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CITY BAR

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July 13, 2022

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 House Office Building  
Washington, DC 20515

**Re: Proposed Reform of National Emergencies Act**

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

The New York City Bar Association urges that both Houses of Congress pass and the President sign meaningful reform of the National Emergencies Act (NEA) this session. As the Association wrote in April, 2020,<sup>1</sup> the NEA, enacted in 1976, in essence provides that any national emergency declared by the President shall terminate if both Houses of Congress pass a resolution that is enacted into law (thus involving Presidential action) or if the President issues a proclamation terminating the emergency. 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. More than 100 statutes grant such authority to the President or other Executive

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<sup>1</sup> New York City Bar Association, Task Force on the Rule of Law, *The National Emergencies Act Must Be Revised* (April 2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020683-ArticleOneActNEA.pdf>. The Task Force on the Rule of Law assisted with the drafting of this letter.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 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.*

Branch official. Many of the underlying statutory grants of emergency power have no or few explicit limitations.<sup>2</sup>

Yet Congress has done little to police the grants of emergency authority it has made and it rarely has reconsidered emergencies once they have been declared. Once the President declares a national emergency, that power can be curbed only by joint resolution of Congress, which the Supreme Court has ruled is subject to presidential veto.<sup>3</sup> The hurdle is simply too high to expect a meaningful reining in of these emergency powers. Thus, the NEA allows a President to exercise virtually unchecked emergency powers.

The current NEA scheme creates a dangerous imbalance to the federal system's power structure. The authority granted by the NEA needs to be subjected to reasonable checks by legislation reversing 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 should terminate after 30 days unless a joint resolution of approval is enacted into law. Meaningful reform also should provide:

- a general prohibition on amending the resolution and a timeline to ensure timely consideration of the resolution;
- any emergency powers invoked by the President pursuant to a declared national emergency should relate to the nature of, and be used only to address, that emergency;
- no authority available to the President under a national emergency may be used to provide authorization or funding for any action for which Congress has withheld authorization or funding.

Upon enactment of a resolution affirming an emergency grant of authority, that authority should last for one year, unless Congress or the President sets an earlier deadline. The President should be able to seek renewal of the declaration which again would be subject to a congressional resolution.

Reform also should include similar limitations on the invocation of powers under the International Emergency Economic Powers Act (IEEPA). The IEEPA allows the President to impose a broad range of economic sanctions, including prohibitions on banking transactions, nullification of property rights and many other strictures with regard to foreign governments or nationals, and adjustment of tariffs. As with other authorities under the NEA, Congress has not, and most likely cannot, exercise effective restraints on the President's actions.

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<sup>2</sup> For a fuller discussion of the statutes granting the President emergency authority, see 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>3</sup> The original NEA gave Congress the sole authority to terminate an emergency declaration, but that was ruled unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983).

Proposals to reform the NEA are pending in Congress, including one that passed the House as part of the Protect Our Democracy Act.<sup>4</sup> We urge that NEA reform legislation be enacted this year, to place presidential emergency authorities within a strong, balanced legal foundation.

Finally, as we noted in our April 2020 report, the NEA and IEEPA are two of many broad grants of authority Congress has given to the Executive. The Insurrection Act<sup>5</sup> is only one such law, and among other provisions would allow the President to utilize the armed forces internally to enforce United States Law. In addition to known Congressional grants of authority, there are over 50 Presidential Emergency Action Documents (PEADs), presidential directives designed to be operative in anticipation of various hypothetical worst-case scenarios. They originated during the Eisenhower Administration in anticipation of nuclear attack. According to the Brennan Center for Justice, neither the documents nor the basis for their authority have been disclosed,<sup>6</sup> but other documents made public show the actions these documents authorize include imposing martial law, censoring the press and widely permitting search and seizure. We recommend that Congress undertake a review of the broad range of Congressional grants of authority and of the PEADs.

Respectfully,



Susan J. Kohlmann  
President

Cc: Members of Congress

#### Contact

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<sup>4</sup> See Protect Our Democracy Act (H.R. 5314 Rep. Schiff / S.2921 Sen. Klobuchar); National Security Reforms and Accountability Act (H.R. 5410 Rep. McGovern); Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act (ARTICLE ONE Act) (S.241 Sen. Lee / H.R.2996 Rep Roy).

<sup>5</sup> 10 U.S.C. §251-255.

<sup>6</sup> Brennan Center for Justice, *Presidential Emergency Action Documents* (last Updated May 26, 2022), <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents>.