place.

Furthermore, the NEA does not include any statutory definition of "national emergency." The Trump administration has exploited this omission to issue Proclamation 9844, notwithstanding the fact that immigration at the southern border fails to meet the most basic dictionary definition of an "emergency" because it is not a sudden or unexpected turn of events.

There are several meritorious lawsuits challenging Proclamation 9844, and Congress should not abandon its own efforts to terminate the declaration. But it is not sufficient to end *this* state of emergency. Proclamation 9844 has now set a precedent for invoking emergency powers when Congress doesn't deliver on a president's initiatives. And the NEA's potential for abuse does not end there. For instance, either this president or a future one could use emergency powers to erect various hurdles to a free and fair election.

Accordingly, we urge you to move quickly to enact NEA reform. That reform should contain, at a minimum, the following crucial elements:

- A presidentially-declared national emergency should automatically expire after 30 days (or a similarly short period of time) unless Congress votes to extend it. This would give the president ready access to emergency powers when he needs them most—i.e., in the immediate wake of a crisis—but would restore the proper balance of power between the president and Congress in the longer term.
- The NEA should include a definition of "national emergency" that is broad enough to cover a wide range of circumstances while clarifying that it does not give the president a blank check.
- Congress should not be able to extend a state of emergency indefinitely. The law should establish a maximum period of time for emergency rule. "Permanent emergencies" are poisonous to a democracy and corrode the rule of law.
- Congress should clarify that the powers invoked to address an emergency must relate to the nature of, and be used only to address, that specific emergency. An emergency declaration cannot give the president access to wholly unrelated powers.
- Existing states of emergency should not be "grandfathered," although a reasonable period of time should be allowed to transition out of them in the absence of a Congressional vote to extend.

Several bills have already been introduced, in both the House and the Senate, that would implement the first (and most important) of these recommendations. Members of Congress from both parties should work together and build on these efforts. **This is not—and should not be made into—a partisan issue.** Without NEA reform, it is no exaggeration to say that the rule of law and our democratic institutions are at risk. At a hearing of the House Judiciary Committee's Constitution Subcommittee in February, all of the expert witnesses testified that the NEA is in critical need of reform, and there was strong bipartisan agreement among the subcommittee members to that effect. The first NEA reform bill that was introduced following the hearing, H.R. 1410, has 12 Democratic and 12 Republican cosponsors.

NEA reform is thus not only necessary, but possible. Congress has the opportunity to enact the most important recalibration of the balance of power between the president and Congress in four decades. For the sake of our democracy, we urge you not to let this rare window of

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opportunity close.

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cc: Members of Congress

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