



UNDERSTANDING THE BREADTH AND DEPTH OF EMERGENCY POWERS, KNOWN AND UNKNOWN, AVAILABLE TO A US PRESIDENT

- “How do we give presidents the tools they need to address emergencies, without giving them the tools to dismantle democracy?”
- As President, insofar as emergency powers go, Donald Trump will have Article I powers under legislation and Article II inherent powers.
- A combination of the National Emergencies Act, the International Emergency Economic Powers Act, the Communications Act and the Insurrection Act provide Trump with a staggering array of powers, and he can also tap into secret emergency authorities.
- Trump has threatened to declare a “national emergency,” which then unlocks upwards of 150 authorities, exercise of which in normal times would be unprecedented and potentially unlawful. Not surprisingly, emergency powers pre-empt civil rights and liberties.
- Emergency powers can be open to abuse, as there is little room for Congressional or judicial oversight.
- Consequences for those targeted by the administration could include frozen bank accounts, loss of access to communications (including the internet), loss of a passport, being placed on a no-fly list, facing criminal charges for aiding undocumented migrants escape detection or arrest, and possible loss of habeas corpus rights.
- Proposed legislation would reassert Congressional oversight and limit presidential overreach.

It has long been recognized that authoritarian rulers since the early 20th century have a tendency to cloak in legality their tactics to cow their citizens, quash political dissent and garner domestic and international legitimacy. One [political scientist](#) characterized the process by which authoritarians undermine democracy as one that shifts from the rule *of* law to the rule *by* law – a process where the law ceases to be a check on the exercise of arbitrary power and, instead, becomes the instrument of control by which the authoritarian regime remains in power and effectively circumvents democratic controls.

When it comes to setting his revenge and retribution agenda in motion, Donald Trump will be no exception. The challenge that the country will face in countering the slide to authoritarianism as Trump pursues his perceived political enemies is that the US presidency has accumulated ever more unilateral power over time, largely facilitated by an accommodative Congress. The accumulation of emergency powers has been particularly pronounced in the context of responding to true national emergencies, where the customary legislative process admittedly is simply too slow and cumbersome to be effective in the moment.

Emergency Powers

It is easy to see how true national emergencies can require an immediate response from governmental authorities, and why empowering the executive to act decisively is far preferable to waiting for a legislature to act.



As former senior White House and U.S. Treasury official in the Clinton administration, Mark Medish, noted in November 2022 ([“Congress Needs to Rein in Presidential Emergency Powers Now”](#)), “democracies have long grappled with the conundrum of emergency powers. The question is whether extraordinary situations – natural disasters, wars, insurrections – should permit exceptional suspension of civil rights. And if so, how can those powers be constrained under law?” Elizabeth (Liza) Goitein of the Brennan Center, perhaps the most prolific commentator on emergency powers, framed it thus ([“Emergency Powers: A System Vulnerable to Executive Abuse”](#)), “how do we give presidents the tools they need to address emergencies, without giving them the tools to dismantle democracy.”

While many countries have enshrined in their constitutions emergency powers to declare national emergencies, the United States is an exception. (See Goitein’s [“Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis.”](#))

The Constitution does not vest the executive with emergency powers to deal with national emergencies. That said, our constitutional democracy has grappled with emergency powers since the outbreak of the Civil War. In 1861, President Abraham Lincoln unilaterally seized vessels bound for Confederate ports and suspended habeas corpus. In February 1942, President Franklin Roosevelt, by Executive Order 9066, ordered the internment of Japanese-Americans and confiscation of their property without due process, acts that were upheld by the Supreme Court in 1944 in *Korematsu v. United States* (which was overruled in 2018 as part of the decision in *Trump v. Hawaii*).

Fast forward to the early 1970s, by which time Americans had been living under a variety of national emergencies declared by presidents and disparate bases for seizing property, restricting travel and otherwise controlling the lives of US citizens. In 1976, in response to the post-Watergate desire to limit presidential power and recognition of the imperative to enshrine in a single legislative act disparate powers, national emergency authority was officially spelled out in the National Emergencies Act (NEA) [[50 U.S. Code §1701](#), [§1702](#) and [§1703](#), as well as [§1621](#) and [§1631](#)]. (See generally, [Statement before Hearing on Never Ending Emergencies](#) of Elizabeth Goitein.)

In short, as described below, Congress has delegated to the president the authority to respond to national emergencies and has provided that, upon a declaration of a national emergency by the president in his sole discretion, a range of special authorities are unlocked to allow the president to mobilize government resources in ways that would be unavailable, and perhaps unlawful, in normal times. Regrettably, there are few checks on the ability of the president to declare a national emergency and, once declared, to act without congressional oversight and in ways that could violate civil rights and liberties in violation of the constitutional rights of American citizens. Said another way, as Goitein [set out](#), the Constitution’s balance of powers should have provided the bulwark against presidential abuse, but Congress has played far too weak a role, which presidents of both parties have taken advantage of.



Article I Powers

National Emergencies Act

The NEA was passed, in the words of Goitein (“[The Alarming Scope of the President’s Emergency Powers](#)”), to rein in the proliferation of statutory authorities passed by Congress (by then 120+ emergency powers spread across the US Code) and states of emergency declared by presidents. Congress retained the right to terminate a national emergency with a majority vote through a simple concurrent resolution that would not need the president’s signature. However, as the Cato Institute noted in its handbook (“[Emergency Powers](#)”), instead of achieving its aim of reining emergency powers, the NEA had the “unintended effect of normalizing emergency rule.”

The unintended consequence can be traced to a 1983 Supreme Court decision, [INS v. Chadha](#), that effectively gutted the NEA’s mechanism for terminating emergency declarations by Congress (what the Supreme Court termed “legislative vetoes”). This led to a 1985 amendment to the NEA that requires a joint resolution of Congress and signature by the president (meaning it needs a two-thirds vote to be veto-proof) to override the president and terminate a declaration of an emergency [[50 U.S. Code §1622](#)]. The one time a national emergency was terminated was in 2023 when Congress passed, and President Biden signed, Joint Resolution 7, ending the COVID-19 emergency declaration.

A president has full discretion to declare a national emergency (which is not defined), but must specify the powers intended to be used, must issue public notices if he intends to invoke additional powers, and must report to Congress every six months on emergency-related expenditures by the government.

The NEA does not provide specific emergency powers, but rather unlocks a cascading set of special emergency powers set out elsewhere in federal legislation (the Brennan Center has catalogued 150 provisions that are activated upon the declaration of a national emergency under the NEA – see “[A Guide to Emergency Powers and Their Use](#)”). Goitein [points out](#) that the NEA does not require that emergency powers that are unlocked relate to the nature of the emergency. Most chillingly, she notes, emergency powers, fashioned as they are to deal with war, allow a president to engage in conduct that would be illegal in ordinary times.

The Brennan Center’s running list of national emergencies, including the 43 still in effect is available here: [Declared National Emergencies under the NEA](#).

International Emergency Economic Powers Act

In 1977, Congress passed the International Emergency Economic Powers Act (IEEPA), again with the intention of reining in presidential power. IEEPA followed efforts to dilute presidential power set out in the Trading with the Enemy Act. And like the NEA, IEEPA has had the unintended consequence of concentrating yet more power in the hands of a president, making it ripe for abuse.



The IPEEA (which has been amended eight times since it was signed) allows the president to address any “unusual and extraordinary threat” – to national security, foreign policy, or the economy – that “has its source in whole or substantial part outside the United States.” (*See generally*, [CRS - The International Emergency Economic Powers Act: Origins, Evolution, and Use.](#)) The president, in the [words of](#) Goitein, “can then order a range of economic actions to address the threat, including freezing assets and blocking financial transactions in which any foreign nation or foreign national has an interest.”

Since 1977, presidents have invoked the IEEPA in 69 declarations of national emergency under the NEA. On average national emergencies last nearly nine years. As of January 2024, there were 42 ongoing national emergencies; all but three involved IEEPA.

Since passage of the IEEPA, the targets of sanctions have expanded – from sanctions imposed on other countries, to targeting foreign political parties, terrorist organizations and suspected traffickers of narcotics and, ultimately, by George W. Bush, without reference to “foreign” status, thus extending coverage to American citizens. The first order extending coverage to US citizens was issued to target persons who threatened the international stabilization efforts in the Balkans (Executive Order 13219) and again following 9/11 (Executive Order 13224, augmented by the PATRIOT Act). Executive Order 13224 prohibited transactions with not only any suspected foreign terrorists, but also with any foreigner *or any U.S. citizen* suspected of providing them with support. Once a person is “designated” under the Executive Order, it becomes illegal for any American to provide any services or support to that person, absent a license from the US government. The government needs only a “reasonable basis” for believing that someone is involved with or supports terrorism in order to designate that person under the Executive Order.

As the Cato Institute [noted](#), US persons targeted under the IEEPA have had only limited success challenging asset seizures under the Constitution. The Cato Institute quotes Eric Sandberg-Zakian of Covington & Burling, who characterized the effect of the application of the powers under the IEEPA to freeze the assets of a US citizen designated under the Act and to render any transaction with that US citizen as a federal felony as follows: “The IEEPA designation of an American person ... amounts to total incapacitation, while the designation of an American organization generally amounts to a death sentence.” (*see* “[Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act](#)”).

Goitein brings the issue back full circle in noting, back in 2018, in reference to Trump’s characterization of the migrant caravan as a “national emergency” (“[What the President Could Do If He Declares a State of Emergency](#)”), that in the future under the IEEPA, Trump “could determine that any American inside the U.S. who offers material support to the asylum seekers – or, for that matter, to undocumented immigrants inside the United States – poses ‘an unusual and extraordinary threat’ to national security, and authorize the Treasury Department to take action against them.”



Communications Act

Goitein also notes ([“The ‘Emergency Powers’ Risk of a Second Trump Presidency”](#)) that under Section 706 of the Communications Act, the president can shut down or take control of “wire communications” facilities in a national emergency. Goitein [characterized](#) the power under Section 706, if interpreted to apply in the digital era in which we now live to the internet, as an “internet kill switch,” providing the president with the power to assume control over internet traffic in the United States.

Goitein [set out](#) the following scenario back in 2018 that highlights the interplay between Section 706 and the IEEPA:

“Proclaiming a threat of war, Trump invokes Section 706 ... to assume government control over internet traffic inside the United States, in order to prevent the spread of Iranian disinformation and propaganda. He also declares a national emergency under IEEPA, authorizing the Treasury Department to freeze the assets of any person or organization suspected of supporting Iran’s activities against the United States. Wielding the authority conferred by these laws, the government shuts down several left-leaning websites and domestic civil-society organizations, based on government determinations (classified, of course) that they are subject to Iranian influence. These include websites and organizations that are focused on getting out the vote.”

Insurrection Act

As I set out in three of my previous briefing notes ([Weaponization of the Military](#), [Living Under Authoritarian Rule](#) and [Existential Threat to Democracy](#)), the president can deploy active duty military and National Guard under the Insurrection Act. The Act overrides the prohibition on deployment of active-duty military under the Posse Comitatus Act, providing largely unchecked powers to deploy active military units as a domestic law enforcement force. Courts are largely powerless to scrutinize or enjoin actions taken under the Insurrection Act. The dress rehearsal for the deployment of active-duty military to quash peaceful protests was likely the clearing of protesters from Lafayette Square on June 1, 2020.

The Alien Enemies Act

On the campaign trail, Trump has promised to invoke the Alien Enemies Act as part of his plan for mass deportations. What he was referring to is described in detail in an article published last month by Katherine Yon Ebright of the Brennan Center ([“The Alien Enemies Act”](#)). The Alien Enemies Act was passed in 1798 as part of the Alien and Sedition Acts. The ACLU noted last month that the Act authorizes a “president to apprehend, restrain, and remove noncitizens during a ‘declared war’ or if the U.S. faces an ‘invasion or predatory incursion’ by another country or foreign government. The law applies to ‘natives’ of another country, which potentially includes people who were born abroad, but who are long-term residents of the U.S. Past presidents have detained or deported noncitizens with legal status



and noncitizens raised in the United States. While the government has never sought to use the Act to detain citizens, we have ample reason to fear that Trump would seek to break that norm.” (See “[Anti-Immigrant Extremists Want to Use this 226-Year-Old Law to Implement a Mass Deportation Program.](#)”)

The Alien Enemies Act was last used as the authority for interning non-citizens of Japanese, German and Italian descent during the early 1940s. Despite the subsequent condemnation of the actions carried under the Act, the Act was neither repealed nor amended (the other three Acts in the package have expired). Ebright posits that, were the United States to declare war in the future, a president could invoke the Alien Enemies Act’s vast detention and deportation power. More troubling, “the language of the law is broad enough that a president might be able to wield the authority in peacetime as an end run around the requirements of criminal and immigration law,” including the substantive and procedural protections for migrants such as the right to request asylum.

The ACLU has noted that, as people have been removed from the United States under the Act without any fundamental due process safeguards, the Act is ripe for civil rights abuses. Moreover, there is a real possibility of racial profiling by federal, state and local law enforcement authorities, potentially emboldening agents to act based on “perceptions of a person’s ancestry or nationality, leading to wrongful arrest, detention, and deportation, including of US citizens.” And, yes, the predicate for invoking the Act is actual or threatened “invasion or predatory incursion,” but Trump often speaks of “the greatest invasion in history” from Mexico at the southern border.

Article II Powers

In his article, Medish [notes](#) there is a second source of presidential emergency power that complements the powers delegated by Congress under Article I of the Constitution, namely a president’s powers inherent in the office of the president under Article II of the Constitution. These include a set of powers, largely legacies of the Cold War, that first emerged during the Eisenhower administration: Presidential Emergency Actions Documents, or PEADs; Special Access Programs, or SAPs; and Executive Orders relating to national security and so-called “continuity of government” in case of nuclear war or other major physical disruptions. These are discussed in greater depth in two Brennan Center articles (“[New Documents Illuminate the President’s Secret, Unchecked Emergency Powers](#)” and “[Presidential Emergency Action Documents](#)”) and a Washington Post op-Ed by Goitein and Andrew Boyle, also of the Brennan Center (“[Trump Has Emergency Powers We Aren’t Allowed to Know About](#)”).

Brian Bennett, in his article in Time last month (“[Doomsday and Democracy: Former Trump Aides Warn of Secret Presidential Crisis Powers](#)”), provides a peek at the PEADs, and only a peek as these documents are shrouded in secrecy and presumably among the government’s most highly guarded secrets. Kept at a Sensitive Compartmented Information Facility (SCIF) at the White House and electronically on a highly restricted server, writes Bennett, are ready-made orders to suspend habeas corpus, place parts of the country under military



control, impose martial law, block Americans from traveling overseas, and restrict telecommunications.

The PEAD authorities, according to Goitein quoted by Bennett, are derived from the Insurrection Act, the Communications Act, the NEA and the Immigration and Nationality Act, and secret DoJ legal interpretations of inherent presidential powers. These documents – a collection of proclamations, executive orders, presidential messages and draft legislation for submission to Congress that have been prepared by the White House, DoJ and Congressional counsel (according to William M. Arkin in his 2020 article ([“Donald Trump's Martial-Law Talk Has Military on Red Alert”](#))) – have not been made available to Congress, on the basis that they are covered by executive privilege. They are intended to be used in the event of doomsday scenarios, but there is little reason to believe they could not be (ab)used by a president willing to test the limits of presidential power with few around him willing to divert his more dangerous impulses.

It is believed that earlier versions of PEADs in fact authorized (and may still authorize) suspension of habeas corpus by the president (and not by Congress, as provided in the Constitution, in “Cases of Rebellion or Invasion the public Safety may require it”), detention of US citizens deemed “subversives,” warrantless searches and imposition of martial law. PEADs may also have authorized restricting the use of US passports. As Goitein and Boyle note, some of these actions would appear to be unconstitutional, at least absent authorization by Congress (though perhaps after the fact). Goitein and Boyle estimated in April 2020 that between 50 and 60 PEADs remained in existence, and it is anyone’s guess what those authorities cover.

According to Arkin, one of the extant PEADs addresses martial law, and another allows for proclaiming the existence of an unlimited national emergency. Arkin quoted an former DoJ lawyer who cautioned, “The greatest danger is that the very existence of these layers of secret directives might convey the impression of powers and authorities that don't really exist in peacetime.”

Concluding Thoughts on Reforms

Starting January 20, 2025, Trump will have at his disposal the NEA, the IEEPA, the Insurrection Act and the Communications Act of 1934, as well as a powerful array of tools that comprise our modern surveillance state. He may well have authorities covered by a web of PEADs. Since the immediate aftermath of Watergate, Congress has largely abdicated exercising its oversight role over Article I powers, giving the president a largely free hand under legislative acts, which he can exercise in parallel with his Article II powers.

None of the concerns raised above are hypothetical, as Trump has confirmed he will declare a national emergency to carry out his threatened mass deportations of migrants living in the United States. Undoubtedly, US citizens will be wrongly caught up in the dragnet. His promises to exact revenge against his perceived political opponents present yet further opportunities for Trump to bring to bear the full force of emergency authorities as well as the



surveillance capabilities of the US government. The question then is whether he will, and what defensive actions can be martialled in response?

So, what do we do? As Goitein [noted](#) most recently in calling on Congress to assert itself by reforming the NEA (a rare bipartisan effort relaunched in May 2024 – the [REPUBLIC Act](#)¹ – would have restored the role of Congress in national emergencies and prevented presidential overreach), “When the Framers omitted presidential emergency powers from the Constitution, they manifested their belief that the dangers posed by insufficiently constrained executive power are greater than any benefits we can hope to obtain from a system of weak checks. The threats our democracy faces today reinforce that conclusion.” While it may be seen as highly inefficient to provide all three branches of government with roles in responding to emergencies (and for Congress in particular to decide to play a more active role consistent with its Article I powers), that may be the only way to preserve our civil rights and liberties. (*See also* Goitein’s “[Testimony on reforming the National Emergencies Act before the Senate Committee on Homeland Security and Governmental Affairs.](#)”)

These reforms represent an important step in reintroducing the balance of power among branches of government when it comes to emergency powers. More would need to be done (*see, e.g.*, the Brennan Center’s [Why It Matters](#), citing the need to amend the IEEPA and the Insurrection Act, closing loopholes that make the National Guard vulnerable to abusive deployments, and Goitein’s 2022 wish list for [Reforming Emergency Powers](#)), but it would be an important first step and would send a message that in no circumstance should American democracy be sacrificed on the altar of expediency.

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¹ The REPUBLIC Act (S. 4373) and H.R. 3988 (the [ARTICLE ONE Act](#)) would by-pass the “[legislative veto](#)” impediment by providing that any national emergency declared under the NEA would expire within 30 days, unless a majority of both houses of Congress approved it under expedited procedures (not subject to filibuster). Any emergency so approved could remain in place for only one year, unless the president seeks to renew it and Congress approves, using the expedited procedures. It would also require the president to disclose PEADs to congressional oversight committees. This legislation would not affect IEEPA declarations, as it presents different issues. *See* the October 2024 letter in support of the reform, available [here](#). On September 18, the House Transportation and Infrastructure Committee passed the ARTICLE ONE Act out of committee by unanimous voice vote. In the Senate, the Homeland Security and Governmental Affairs Committee passed the bill out of committee by a vote of 13–1.