



NEW YORK  
CITY BAR

**TASK FORCE ON THE RULE OF LAW**

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December 8, 2021

Hon. Charles E. Schumer  
Majority Leader  
United States Senate  
322 Hart Senate Office Building  
Washington, DC 20510

Hon. Nancy Pelosi  
Speaker  
United States House of Representatives  
1236 Longworth House Office Building  
Washington, DC 20515

Hon. Mitch McConnell  
Minority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, DC 20510

Hon. Kevin McCarthy  
Minority Leader  
United States House of Representatives  
2468 Rayburn Office Building  
Washington, DC 20515

**Re: Support for the ARTICLE ONE Act**

Dear Majority Leader Schumer, Minority Leader McConnell, Speaker Pelosi and Minority Leader McCarthy:

As you know, both houses of Congress are now considering legislation that would address the President's power, under the National Emergencies Act, to declare a national emergency. One such proposal, the ARTICLE ONE Act, has been introduced in the Senate and incorporated into proposed legislation titled the National Security Powers Act (S.2391), sponsored by Senators Murphy, Lee and Sanders. In the House, a similar provision has been included in the Protecting Our Democracy Act (H.R. 5314), with sponsorship including nine committee chairs.<sup>1</sup>

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<sup>1</sup> See <https://dean.house.gov/2021/9/house-democrats-introduce-the-protecting-our-democracy-act-to-restore-strengthen-and-protect-our-democracy>.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

This Association issued a report supporting the ARTICLE ONE Act last year, a copy of which is attached.<sup>2</sup> We write now to reiterate our support for that proposal. Over the last century, Congress has passed over 100 laws that grant the President the power to declare a national emergency and exercise a broad range of powers. Many of these grants are still active. Congress has the authority to terminate the President's exercise of emergency powers but only through a joint resolution, which is treated as a law requiring either the President's approval or congressional override of a presidential veto. As a practical matter, this has meant that presidential declarations of emergency powers remain in effect for many years after the emergency giving rise to the declaration has ended. We believe this is inconsistent with the balance of powers contemplated by the Constitution and provides unwise potential for abuse by a President intent on avoiding otherwise required congressional authorization for Executive Branch actions.

Essentially, the ARTICLE ONE Act reverses the presumption of continuing and the burden of ending a presidentially declared emergency. Instead of an emergency continuing in effect until it is terminated by joint resolution enacted into law, any authority the President invokes during an emergency would terminate after 30 days unless a joint resolution of continuing approval is enacted into law. If Congress does not pass such a resolution, the President may not, during the remainder of the President's term of office, declare a subsequent national emergency with respect to the same circumstances. Upon enactment of a resolution affirming an emergency grant of authority, that authority would continue for one year (unless Congress or the President sets an earlier deadline). The President could seek renewal of the declaration, which again would require a congressional resolution. In addition, the Act requires the President to make detailed reports to Congress regarding the use of emergency declarations.

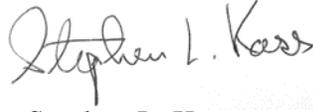
We believe the ARTICLE ONE Act would provide an appropriate check on the exercise of the President's emergency authority. It would achieve a balance between the Executive and Legislative Branches, providing the Executive with the flexibility to respond to legitimate emergencies but only for a limited time (30 days) unless Congress approves an extension for up to one year. Granting the President 30 days to exercise emergency authority should allow time for an appropriate response to the emergency. And, in a clearly recognized emergency, Congress would be able to extend the grant for one year, subject to renewal by the action of the President and Congress. Congress's ability to act quickly to deal with the coronavirus crisis is an example of its ability to operate rapidly where there is a consensus that an emergency exists.

With the growing concern that the balance of powers among the branches has tilted excessively toward the Executive Branch with respect to the use of emergency powers and that protracted emergency declarations by a President could further erode both that balance and the public's confidence in the rule of law, we urge Congress to take this opportunity to revise the National Emergencies Act along the lines set forth above.

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<sup>2</sup> See *The National Emergencies Act Must Be Revised*, NEW YORK CITY BAR ASSOCIATION, reissued April 2020, available at: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/national-emergencies-act-urging-passage-of-article-one-act>.

Respectfully,

A handwritten signature in black ink that reads "Stephen L. Kass". The signature is written in a cursive style with a large initial 'S'.

Stephen L. Kass  
Chair, Task Force on the Rule of Law

Cc: Hon. Mike Lee  
Hon. Bob Menendez  
Hon. Chris Murphy  
Hon. Jim Risch  
Hon. Bernie Sanders  
Hon. Adam Schiff

**REPORT BY THE TASK FORCE ON THE RULE OF LAW**

**THE NATIONAL EMERGENCIES ACT MUST BE REVISED**

**S.764**

**Sen. Lee**

To provide for congressional approval of national emergency declarations, and for other purposes.

**THE “ARTICLE ONE” ACT**

**THIS BILL IS APPROVED, WITH MODIFICATION**

**I. SUMMARY**

Over the last century, Congress has given the President increasing authority to take action in the case of national emergency that does not involve war or other military conflict. The Brennan Center for Justice has identified over 100 statutes which grant such authority to the President or another official of the Executive Branch.<sup>1</sup> To set out a procedural framework within which these grants of authority may be exercised, Congress passed the National Emergencies Act (NEA) in 1976.<sup>2</sup> In essence, this legislation provides that any national emergency declared by the President shall terminate if Congress passes such a resolution that is enacted into law (thus involving Presidential action) or if the President issues a proclamation terminating the emergency.

Congress has done little to police the grants of emergency authority it has made. It rarely has reconsidered emergencies once they have been declared.<sup>3</sup> Even when Congress has voted to end an emergency declaration, as in its attempt to prevent diversion of funds for border wall construction, it has not reached the two-thirds majority to avoid a presidential veto.<sup>4</sup> In addition, many of the underlying statutory grants of emergency power have no or few explicit limitations.

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<sup>1</sup> Brennan Center for Justice, *A Guide to Emergency Powers and Their Use*, Dec. 5, 2018, last updated Sept. 4, 2019, (hereinafter “Brennan Center Report”), [https://www.brennancenter.org/sites/default/files/2019-10/2019\\_10\\_15\\_EmergencyPowersFULL.pdf](https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf).

<sup>2</sup> 50 U.S.C. §1601 et seq.

<sup>3</sup> Senate Committee on Homeland Security, Report on Assuring That Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act, Nov. 18, 2019, (hereinafter “Senate Report”) at 3, <https://www.congress.gov/congressional-report/116th-congress/senate-report/159> (all cites last visited April 19, 2020).

<sup>4</sup> Carney, Jordain, *Senate again votes to end Trump emergency declaration on border wall*, The Hill, Sept. 25, 2019, <https://thehill.com/homenews/senate/462983-senate-again-votes-to-end-trump-emergency-declaration-on-border-wall>.

As will be discussed below, the New York City Bar Association (City Bar) supports the enactment of the pending Senate bill known as the “ARTICLE ONE Act”, with modification of one provision in the bill discussed below, to establish better checks and balances in the exercise of emergency powers by the President. We also recommend the formation of a bipartisan congressional committee to undertake a full review of the statutes granting powers to the Executive Branch under emergencies.

It is important to note that this report does not address the President’s war-making authority, which is governed by a separate regime. Nor does it address other authorities claimed by Presidents throughout history, whether arising out of a statutory scheme or an assertion of inherent Presidential authority. The focus of this report is on the exercise of authority granted to the President when a national emergency is declared in the absence of war, thus triggering the NEA.

## II. INTRODUCTION

As noted above, over the past century Presidents have gained increasing authority to exercise powers after a state of emergency is declared. These powers are granted through over 100 statutes that have been enacted over the past century. The NEA was passed to provide a framework within which these powers are to be exercised. However, experience has shown that Congress has not been effective in overseeing the exercise of these authorities and that some adjustment of the existing statutory regime is necessary.

The recent discussion of the availability of emergency powers was triggered when President Trump declared an emergency to justify using funds not allocated for the purpose to build a border wall. Indeed, this decision was in opposition to the budget agreement between the Senate and House. Furthermore, the President actually denied that an emergency existed, stating that “he didn’t need to do this” and could do the wall “over a longer period of time. But I’d rather do it much faster.”<sup>5</sup> Nearly \$10 million in funds has been diverted from Department of Defense funding for border wall construction.<sup>6</sup>

More recently, President Trump has invoked emergency powers in addressing the coronavirus.<sup>7</sup> As of this writing, the exercise of the powers during this crisis has been widely supported, but that does not alleviate the structural problem of potentially unchecked use of emergency powers by the Executive Branch.

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<sup>5</sup> Fritz, John and Michael Collins, “*I didn’t need to do this.*” *Critics say Trump quote undercuts national emergency for border wall*, USA Today, Feb. 16, 2019, <https://www.usatoday.com/story/news/politics/elections/2019/02/16/border-emergency-donald-trump-quote-undercuts-move-critics-says/2881619002/>.

<sup>6</sup> *See The President Takes a Campaign Donation From the Pentagon*, Editorial, New York Times, Feb. 14, 2020, <https://www.nytimes.com/2020/02/14/opinion/editorials/trump-wall-cuts.html>.

<sup>7</sup> *See Presidential Memoranda, Memorandum on Order Under the Defense Production Act regarding 3M Company*, April 2, 2020, <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/>; *see also* David Welna, *Trump Invokes A Cold War Relic, The Defense Production Act, For Coronavirus Shortages*, NPR, March 18, 2020, <https://www.npr.org/2020/03/18/818069722/trump-invokes-a-cold-war-relic-the-defense-production-act-for-coronavirus-shortage>; Elizabeth Goitein, *The coronavirus is a real crisis. The border wall obviously wasn’t*, Washington Post, March 18, 2020, <https://www.washingtonpost.com/outlook/2020/03/18/coronavirus-is-real-crisis-border-fence-obviously-wasnt/>.

The Brennan Center’s report listing the grants of emergency powers was accompanied by an article in *The Atlantic*<sup>8</sup> describing the breadth of these powers and providing some examples of what a President could do if unchecked. For example, Section 606 of the Communications Act allows the President, upon proclaiming a national emergency, or a state of public peril or disaster, to close any radio station or “device capable of emitting electromagnetic radiations”, or to authorize the use or control of any radio station or device and/or its apparatus and equipment.”<sup>9</sup> The President essentially would be able to take control over the country’s communications network. It does not take much to imagine the import and scope of such an action, and the difficulties of ameliorating their ongoing impact once implemented. Other statutes provide for Executive Branch take-overs of transportation systems and would allow major control of the country’s economic system.

Concern has grown in Congress that the NEA is not serving as a bulwark against unchecked presidential authority. Nineteen Republican senators have sponsored the Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act (ARTICLE ONE Act), in an attempt to instill some checks on this authority.<sup>10</sup> In essence, this bill provides that a presidential declaration of emergency would last 30 days unless Congress passed a resolution to extend it.

The City Bar has reviewed the ARTICLE ONE Act and supports its passage, with some recommendations regarding one provision of the Act, as presented below. In addition, the City Bar urges Congress to consider imposing more limits on the exercise of power in the underlying statutory grants of authority, rather than relying solely on the procedure of the NEA. To do so, we recommend the formation of a bipartisan committee to undertake a full review of the statutes granting emergency powers to the Executive Branch.

We reiterate that the emergency authority this report addresses is distinct from the federal government’s war-making power. Accordingly, this report does not address the powers to wage war under Articles I and II of the federal constitution. Nor does it address the controversies over the allocation and use of those powers, including those involved with the War Powers Resolution passed by Congress in 1973,<sup>11</sup> designed to provide a framework for engaging U.S. troops in foreign conflicts. We do note that of the over 100 statutes cited by the Brennan Center as providing the President with authority to act in case of a national emergency, nearly two-thirds add, as an additional ground for exercise of those powers, "time of war" or similar language. Enactment of the ARTICLE ONE Act, with our suggested modification, would not affect the war-making power of the President or the ability of the President to take necessary action in time of war.

In addition, this report is focused only on statutory grants of powers to the Executive. We recognize that beyond what Congress can control, presidents have exercised authority which is not

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<sup>8</sup> Elizabeth Goitein, *In Case of Emergency, Break Glass – The Alarming Scope of the President’s Emergency Powers*, *The Atlantic* (January/February 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

<sup>9</sup> 47 U.S.C. §606.

<sup>10</sup> S.764, 116th Congress (2019-20), <https://www.congress.gov/bill/116th-congress/senate-bill/764>.

<sup>11</sup> 50 U.S.C. §1541-8.

authorized by Congress. Arguably this is based on residual or inherent powers in Article II. Over the years, Congress has attempted to assert its lawmaking authority to check unbridled presidential authority. Given the lack of clarity in this area, it is incumbent upon all Presidents to operate lawfully, and prudently, within the nation's constitutional system and the rule of law. However, given that our Constitution is premised on the notion that "devices [are] necessary to control the abuses of government," it is Congress that must use its authority to enact legislation to curtail the exercise of presidential power.<sup>12</sup>

### III. THE NEA AND UNDERLYING STATUTES

The NEA was an outgrowth of a special bipartisan committee convened in 1972 "to assess the consequences of terminating the ongoing state of emergency initially declared by President Truman on the eve of the Korean War in 1950."<sup>13</sup> "During the course of its work, the Special Committee realized the breadth of the emergency authorities that Congress had ceded to the President."<sup>14</sup>

The resulting NEA terminated all then-existing emergencies two years after the enactment of the NEA, and codified the process through which the President invoked emergency authority. The President is required to specify the emergency authorities invoked. The state of emergency would exist for one year, though the President can renew it. The statute provided Congress with the authority to terminate any declared emergency by concurrent resolution, or the President could terminate an emergency. In addition, at six-month intervals Congress is required to consider a vote on a concurrent resolution to determine whether the emergency declaration should be terminated.<sup>15</sup>

The mechanism of Congress having the sole power to terminate an emergency declaration was ruled unconstitutional in *INS v. Chadha*.<sup>16</sup> The Supreme Court determined that resolutions in themselves cannot be used to veto actions of the Executive Branch. The presentment requirements of U.S. Constitution Article I prescribe that the legislative power must be exercised through the single mechanism of passage of a measure by both houses of Congress, approval or veto by the President, and override of a veto by a two-thirds majority in each house. Congress thereafter amended the NEA to provide that a national emergency can be terminated if "there is enacted into law a joint resolution terminating the emergency."<sup>17</sup> Thus, Congress no longer can terminate a national emergency unilaterally.

However, even when Congress had the unilateral power to end an emergency it "rarely has reconsidered emergencies once they have been declared." Since the enactment of the NEA, there

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<sup>12</sup> The Federalist, No. 51.

<sup>13</sup> Senate Report at 2, quoting from Patrick A. Thronson, *Note: Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. Mich J.L. Reform 737, 744 (Winter 2013).

<sup>14</sup> Senate Report at 2.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> 462 U.S. 919 (1983).

<sup>17</sup> 50 U.S.C. §1622(a)(1).

have been 63 declared emergencies. As of October 18, 2019, there were 34 declared emergencies still in effect.<sup>18</sup>

Thus, the statutory framework consists of an underlying grant of authority in a statute, on which the procedural mechanism of the NEA is overlaid. The statutes granting authority set out conditions under which the emergency authority can be exercised (for example, in the event of war or a national emergency declared by the President or Congress), and describe what the President or another Executive Branch official can do in exercising that authority. Often these grants of authority are very broad. One example is the power to take over communications facilities, described above. And most of the authority in these statutes may be exercised upon the President's declaration of a national emergency. Once that declaration is made, the President has a huge range of powers at his or her disposal and can be confident that Congress cannot curb that authority without a veto-proof majority of both houses.

The statute most often invoked in recent decades for exercising emergency authority has been the International Emergency Economic Powers Act (IEEPA).<sup>19</sup> IEEPA primarily functions as a grant of authority to the executive branch to impose economic sanctions without returning to Congress for specific authorization. The authority under IEEPA may be exercised "to deal with any unusual or extraordinary threat, which has as its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States, if the President declares a national emergency with respect to such threat."<sup>20</sup> Among the many powers the President has under the IEEPA are:

- To regulate or prohibit any transactions in foreign exchange, transfers of credit or payments through any banking institution to the extent such payments involve the interest of any foreign county or national;
- To regulate, nullify or prohibit the acquisition, use or exercise of any right or power with regard to any property subject to U.S. jurisdiction in which a foreign government or national has an interest;
- To confiscate property of any foreign government or national the President has determined planned, engaged in or aided hostilities against the U.S.<sup>21</sup>

One example of IEEPA's use which has been employed by the current President is to threaten to adjust tariffs in his recent dispute with Mexico.<sup>22</sup> According to a recent Senate Report,

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<sup>18</sup> Senate Report at 4.

<sup>19</sup> 50 U.S.C. §1701 et seq.

<sup>20</sup> 50 U.S.C. §1701(a).

<sup>21</sup> 50 U.S.C. §1702.

<sup>22</sup> See Statement from the President Regarding Emergency Measures to Address the Border Crisis (May 30, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/>.

in all but three of the declared national emergencies currently in effect the sitting President invoked authorities available under IEEPA.<sup>23</sup>

While IEEPA may be the primary statute invoked, the range of other statutes granting authority to the President or other Executive Branch official is vast, as the Brennan Center report describes. Among the available authorities are control over the nation's agriculture, industrial base, transportation system, energy resources, displacement of residents, and many aspects of the military, including the call-up of reserves.<sup>24</sup> For example, the President or another Executive Branch official, exercising authority in a national emergency, may:

- Suspend provisions regulating chemical and biological weapons;<sup>25</sup>
- Coordinate domestic transportation and undertake action regarding the transportation system (at the direction of the Secretary of Homeland Security);<sup>26</sup>
- Create, maintain, protect, expand and restore industrial base capabilities the President deems essential to the national defense;<sup>27</sup>
- Undertake military construction projects not otherwise authorized;<sup>28</sup>
- Prohibit or curtail agricultural exports<sup>29</sup> and limit agricultural imports;<sup>30</sup>
- Keep inventions secret if disclosure would be detrimental to national security;<sup>31</sup>
- Requisition vessels owned by U.S. citizens<sup>32</sup> and take possession of vessels in U.S. waters.<sup>33</sup>

The Brennan Center has described how combining various powers granted the President by Congress, both under national emergency declarations and triggered by other occurrences, could lead to the aggrandizing of power by the President, severe restrictions on the rights of Americans and even interference with the electoral process for choosing a President.<sup>34</sup> The current

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<sup>23</sup> Senate Report at 4.

<sup>24</sup> See generally Brennan Center Report.

<sup>25</sup> 50 U.S.C. §1515.

<sup>26</sup> 49 U.S.C. §114(g).

<sup>27</sup> 50 U.S.C. §4533(a)(7).

<sup>28</sup> 10 U.S.C. §2808(a)

<sup>29</sup> 7 U.S.C. §5712(c).

<sup>30</sup> 7 U.S.C. §624(b).

<sup>31</sup> 35 U.S.C. §181.

<sup>32</sup> 46 U.S.C. §56301.

<sup>33</sup> 46 U.S.C. §70051.

<sup>34</sup> See generally Goitein, note 8.

NEA makes it quite difficult, at the very least, for Congress to curb the exercise of this power. There needs to be some way to rein in the exercise of such authority.

#### IV. ARTICLE ONE ACT

The ARTICLE ONE Act,<sup>35</sup> introduced in March and revised in November, 2019, changes the framework for terminating emergencies.<sup>36</sup> The bill was reported out of the Senate Committee on Homeland Security and awaits full Senate action.<sup>37</sup> Essentially, it reverses the presumption and burden of continuing a declared emergency: instead of an emergency continuing until it is terminated by a resolution enacted into law, any authority the President invokes during an emergency terminates after 30 days unless a joint resolution of approval is enacted into law. There would be a general prohibition on amending the resolution and a time line is set forth to ensure timely consideration of the resolution. If Congress does not pass such a resolution, the President may not, during the remainder of the President's term of office, declare a subsequent national emergency with respect to the same circumstances. Upon enactment of a resolution affirming an emergency grant of authority, that authority lasts for one year, unless Congress or the President sets an earlier deadline. The President may seek renewal of the declaration which again would be subject to a congressional resolution.

The President would be required to provide a detailed report to Congress upon invoking emergency authority, including the circumstances necessitating an emergency declaration, its estimated duration and a summary of actions taken.

The ARTICLE ONE Act would provide an effective check on the exercise of emergency authority. It would achieve a balance between the Executive and Legislative Branches, providing the Executive with the flexibility to respond to legitimate emergencies, but only for a limited time unless Congress approved. Granting the President 30 days to exercise emergency authority should allow time for an appropriate response. And, in a clearly recognized emergency, Congress would be able to extend the grant of authority for one year, subject to renewal, again by action of the President and Congress.<sup>38</sup> Congress's ability to act quickly to deal with the coronavirus crisis is an example of its ability to operate rapidly when there is a consensus that an emergency exists.

The legislation would not apply to IEEPA. According to the Senate Report, this exclusion "is intended to preserve the President's flexibility in deploying economic sanctions as a national

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<sup>35</sup> *Supra* note 10.

<sup>36</sup> Another bill was introduced to amend the NEA, S.1809, named the REPUBLIC Act (<https://www.congress.gov/bill/116th-congress/senate-bill/1809>). That bill would grant the President authority for only 3 days without congressional action. As the ARTICLE ONE Act, and not this bill, has moved through a committee, we focus our attention on the ARTICLE ONE Act.

<sup>37</sup> We note that while only Republican senators have signed on as sponsors, the five Democratic senators present for the vote to report the bill all voted to report the bill out of committee. Three of the eight Republican senators present asked to be recorded as voting "No". Senate Report at 5. The ARTICLE ONE Act has been introduced in the House of Representatives (H.R.1755) but no further action has been taken in the House.

<sup>38</sup> Among the justifications for granting the President emergency powers is the concern that Congress may not be able to assemble and act in a rapid manner. Advances in transportation and communication over the past several decades have made this much less a concern, though during this period the possibility of nuclear or cyber attacks have emerged. In any event, the ARTICLE ONE Act contains an exception when Congress is unable to act. (S.764, §202).

security tool.” However, the ARTICLE ONE Act does amend IEEPA by prohibiting the use of its authorities to impose duties or tariff-rate quotas. To ensure the President cannot skirt congressional review by invoking IEEPA along with other emergency authority provisions, the bill specifies that any such declared emergency remains subject to the new framework established by the ARTICLE ONE Act.<sup>39</sup>

### **Recommendation**

The City Bar is concerned that IEEPA is excluded from this bill, though it supports removing the emergency authority under IEEPA to impose tariffs. The IEEPA exclusion was not in the original legislation. We recommend that Congress revisit the IEEPA exclusion. If the concern is that the President should be able to exercise more authority to react to national security situations by exercising economic powers, the time period between the emergency declaration and its expiration absent congressional approval regarding IEEPA can be extended to 60 or 90 days. Furthermore, the President would be able to declare a national emergency to invoke IEEPA not only for a threat to national security, which is referred to in the Senate Report’s justification, but also for a threat to the “foreign policy or economy” of the United States. Congress should consider narrowing the IEEPA exception to the ARTICLE ONE Act solely to “a threat to the national security of the United States or an ally through actual or imminent armed attack by a foreign power or other foreign armed force or through internal armed insurrection or rebellion in the United States or an ally.” The legislation could provide a broader definition of national security that would justify a presidential emergency declaration in the event Congress is not in session or is otherwise unable to meet, with such broadened emergency power ending when Congress reconvenes.

## **V. REVIEW OF THE STATUTORY GRANTS OF AUTHORITY**

Passage of the ARTICLE ONE Act would provide Congress with a more effective mechanism to manage the exercise of authority in response to a declaration of national emergency. However, there are many statutes which grant the President authority to act in circumstances other than the declaration of a national emergency. In addition, most of the statutes which require a declaration of national emergency give the President relatively broad powers. As a separate matter, Congress should review these statutory grants of authority to determine whether they should be limited in some way.

Among the statutes which grant the President broad authority but do not involve a national emergency declaration is the Insurrection Act.<sup>40</sup> This legislation, which has been on the books in some form for over 200 years, provides that:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any state by the ordinary course of judicial proceedings he may call into Federal service such of the militia of

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<sup>39</sup> Senate Report at 4.

<sup>40</sup> 10 U.S.C. §251-255.

any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.<sup>41</sup>

Another section of the Act provides that:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>42</sup>

These provisions clearly grant the President enormous, unchecked power to determine when armed forces should be used in the United States, and no emergency declaration is needed to trigger this authority. While Presidents have generally been prudent in their use of this authority there is no guarantee of that continuing in the future.

There are other statutes which grant authority to the President or another Executive Branch official upon some other occurrence than a declaration of national emergency. Among the situations that would trigger such authority are “to save lives and protect property,”<sup>43</sup> “serious economic conditions affecting the general welfare”,<sup>44</sup> “necessary in the public interest”,<sup>45</sup> and “the

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<sup>41</sup> 10 U.S.C. §252.

<sup>42</sup> 10 U.S.C. §253. Another important section of the Insurrection Act, 50 U.S.C. §212, provides:

“Whenever during any insurrection against the Government of the United States after the President shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or his agent, attorney, or employee purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned.”

<sup>43</sup> 42 U.S.C. §5121 (disaster relief).

<sup>44</sup> 5 U.S.C. §5303(b) (military pay).

<sup>45</sup> 40 U.S.C. §545(b)(1)(A) (disposal of surplus property).

interest and welfare of the United States.”<sup>46</sup> These statutes would not be affected by the operation of the NEA, or the ARTICLE ONE Act.

Even among the statutes involving a declaration of national emergency, there are broad grants of authority. For example, in times of national emergency the Secretary of Homeland Security can direct the Administrator of the Transportation Security Administration “[t]o coordinate domestic transportation, including aviation, rail, and other surface transportation, and maritime transportation (including port security)<sup>47</sup> and “[t]o carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary of Homeland Security shall prescribe.”<sup>48</sup> Similarly, the Secretary of Transportation may requisition any vessel owned by United States citizens during a national emergency.<sup>49</sup> In addition, the President can exercise many controls over agriculture.<sup>50</sup>

On occasion, Congress, in addition to enumerating the authorities to be exercised under emergency declarations, has limited the authority by imposing deadlines on when the authority expires,<sup>51</sup> spending limits,<sup>52</sup> and other restraints.<sup>53</sup> In at least one area, the President may exercise emergency powers only after Congress declares a national emergency.<sup>54</sup>

Given the large range of statutes which grant the Executive Branch emergency authority and the extensive powers that can be exercised, we believe it wise for Congress to reassess the whole statutory framework for emergency grants of authority. This would include a review of statutes which, like the Insurrection Act, provide the Executive Branch with broad authority that is not triggered by war or a national emergency declaration. Consideration should be given as to which statutes are obsolete, which should have more specific grants of authority or additional bases for exercising authority, such as during “time of war”, and which would benefit by including limitations as to duration of the grant of authority or caps on funds that may be expended in exercising particular authorities.

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<sup>46</sup> 50 U.S.C. §4309 (sale of alien property).

<sup>47</sup> 49 U.S.C. §114 (g)(1)(A). The Secretary of Homeland Security also has this power during times of war.

<sup>48</sup> 49 U.S.C. §114(g)(1)(D).

<sup>49</sup> 46 U.S.C. §56301.

<sup>50</sup> *See, e.g.*, 50 U.S.C. §4533(a)(7) (purchase of agricultural products for resale); 7 U.S.C. §5712(c) (prohibit or curtail agricultural exports); 7 U.S.C. §4208 (acquisition or use of farmland).

<sup>51</sup> *See, e.g.*, 42 U.S.C. §7410(f) (suspension of a state’s Clean Air Act plan); 10 U.S.C. §12302(a) (call-up of reserves); 42 U.S.C. §247d (public health emergency).

<sup>52</sup> *See, e.g.*, 50 U.S.C. §1431-1435 (contracting provisions regarding national defense); 22 U.S.C. §2318(a)(1) (drawdown from department of Defense stocks); 42 U.S.C. §7410(f) (suspension of a state’s Clean Air Act plan).

<sup>53</sup> *See, e.g.*, 42 U.S.C. §5121 (disaster relief request must be made by a governor or Indian tribal government leader); 16 U.S.C. §831s (taking of Tennessee Valley Authority land in case of war, or national emergency which can only be declared by Congress).

<sup>54</sup> 16 U.S.C. §831s (*see note 48*).

## Recommendation

As a means to this end, we recommend that Congress follow the model of the bipartisan committee created by the Senate in 1972, which was formed for the purpose of addressing the state of emergency declared in 1950 regarding the Korean War but which expanded its review to consider the vast scope of the President's emergency authorities. The lack of substantial activity to restrain these authorities, and the rising concern in Congress as to the extent of such authorities, suggests a fuller review should be undertaken and recommendations made as to which statutes should be repealed or amended.

## **VI. THE SCOPE OF PRESIDENTIAL AUTHORITY**

Throughout United States history, Presidents have taken actions which may not have a clear basis in the Constitution. For the most part, Presidents have acknowledged the importance of involving Congress in the exercise of those powers. Even President Lincoln, after taking a number of actions at the start of hostilities with the Confederacy, sought retroactive approval from Congress. However, in the past century Presidents have more consistently exercised increased authority, most notably with regard to foreign affairs. The Supreme Court's response to these growing assertions has been mixed. Several of the Court's most controversial decisions, including *Korematsu v. United States*<sup>55</sup> and *Trump v. Hawaii*,<sup>56</sup> accord the President significant foreign affairs deference. Dicta in *United States v. Curtiss-Wright Export Corp.*,<sup>57</sup> moreover, famously asserted the President is the "sole organ" in foreign affairs, even though that statement is more accurately read as referring to the President's role as the nation's point of communication with other governments rather than as a general international relations authority. More generally, however, precedents have sought to locate the basis of any independent executive authority in foreign affairs to specific textual grants of power, clear Founding understandings, or consistent constitutional practice, including *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>58</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*,<sup>59</sup> and the Court's post-9/11 cases.<sup>60</sup> Scholars likewise argue whether and to what extent the President has inherent or residual foreign affairs authority.<sup>61</sup> In addition, recent Presidents have used "signing statements" to disclaim an obligation to abide by legislation, and Presidents have expressed the right to act beyond Congressional authority even when Congress has enacted comprehensive legislation.<sup>62</sup> Furthermore, there reportedly are classified presidential emergency action documents, apparently never implemented, that claim vast executive authority

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<sup>55</sup> 323 U.S. 214 (1944).

<sup>56</sup> 585 U.S. \_\_ (2018).

<sup>57</sup> 299 U.S. 304 (1936).

<sup>58</sup> 343 U.S. 579 (1952).

<sup>59</sup> 576 U.S. 1059 (2015).

<sup>60</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

<sup>61</sup> See, e.g., Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L.J. 525 (2004); Saikrishna B. Prakesh and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001).

<sup>62</sup> See Congressional Research Service, *Presidential Signing Statements: Constitutional and Institutional Implications* (Jan. 4, 2012); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

to take action in an emergency.<sup>63</sup> These issues are not likely to be resolved in the foreseeable future.<sup>64</sup>

Congress can seek to limit presidential authority through using its statutory powers, recognizing that it would need two-thirds majorities in each house to override a presidential veto.<sup>65</sup> But even if such laws are enacted, Presidents may continue to assert authority despite questionable legal support, perhaps into new areas that would raise serious concerns among Americans. The use of the impeachment power and ability to vote a President out of office every four years do not assure that serious mistakes will not be made in the meantime. Nor can we be confident that courts will be able to check presidential misuse of authority effectively. We can only hope that Presidents will be guided by precedent, prudence and wise counsel, and the restraint of a constitutional system bulwarked by the rule of law. At the same time, Congress should reexamine its broad grants of authority to the executive that have been premised on the assumption that he or she will exercise that authority in a restrained manner that accords with tradition and comity among the branches of government.

## VII. CONCLUSION

The City Bar urges enactment, with the modification discussed above, of the ARTICLE ONE Act in order to rebalance the relationship between the Executive and Legislative Branches in the exercise of authority during national emergencies not involving war or other military conflict. In addition to enacting the ARTICLE ONE Act, we urge Congress to review the entire statutory framework for granting the Executive the power to operate under emergencies and other special circumstances in order to limit potential abuse of those powers.

Task Force on the Rule of Law  
Stephen L. Kass, Chair

Reissued April 24, 2020<sup>66</sup>

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<sup>63</sup> See Elizabeth Goitein and Andrew Boyle, *Trump Has Emergency Powers We Aren't Allowed to Know About*. New York Times (April 10, 2020), <https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html?searchResultPosition=1>.

<sup>64</sup> See generally, Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in Foreign Affairs* (2019).

<sup>65</sup> Congress has used tools similar to those proposed in the ARTICLE ONE Act to limit Presidential authority. See, e.g., Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. §§601-688); War Powers Resolution (50 U.S.C. §§1541-1548). In the later legislation, Congress articulated its aim to limit Executive Power: “Under Article I, Section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.” (50 U.S.C. §1541(b)).

<sup>66</sup> This report was originally issued on April 22, 2020. It has been reissued in order to add a citation at note 22 and to clarify that, as part of the President’s border dispute with Mexico in 2019, he invoked his authority under the IEEPA to impose tariffs on all goods from Mexico unless Mexico took effective action to alleviate the “illegal migration crisis” at the border. See n. 22 and accompanying text.