

October 24, 2019

**RE: Support the ARTICLE ONE Act (S. 764) to
Fundamentally Reform the National Emergencies Act**

Dear Senators,

On behalf of the American Civil Liberties Union, we write to urge you to support the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act (ARTICLE ONE Act) (S. 764).¹ This legislation contains fundamental reforms of the National Emergencies Act of 1976² (NEA) that would re-establish crucial checks and balances within the federal statutory framework governing the national emergency declaration process. Should the measure be considered by the full chamber, the ACLU will score the votes.



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In the context of the NEA framework, the balance of power between the executive and the legislative branches has been increasingly tilted towards the executive in ways that threaten Americans' civil liberties and the separation of powers that underpins American democracy. Under current law, a presidential declaration of emergency unlocks more than one hundred statutory authorities for the president's use—including sweeping powers with profound, troubling implications for Americans' civil liberties.³ This NEA framework is ripe for extraordinary abuse, in addition to failing to work as Congress intended—to the detriment of our constitutional system of checks and balances.

As such, the ACLU urges the Senate to support the ARTICLE ONE Act and pass its procedural reforms as a first step towards broader substantive overhaul of the president's delegated authorities, including the International Emergency Economic Powers Act and the Immigration and Nationality Act.

**The ARTICLE ONE Act Fundamentally Reforms The
National Emergencies Act**

The amended Senate bill, S. 764, is currently awaiting consideration by the full Senate after the Senate Committee on Homeland Security and Governmental Affairs ordered the amended legislation reported on July 24, 2019.⁴ This amended measure received strong bipartisan support in committee and

passed by voice vote.⁵ A companion bill, H.R.1755, is still pending review by multiple committees in the House.

The central reform contained in the ARTICLE ONE Act inverts the emergency renewal framework so that affirmative approval by a simple majority of Congress would be required to renew a national emergency that would otherwise automatically expire; in contrast, the current system requires veto-proof congressional support to terminate a national emergency that the president may otherwise unilaterally continue in perpetuity. Specifically, a presidential declaration of emergency would expire under the new procedures unless a joint resolution of approval is enacted within an initial 30-day time window. This 30-day period is intended to give the president access to emergency statutory authorities in the immediate aftermath of a serious crisis. If Congress decides not to approve the emergency, the amended Senate bill would prohibit the president from declaring a subsequent emergency with respect to the same circumstances for the remainder of the president's term of office.

If a joint resolution of approval is enacted into law, the national emergency may last up to one year under the ARTICLE ONE Act. The president must seek congressional approval to extend the emergency at that point and every subsequent year thereafter. Moreover, the amended Senate bill does not "grandfather in" states of emergency currently in effect, as they would be subject to the legislative provision requiring annual congressional approval at the end of each emergency's current one-year term.⁶ Exceptions are described below. Also, the ARTICLE ONE Act provides for Congress to consider the joint resolutions of approval under expedited

¹ S. 764, 116th Cong. (2019).

² National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255-58 (1976) (codified at 50 U.S.C. §§ 1601-1651) (2019).

³ *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUSTICE (last updated Sept. 4, 2019), available at <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

⁴ The amended Senate bill, as approved by the U.S. Senate Committee on Homeland Security & Governmental Affairs on July 24, 2019, has not yet been posted on the Library of Congress website. Descriptions of proposed legislative changes are available via the Committee's hearing record at <https://www.hsgac.senate.gov/hearings/business-meeting-07/24/2019>. Copies of Chairman Ron Johnson's substitute amendment, Ranking Member Gary Peters' amendment to the Johnson substitute amendment, and Chairman Johnson's second degree amendment are available through Bloomberg Government as well as the ACLU website at (respectively): <https://www.aclu.org/other/johnson-substitute-amendment-s764-07-24-19>, <https://www.aclu.org/other/peters-amendment-johnson-substitute-amendment-s-764-07-24-19>, and <https://www.aclu.org/other/johnson-second-degree-amendment-s764-07-24-19>.

⁵ Business Meeting of the U.S. Senate Committee on Homeland Security and Governmental Affairs (July 24, 2019), available at <https://www.hsgac.senate.gov/imo/media/doc/Committee%20Record-2019-07-241.pdf>. Two of the committee's 14 senators voted no on final approval.

⁶ Therefore, if the amended Senate bill were in effect as of the date of this letter, the national emergency at the southern border declared on February 15, 2019, by President Donald Trump via Proclamation 9844 would automatically expire on its one year anniversary unless Congress affirmatively agrees with the president to extend it.

floor procedures; joint resolutions approved by Congress are then presented to the president for approval or veto.

Upon termination of a national emergency, the ARTICLE ONE Act would require any unobligated funds transferred or reprogrammed pursuant to the emergency to be returned. The amended Senate legislation would also terminate construction contracts entered into under the terminated emergency. To ensure transparency and to enable more effective oversight, the bill would mandate the president to respond to congressional inquiries about any national emergency in effect and to submit regular reports to Congress on the executive actions taken to address each active emergency.

To be clear, the ARTICLE ONE Act would not affect the president's authority to declare an emergency under the NEA as an initial matter without congressional involvement, or the president's ability to terminate emergencies unilaterally. Rather the bill is meant to restore the legislative branch's ability to meaningfully check the president's overall access to an enormous array of statutory powers that are activated by the mere proclamation of an emergency. Although the bill does not restrict the authorities available pursuant to an emergency declaration to those that are strictly relevant to that emergency, the new time limits, approval and oversight mechanisms, and reversal of the legislature's burden from termination to affirmative agreement represent major progress from the status quo.

Congress did not intend this disturbing status quo where national "emergencies" persist for years and decades,⁷ during which the president enjoys excessive discretion to pick and choose which emergency power to exercise and for how long. To the contrary, Congress enacted the National Emergencies Act of 1976 to rein in an alarming proliferation of emergency powers and to limit executive power, not to expand it.⁸ That is why the original NEA statute envisioned Congress wielding the ability to end an emergency at any time by passing a concurrent resolution, which unlike a joint resolution is not signed by the president.

However, the Supreme Court later invalidated the use of a concurrent resolution to overturn an executive action as an unconstitutional legislative veto.⁹ As a result, if

⁷ L. Elaine Halchin, *National Emergency Powers*, CONG. RESEARCH SERVICE (last updated Aug. 5, 2019), available at <https://fas.org/sgp/crs/natsec/98-505.pdf>.

⁸ As stated in the Senate report accompanying H.R. 3884, S. Rep. No. 94-1168, "The National Emergencies Act is not intended to enlarge or add to Executive power." Reprinted in the National Emergencies Act (Public Law 94-412): Source Book, Legislative History, Texts, And Other Documents at 292 (Nov. 1976), available at <https://books.google.com/books?id=t03P83w7dgkC&pg=PA292>.

Also see Elizabeth Goitein, *Statement Before The United States House Of Representatives Committee On The Judiciary Subcommittee On The Constitution*, BRENNAN CTR. FOR JUSTICE (Feb. 28, 2019), available at <https://docs.house.gov/meetings/JU/JU10/20190228/108974/HHRG-116-JU10-Wstate-GoiteinE-20190228.pdf>.

⁹ *INS v. Chadha*, 462 U.S. 919 (1983).

Congress wants to terminate a presidential declaration of emergency over the president's objection, the current legal scheme requires Congress to muster a veto-proof two-thirds supermajority for the joint resolution of termination—an extremely difficult feat that has never been successfully done, as members of the 116th Congress know.¹⁰

The ARTICLE ONE Act sets forth sensible solutions to these concerns raised by the current National Emergencies Act framework. We therefore urge the Senate to support the legislation and swiftly proceed to floor consideration. At the same time, we call on lawmakers to approach this measure, if enacted, as the beginning of broader efforts to legislatively reconsider and revamp the president's emergency powers. As a national organization dedicated to defending civil liberties, we feel compelled to outline a few of the areas that we believe additionally warrant Congress's attention because of their implications for our basic rights and our democracy.

Congress Must Go Beyond Reforming the NEA and Reform The Individual Emergency Powers

The amended Senate legislation would exempt emergency declarations from the new approval framework if they invoke solely the International Emergency Economic Powers Act (IEEPA), "supplemented as necessary" by the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); Section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)); or "any provision of law that authorizes the implementation, imposition, or enforcement of economic sanctions with respect to a foreign country."¹¹ The amended Senate bill also specifies that the president cannot invoke IEEPA to impose tariffs or trade quotas.

Section 212(f)¹² was enacted as part of the Immigration and Nationality Act of 1952 (INA).¹³ It states, in part, the following:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

¹⁰ Congress has voted to end a national emergency through the NEA framework in only two instances, both for the same emergency at the southern border declared by President Trump. The first veto override attempt failed in the House by a vote of 248-181 on March 26, 2019. The second veto override attempt failed in the Senate by a vote of 53-36 on October 17, 2019.

¹¹ *Supra* note 4.

¹² 8 U.S.C. § 1182(f).

¹³ Pub. L. 82-414, 66 Stat. 163.

It is important to note that INA Section 212(f) is the authority invoked by President Trump to impose his Muslim ban,¹⁴ which the ACLU and other parties challenged as a violation of our basic constitutional guarantee of religious freedom and of anti-discrimination provisions in the INA itself. The Trump administration also invoked INA Section 212(f) when it introduced an unlawful asylum ban,¹⁵ which is currently blocked while litigation continues.¹⁶ Because INA Section 212(f) is being relied on as authority for the Muslim ban, asylum ban, and other similar proposals,¹⁷ Congress should, at the minimum, clarify and update this statute to prevent its misuse for such grossly unlawful and discriminatory executive actions.¹⁸

The International Emergency Economic Powers Act (IEEPA), which allows the president to control certain economic transactions pursuant to a declaration of emergency, raises another set of concerns. Enacted in 1977 to clarify and establish new limits on presidential power, IEEPA is now core to the modern U.S. economic sanctions system and the most frequently used emergency power¹⁹—which has been used in ways that violate civil liberties and rights.

For the ACLU, what is specifically troubling about IEEPA is the executive branch's use of it, in gross violation of fundamental due process guarantees, to designate disfavored people and organizations as "terrorists" and to seize their assets—based on secret evidence and without any notice of wrongdoing, any probable cause, any opportunity to defend oneself, or any judicial review.²⁰ Under the USA Patriot Act's amendments to IEEPA, the government may block or freeze an entity's assets, even without a designation, by simply opening an investigation into whether it should be designated.²¹ Critically, IEEPA does not explicitly prohibit the president from wielding it to target U.S. citizens and residents, as we saw when President George

¹⁴ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁵ Interim Final Rule on Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018).

¹⁶ For more information, see *East Bay Sanctuary Covenant v. Trump*, ACLU (last updated Feb. 7, 2019), available at <https://www.aclu.org/cases/east-bay-sanctuary-covenant-v-trump>.

¹⁷ Most recently, the Trump administration issued a proclamation under INA Section 212(f) restricting entry based on health insurance status in another attempt to drastically curtail immigration. This proclamation issued on Oct. 4, 2019, is available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-suspension-entry-immigrants-will-financially-burden-united-states-healthcare-system/>.

¹⁸ For examples of key reforms to the INA, see the ACLU's endorsement of the NO BAN Act (Mar. 25, 2019), available at <https://www.aclu.org/letter/aclu-endorsement-no-ban-act>.

¹⁹ See, e.g., Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, CONG. RESEARCH SERVICE (last updated Mar. 20, 2019), available at <https://fas.org/sgp/crs/natsec/R45618.pdf>.

²⁰ Jennifer Turner, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving In The "War On Terrorism Financing"* 33-35, AMERICAN CIVIL LIBERTIES UNION (June 2009), available at <https://www.aclu.org/report/blocking-faith-freezing-charity-chilling-muslim-charitable-giving-war-terrorism-financing>.

²¹ *Ibid.*

W. Bush invoked this law during the post-9/11 panic to effectively shut down U.S.-based Muslim charities without due process.²²

For the above reasons we are concerned about the significance of the IEEPA and INA carve-outs in the amended Senate bill, even as we support the overall measure and acknowledge the legislation's deliberate focus on the procedural aspects and not the various emergency authorities themselves. Lawmakers must not leave behind potential reforms of the harmful flaws in IEEPA, INA, and other statutes available for the president's "emergency" use as they look ahead to future legislative activity. The ACLU stands ready to assist Congress in those vital efforts as well.

Conclusion

The threats and risks posed by the NEA framework are present regardless of which particular person is president, although they are greatly magnified when that leader does not respect the rule of law, the separation of powers, and other basic safeguards against tyranny. Perpetual states of national emergency that give the leader of a country easy access to extraordinary powers, with weak mechanisms to guard against abuse, are a feature of autocratic regimes and not what we should tolerate for our own nation.

It is time for Congress to assert its duties in our constitutional system of checks and balances and reclaim its ability to effectively supervise presidential declarations of national emergency. The ARTICLE ONE Act is a sensible proposal aimed at achieving just that. Thus the ACLU urges lawmakers to support the legislation—even as we simultaneously call on Congress to undertake further reviews and reforms of the statutory authorities that rely on presidential declarations of national emergency. If you have questions, please contact Policy Counsel Kate Oh at koh@aclu.org or (202) 715-0816.

Sincerely,



Ronald Newman
National Political Director



Kate Oh
Policy Counsel

²² *The "Specially-Designated Global Terrorist" Designation Scheme and its Constitutional Flaws*, AMERICAN CIVIL LIBERTIES UNION (last visited Oct. 17, 2019), available at <https://www.aclu.org/other/briefing-paper-specially-designated-global-terrorist-designation-scheme-and-its-constitutional>.