Written Statement

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"The National Emergencies Act of 1976"

Committee on the Judiciary
Subcommittee on The Constitution, Civil Rights and Civil Liberties

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I. INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and members of the Subcommittee, my name is Jonathan Turley and I am a law professor at The George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is a distinct honor to appear before you today to discuss the controversy over the declaration of President Donald Trump of an emergency under the National Emergencies Act of 1976.[1]

I come to this question as both an academic and a litigator in the field. As a law professor, my published scholarship has focused on constitutional law and legal theory, with an emphasis on the separation of powers, war powers, and the military.[2] As a litigator, I have litigated various

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[1] Pub. L. 94-412, 90 Stat. 1255, codified at 50 U.S.C. §§ 1601-1651.

[2] *See, e.g.*, Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also*

constitutional cases dealing with presidential and congressional powers, including had the privilege of serving as lead counsel for both Democratic and Republican members in challenging the undeclared war in Libya under the Obama Administration. I also served as lead counsel representing the United States House of Representatives in its successful challenge to the unauthorized use of federal funds in Obamacare. As this body of work reflects, I am an unrepentant Madisonian scholar and, as such, I tend to favor a robust and active role for Congress. Indeed, I have previously testified against the encroachment of the Executive Branch and the growing imbalance in our tripartite system of governance. Much of this imbalance is due to the acquiescence of Congress in yielding greater and greater authority to the Chief Executive.

I have repeatedly testified before both the House and the Senate to implore members to reclaim their inherent powers and exercise legislative authority in our government. Instead, members have frittered away their Article I powers to an ever-expanding executive branch. The National Emergency Act is an archetype of this long acquiescence. While originally portrayed as an effort to limit executive power, the National Emergencies Act actually gives unfettered authority to presidents in making emergency declarations and exercising emergency powers. At the same time, Congress has continued (despite objections by some of us) to appropriate billions of dollars to the Executive Branch with few conditions attached. The current controversy is the result of this long and irresponsible history. Although I disagree on a policy level with the declaration of the emergency on the southern border, this problem is the making of the Congress, not the President.[3] Challenges are unlikely to succeed given the language of the Act and the fluidity of federal appropriations. The federal courts are not designed

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Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance,* 71 George Washington Law Review 1-90 (2003); Jonathan Turley, *The Military Pocket Republic*, 97 Northwestern University Law Review 1-134 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy,* 70 George Washington Law Review 649-769 (2002).

[3] Jonathan Turley, *Why Trump Will Win The Wall Fight*, The Hill, February 16, 2019; Jonathan Turley, *Why Trump May Win His Legal Fight Over The Border Wall,* BBC, February 17, 2019.

to protect Congress from itself. To be blunt, as someone who has long fought for legislative authority, a paraphrasing of the words of Cassius in Shakespeare's *Julius Caesar* seems all to apt: "The fault, dear Congress, is not in our presidents, but in ourselves."

II. THE NATIONAL EMERGENCIES ACT OF 1976

Presidents have long grounded controversial executive actions in claims of inherent Article II powers and the emergency provisions of statutes preexisting the National Emergencies Act. The first formal emergency declaration occurred under President Woodrow Wilson in 1917 when he stated: "I have found that there exists a national emergency arising from the insufficiency of maritime tonnage to carry the products of the farms, forests, mines and manufacturing industries of the United States, to their consumers abroad and within the United States." Notably, this was not done under Wilson's inherent authority but under federal law with Wilson declaring "Now, Therefore, I, Woodrow Wilson, President of the United States of America, acting under and by virtue of the authority conferred in me by said Act of Congress." He declared the emergency under the authority of the act that established the United States Shipping Board. 39 Stat. 729. That declaration would be followed by dozens of emergencies.

The NEA was an example of Congress snatching defeat out of the jaws of victory. The law was passed roughly 20 years after Congress prevailed in a conflict with President Harry Truman over the seizure of steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*.[4] The ruling against Truman reaffirmed the authority of Congress and expressly warned of the tendency of presidents to declare emergencies. Justice Robert Jackson noted "[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies." Despite such warnings, Congress proceeded to create a law that allow presidents to "kindle emergencies" with virtual abandon. The irony is that the statute was originally drafted to end the constant use of emergency powers. Instead, a statute that was designed to discourage the use of national emergency declarations was converted into a virtually unlimited license to make such declarations.

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[4] 43 U.S. 579, 650 (1952).

A. Good Intentions and Bad Drafting.

The original motivation behind the National Emergencies Act was commendable. If the old adage is true that "the road to hell is paved with good intentions," Congress stopped long enough along the way for the passage of the NEA. Congress was concerned that there seemed to be no limitations or conclusion for emergencies declared by presidents. Sen. Charles Mathias stated "The Committee concluded that not one, but four national emergencies exist and continue to this day. Moreover, we discovered that emergency powers exist in more than 470 separate statutes and, when combined, give the President potential dictatorial powers."[5] What became known as the Special Committee on National Emergencies and Delegated Emergency Powers sought to address what it legitimately viewed as a growing usurpation of legislative authority in the area: "This dangerous state of affairs is a direct result of Congress's failure to establish effective means for the handling of emergencies… Congress, through its own actions has transferred awesome magnitudes of power to the Executive without ever examining the cumulative effect of that delegation of responsibility." Thus, the Act sought to terminate existing emergencies and to provide for a formal process by which emergencies could be declared and Congress could rescind such powers.

The problem is that the National Emergencies Act lacks one conspicuous element: a definition of what constitutes a national emergency. The Act left the declaration of a national emergency as largely an unfettered authority of a president. An early version had a loose but express requirement that a president establish that a declared emergency is "essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States."[6] That language was perilously dropped in the final version, leaving the Act without express conditions or elements to establish a national emergency. This was done, according to a Senate report, to rely on the definition of emergencies under other acts. S. Comm. on Gov. Operations, Report to Accompany H.R. 3884, S. Rep. No. 94-1168, at 3

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5 121 Cong. Rec. S2302 (daily ed. Mar. 6, 1975) (statement of Sen. Charles Mathias), reprinted in S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 285 (1976).

6 S. Rep. No. 93-1170, at 8 (1974).

(1976) (reprinted in Spec. Comm. on National Emergencies Source Book at 292) ("The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power."). If this was the purpose, it was a curious choice since the NEA would be the authority of the declaration and the focus of judicial review. Moreover, the language did not tether any NEA declarations to satisfaction of an underlying statute. Finally, a review of the underlying statutes reveals that most do not contain such a definition.

Congress also originally sought to repeal the 49 provisions in various statutes granting emergency powers to the president. Yet, it would ultimately repeal only a handful of such provisions, including the ability of a president to criminalize conduct in military zones and the authority to strip citizenship from certain persons. The federal statutory books are still inundated with ongoing emergency powers that can be used after a president makes an effectively unassailable declaration of an emergency. Currently, there are 136 emergency powers available to a president for use in a unilateral declaration of national emergency, including the use of construction funds appropriated to the Defense Department.

There was an even greater change made at the end of the legislative process at the insistence of the Ford Administration. The original version of the statute had a critical provision that would have made a meaningful change in the status quo in reasserting legislative authority. A president could declare a national emergency but it would end automatically absent an affirmative act of Congress within six months. Thus, a president had months to convince Congress that a national emergency actually existed to continue the exercise of emergency powers. It also required that every six months after a declaration a President would submit to Congress an accounting of expenditures "directly attributable to the exercise of powers and authorities conferred by such declaration." From a separation of powers standpoint, the requirement of affirmative congressional action was the defining limitation of the law. Yet, at the demand of the Ford Administration that condition was cut out of the final bill. Instead, Congress would be able to rescind an emergency by a vote of both houses. Thus, absent action from Congress, emergencies could continue indefinitely with period notices of renewal.

That is precisely what has occurred under the Act. Since 1979, presidents have declared 58 national emergencies called by presidents. That amounts to more than one new national emergency declaration every year. Thirty-one of those national emergencies are still in effect. After Congress

yielded to Ford's demand to gut the affirmative approval provision, it became easy to declare an emergency but far more difficult to end one. No politician wants to be caught on the wrong side of an emergency. So, the current language allows members to do nothing. If an emergency becomes unpopular, they can deny that they ever really supported it. If there is no vote affirmatively approving the emergency, there is nothing tying members to it. Billions of dollars are spent as Congress watches as a pure spectator to the act of governing.

Even residual checks on executive powers that remained in the Act appear honored primarily in their breach. While the Act purports to require that Congress meet every six months to review these emergencies, Congress quickly found even that modest level of involvement in governing to be inconvenient or burdensome. The Congress has never met to fulfill this express duty. Not once. The failure to exercise congressional review was challenged but the courts refused to hold Congress to the commitment to actually vote on the record through a joint resolution or any other formal means. Indeed, the most that Congress has done to show a modicum of responsibility over emergency declarations was the introduction of a single resolution to terminate a declaration related to Hurricane Katrina. That declaration however was later revoked by President George W. Bush.[7]

The result is a law that proved to be the ultimate political bait-and-switch. Congress promised the public to limit future declared emergencies, curtail presidential emergencies powers, and restore congressional authority. Instead, Congress knuckled under to demands from the Ford Administration and created the opposite: a law with largely unbridled emergency powers tied that allow the use of largely unconditioned funds.

B. Unfettered Authority Meets Unconditional Funding.

The current controversy is the combination of two long-standing trends in Congress: the granting of largely unfettered authority and the appropriation of largely unconditioned funds to presidents. I have previously testified about the loss of legislative authority in the modern appropriations process where billions are loosely committed to various agencies.[8]

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[7] Gregory Korte, *America's Perpetual State of Emergency*, USA Today, Oct. 22, 2014.

[8] See, e.g., United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial*

While the "power of the purse" is central to the separation of powers,[9] it has become something of a constitutional mythology in many cases. Due to modern budget rules, it is practically difficult for Congress to immediately alter government programs with appropriation changes. There are billions sloshing around in federal budgets that can be moved around to fill gaps in funding. The Libyan War is a good example. President Obama announced that he would not ask Congress for authority to attack another country, including attacks on its capital and military units in support of rebel forces. Instead, he merely shifted billions to fund a war without the need to ask for immediate funding. Thus, even without a declaration, Congress has routinely given federal agencies billions in funds that can be easily moved around under loose conditions on their use.

The NEA magnifies that problem by affirmatively stripping conditions off funds whenever a president unilaterally declares an emergency. For example, Section 2808 allows a president, through the Secretary of Defense, to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). This includes "the total amount of funds that have been appropriated for military construction . . . that have not been obligated." *Id*. Such military construction projects encompass "any construction, development, conversion, or extension of any kind carried out with respect to a military installation," and "military installation" includes a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801. This is but one of the 136 powers listed under the Act that range from suspending any Clean Air Act implementation to drafting retired Coast Guard officers.

Deference to Agencies," March 15, 2016 (testimony of Professor Jonathan Turley); United States House of Representatives, *"Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States"* Before the H. Comm. On Rules, 113th Cong., July 16, 2014 (testimony of Professor Jonathan Turley).

[9] *See, e.g., Campbell*, 203 F.3d at 23 ("Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again, there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.").

The NEA allows presidents to augment any undedicated money with emergency funding to achieve objectives not expressly approved by Congress. Given the absence of a definition or any criteria for a declared emergency, the ability to shift billions in dollars without a vote of Congress has proven an irresistible temptation for presidents after the passage of the NEA.

III. THE MERITS – AND PERILS – IN THE CHALLENGES TO THE TRUMP DECLARATION

Until the declaration by President Trump, there was notably little interest in Congress or the public in most declarations despite the exercise of largely unfettered authority by presidents. Indeed, most citizens were entirely unaware that there are dozens of such emergencies still in place. President Bill Clinton had 18 such declarations in 8 years – more than two for every year in office. Presidents George W. Bush and Barack Obama had another 13 and 12, respectively. Moreover, most of these declarations concern "national emergencies" that the public is still largely unaware of or particularly concerned about. The importation of rough diamonds from Sierra Leone or the transfers of property by certain Haitian or Zimbabwean officials are clearly serious matters but hardly household concerns with the public. Most declarations were made for diplomatic or economic purposes, particularly with reference to International Emergency Economic Powers Act (IEEPA). Even though that law refers to an "unusual and extraordinary threat," there have been no meaningful limitations on these routine declarations. Yet, not only has the Congress never rescinded such declarations but no court has ever ruled that a president lacked the authority to declare a national emergency under the Act.

There are two basic challenges that can be brought in national emergency cases: a challenge to the source of the authority and a challenge to the source of the funding. While it is certainly possible that the Administration could suffer a defeat in a lower court, the statutory text and the existing precedent strongly favor the Trump Administration in ultimately prevailing in this litigation on both grounds. The most promising claims are largely procedural or limited in character.

A. The Source Of The Authority.

The multistate lawsuit filed in the Northern District of California in *State of California, et al v. Trump* spends considerable space challenging the

Administration's basis for the emergency declaration. It is in large measure a challenge on the merits of treating the border crossings as a true emergency. Thus, the filing invites the court to do something that most courts steadfastly refuse to do: substitute its judgment for that of a sitting president on a discretionary matter.

I have previously stated that I do not view the situation on the southern border as a national emergency. However, neither my view of the situation nor that of the court should be determinative. Under the law written by this body, this is a national emergency because President Trump said it is an emergency. That may seem superficial and simplistic but the NEA is superficial and simplistic.

President Trump has detailed the reasons for his declaration,[10] which states in part:

> "The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate."

There are ample reasons to disagree with that declaration on a policy level. However, this is a question of the constitutional role of the courts and Congress respectively, not the merits.

First and foremost, a court is unlikely to do for Congress what Congress will not do for itself. It was Congress that enacted such a vacuous bill allowing for the declaration of national emergencies. It is Congress that can rescind such an order, as the House of Representatives showed this week with its vote to terminate the emergency. If Congress cannot muster the

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[10] Declaration of President Donald Trump, February 15, 2019, available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/

votes to rescind the emergency or the supermajority needed to override a veto, it is not the function of the courts to compel the same result by the decision of a single jurist. Congress must either live with the system that it created or it must change the system. The record before the Court will show that a significant number of members agree with the President on the declaration, including 182 members of the House this week. In the Senate, this is likely to be close to fifty percent. That remains a political question that is extrinsic to the function of an Article III judge. Indeed, such a judge is likely to note that Congress has been repeatedly criticized over the toothless language of the NEA and its regular use by presidents, including its use in non-emergencies.[11] Congress has ignored that criticism despite emergencies that seem not only opportunistic but never-ending.

Second, for a court to rule against the President, it would have to effectively amend the NEA to insert the standard that Congress conspicuously omitted. What would that standard be? A court would have to set some elements as a prerequisite for a presidential declaration without benefit of a research staff, expert testimony, or regulatory experience. It would also have to ignore the supportive declarations of various agencies, which are ordinarily given deference under controlling federal precedent like *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[12] That case addressed the question of how the Environmental Protection Agency could treat "non-attainment" states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. As noted by Chief Justice John Roberts, "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[13] *Chevron* put forward a simple test for courts in first looking at whether the underlying statute clearly answers the question and, if not, whether the agency's decision is "permissible" or reasonable.[14] The court in this case would have to reject the expert views of agencies like the Department of Homeland Security. As

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[11] See, e.g., Gregory Korte, *America's Perpetual State of Emergency*, USA Today, Oct. 22, 2014.

[12] *Chevron*, 467 U.S. 837 (1984).

[13] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

[14] *Chevron,* 467 U.S. at 842-43.

a critic of *Chevron* in both writing[15] and testimony,[16] I have encouraged closer scrutiny of agency decisions but it must be based on some clear and cognizable standard. It is difficult to see such a clear foundation for a federal court to not only constructively amend this statute but override these agencies.

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[15] *See, e.g*., Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013).

[16] *See* United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, March 21, 2017; United States House of Representatives, House Committee on Science, Space, and Technology, "*Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*," September 14, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"* June 22, 2016; United States Senate, Committee on Homeland Security and Governmental Affairs, "*The Administrative State: An Examination of Federal Rulemaking,*" April 20, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," March 15, 2016; *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014); *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015).

Finally, even if a court were to delve into the merits, it would be unlikely to delve too far. The multistate lawsuit argues that apprehensions are down significantly from their historic highs. That factual point seems unassailable. In 2018, apprehensions at the border were less than 400,000. In 2000, that rate was 1.6 million. However, that does not mean that the rate of crossings cannot be deemed an emergency. It is akin to saying that a storm surge of 25 feet in 2000 must mean that a storm surge of 12 feet is not an emergency this year. The President can still declare that the ongoing rate of crossings constitutes an emergency in his judgment. Indeed, elections often result in significant changes in how elected officials view public safety concerns, particularly presidents. The public elected President Trump based in part on his view that the border situation is a national security crisis. For an unelected federal judge to substitute his or her view on such a question would go well outside of the navigational beacons for judicial review.

A challenge to the source of the authority in this controversy is highly dubious. It is unlikely to prevail not because of what the President has done but what the Congress did not do in crafting the National Emergencies Act.

B. The Source of the Funds.

The second area of challenge is more promising but only to a limited extent. The use of federal funds does offer a court a more concrete basis to review executive action based on any conditions set by Congress. The problem is that the NEA is designed to remove such conditions on some funding and other sources have broad possible uses. Thus, even if the challengers could succeed in enjoining a couple areas of funding, there would still be ample funding to continue wall construction.

The funding for the wall starts with the $1.375 billions approved by Congress for border security in a compromise to end the recent government shutdown. If critics are hoping that this purported limitation in the appropriation will stop the Executive Branch, they are relying on the same low-grade legislative work that characterizes the NEA itself. On February 14, 2019, Congress passed the Consolidated Appropriations Act, 2019 (H.J. Res. 31) (the "2019 Appropriations Act"), which provides $1.375 billion for construction of primary pedestrian fencing. This fencing expressly is approved for in "the Rio Grande Valley Sector" of the border. H.J. Res. 31 § 230(a)(1). The Rio Grande Valley sector alone runs along 316 river miles and 317 coastal miles. It also covers 34 Texas counties. While the Congress specified that the money "shall only be available for operationally effective designs deployed as of the date of the Consolidated Appropriations Act,

2017 (Public Law 115-31), such as currently deployed steel bollard designs, that prioritize agent safety." Id. § 230(b). This would still allow border construction for hundreds of miles. Moreover, the Congress has not even required the use of steel bollard designs per se. It merely specified the use of "operationally effective designs" previously deployed in wall construction. A court would be hard pressed to deny the use of such funds when Congress, again, gave ample flexibility to the federal agencies in the use of the funds.

A second source of funding is directly related to the NEA declaration. President Trump has declared that he will use military construction funding as allowed under Section 2808, which states that a declaration allows a president to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The challengers insist that "military construction" under Section 2808 includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." Again, Congress used language that defeats meaningful limitations. While the language "to support such use of the armed forces" may seem like a meaningful limitation, presidents have previously dispatched military to the border and border protection is a classic role for military units. It is certainly true that our border has long been maintained by our non-military border patrol and other assets. However, that does not mean that military units cannot be used so long as they do not violate such laws as the Posse Comitatus Act. *See* 18 U.S.C. § 1385. Some have suggested that the funds may be barred because the construction of the wall is not an activity where the use of the armed forces is required. However, that is not what the law actually says. Section 1385 says that the funds may be used when those funds are "necessary to support use of the armed forces." It is not that the armed forces are required but that the funds are required as support for such forces. It is the President who determines whether armed forces are to be used and few have questioned that the military can be used on our borders for security. Finally, the reference to a "military installation" seems like a meaningful limitation until you actually look how Congress defined it. It includes a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801. Using words like "other activity" defeats efforts to limit the scope of such construction.

The Administration has also linked the drug interdiction elements of the declaration to the use of drug enforcement resources. Even without the NEA, Section 284 authorizes the Secretary of Defense to assist civilian drug enforcement activities, including the providing of support "for the

counterdrug activities or activities to counter transnational organized crime." 10 U.S.C. § 284. Notably, this includes "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." Again, Congress elected to give this authority to presidents by an overwhelming vote in 2016. It was signed into law by President Barack Obama and is now being used by President Trump. The meaning of the law does not change with the identity of the president.

The Administration is also indicating that it will use forfeiture funds under Section 9705(g)(4)(B) that expressly allows for the discretionally use of the Treasury Forfeiture Fund's "unobligated balances . . . shall be available to the Secretary . . . for obligation or expenditure in connection with the law enforcement activities of any Federal agency. . . ." Again, Congress decided that this free and fluid use of forfeiture funds was in the interests of the public when the White House was under the control of a different president. A court will apply the limitations – or lack thereof – set by Congress.

These funds constitute $6.7 billion over the roughly $1.4 billion appropriated recently by Congress. That constitutes roughly $8 billion – three billion above the amount originally sought by President Trump. That simple math reveals the simple problem for a challenge. Even if a court were to enjoin one or two sources of funding, there would remain ample money to fund the construction. It would be quite extraordinary for a court to "run the table" and block all such sources for funds.

C. A Question of Deference and Discretion.

My judgment that the current challenges face a low likelihood of success is based not only on the text of the National Emergencies Act but also prior judicial precedent. A court would have to depart not only from the text of various laws but the approach of past courts to entirely block construction of the wall.

One such ruling was handed down in *Beacon Products Corp. v. Reagan*,[17] where a business sought to challenge the declared national emergency related to Nicaragua. That declaration imposed trade restrictions under National Emergencies Act and International Emergency Economic

[17] 814 F.2d 1 (1st Cir. 1987).

Powers Act (IEEPA).[18] However, the challengers noted that the Congress had not fulfilled its obligation under section 202(b), which states:

> "Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated."

50 U.S.C. § 1622(b). Then Judge (and now Supreme Court Justice) Stephen Breyer ruled against the challenge and adopted a fluid interpretation of even the express language of Section 202(b). Here the language states clearly that "each House of Congress shall meet to consider a vote on a joint resolution." It is the last residue of affirmative congressional action. It is not a high burden but even that requirement was declared by the court to be unnecessary to fulfill. Breyer wrote that it was practically inconvenient and unnecessary to actually meet for such a purpose:

> "Failure to vote likely means that few legislators wish to end the emergency. It would be odd to think that Congress would make it easier to terminate a popular emergency than an unpopular one. It seems far more likely that Congress meant the "shall meet to consider a vote" language to give those who want to end the emergency the chance to force a vote on the issue, rather than to *require* those who do *not* want to end the emergency to force congressional action to prevent automatic termination."

What is most striking about this decision is that Section 202(b) is a model of specificity in comparison to the rest of the NEA. Yet, even that language was read broadly to eliminate conditions placed by Congress. Moreover, Breyer emphasized that this view is supported by the fact that Congress can always exercise its authority to rescind an emergency order. Given such reserved authority, the court did not feel compelled to intervene in such controversies.

Rulings in other areas are equally relevant to this controversy. The last major litigation over inherent presidential powers occurred over the President's immigration orders. While I criticized the first immigration order as a dreadful document that was poorly written and later poorly supported,

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[18] 50 U.S.C. §§ 1701-1706.

there was no doubt that the President had the better case based existing case law. For that reason, I disagree with the lower court rulings though I recognized that there were good-faith arguments on both sides. The order was later changed though challengers insisted that the core violations under the Constitution and statutes remained. Ultimately, in *Trump v. Hawaii*, the Supreme Court ruled for the President. In a 5-4 decision, the Supreme Court reversed the Ninth Circuit in finding that the multistate plaintiffs did not have a "likelihood of success on the merits." The decision by Chief Justice John Roberts reaffirmed the high level of deference afforded to a president in this area–the same level of deference likely to be applied in the current challenge over the emergency declaration along out border.

There are other such cases affirming deference accorded to presidents along the border but there is little need to establish this obvious fact. It is probably more useful to note what case is not determinative. Some in Congress have insisted that this declaration is unconstitutional under the precedent established under *Youngstown Sheet & Tube Co. v. Sawyer*.[19] House Intelligence Committee Chair Adam Schiff has made this point in "Look, if Harry Truman couldn't nationalize the steel industry during wartime, this President doesn't have the power to declare an emergency and build a multibillion-dollar wall on the border, so, that's a nonstarter."[20] I have to disagree with Chairman Schiff despite my respect for his legal judgment (learned as his opposing counsel in the last impeachment trial in the United States Senate).

In *Youngstown Sheet & Tube Co*., Justice Hugo Black ruled "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress … from which such a power can be fairly implied." Likewise, in his famous concurrence, Justice Robert Jackson explained that presidential actions are reviewed along a spectrum of legitimacy with three critical categories. First, a president's action are largely unassailable when "[t]he President acts pursuant to an express or implied authorization of Congress." Second, there are cases where a president acts in areas where Congress is silent. Finally, a president has the least legitimacy "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

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19 343 U.S. 579 (1952).

20 Melissa Caen, *CA Congressman Says President Cannot Use National Emergency To Build Wall*, CBS News, Jan. 6, 2019.

This is not *Youngstown*. In that case, President Truman sealed the steel mills without any authorization of Congress. In this case, President Trump is acting under such authority given to him and all presidents by Congress under the NEA. It falls into the first category described by Justice Jackson of an express authorization of Congress. Thus, to the extent that *Youngstown Sheet & Tube Co.* applies, it works heavily in favor of President Trump in this litigation. To rule against this declaration would not only gut that ruling but circumvent decades of legal authority affording great deference in this area to presidents.

IV. CONCLUSION

Justice Oliver Wendell Holmes once said, "If my fellow citizens want to go to hell, I will help them. It is my job." He was expressing the limited role of courts in challenges to federal law. They will gladly send Congress to hell. It only needs to point to the destination.

The National Emergencies Act of 1976 is an example of this body being hellbent to surrender its institutional powers–even its institutional relevancy–in the governing of this nation. Indeed, it is more proof that Madison may have been wrong in his faith that members would fight jealously to protect their constitutional authority. While Madison hoped in *Federalist No. 51* that "ambition must . . . counteract ambition," members have shown little institutional fidelity as they worked toward their own institutional obsolescence. If this controversy has any positive result, it will be to expose that record and force members to resume their constitutional duties under Article I. Yet, the effort to litigate this matter seems to suggest that this controversy is the making of the President, not Congress. To make matters worse, some have suggested that this body should sue as a party to contest the declaration. Such a filing would use the precedent secured in *United States House of Representatives v. Burwell*,[21] where the House of Representatives succeeded in establishing standing in what proved to be a successful challenge to President Obama ordering potentially the payment of billions to insurance companies under the Affordable Care Act without an authorization from Congress. I was lead counsel for the House of Representatives in that case. We won the case. Superficially, it may look like the wall controversy. Obama sought funds from Congress and, when unsuccessful, acted unilaterally. But Obama ordered the money directly from the Treasury as a permanent appropriation, like the money used to pay tax

[21] 185 F. Supp. 3d 165 (D.D.C. 2016).

refunds. Congress had never approved such payments. Conversely, Trump is using appropriated funds and an authorization under federal law.

The border declaration is now being challenged in multiple courts. That is right and proper. However, there is no need for this body to file as a party. As a long advocate of legislative authority and specifically legislative standing, I can only implore this body not to risk the hard-fought victory in *Burwell* with an ill-considered challenge. The concern is that the challenge will not only fail but that this body will undermine its own standing precedent. While a court could rule on the merits of the arguments in such a challenge, it is a well-known fact that courts will often look to standing as a way to avoid such difficult question. There is no reason for members to risk a negative ruling on standing in a weak case when it is already being fully litigated by others and members can join as amicus curiae. Some of us have written and argued for years to establish legislative standing. Much still must be done but it would be a wasteful and self-defeating act for this body to risk our victory in *Burwell* on a filing with such a low likelihood of success.

That brings us back to Holmes. Congress has the authority to rescind the national emergency declaration of Trump with a vote of both chambers. If Congress cannot muster the votes, however, a federal judge is unlikely to do so. The court is more likely to send Congress along its long chosen road toward institutional obsolescence.

I thank you again for the honor of appearing today and I am happy to answer any questions that you might have.

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