

## THERE IS A NATIONAL EMERGENCY AT THE SOUTHERN BORDER: TRUE OR FALSE?

ENGY ABDELKADER, ERICA NEWLAND, SETH WEINBERGER, AND LAURA  
PEÑA<sup>∞</sup>

*From November 2019 to April 2020, the ABA Section of Civil Rights and Social Justice's Rights of Immigrants Committee hosted a six-part webinar series exploring immigration at the intersection of national security law, public international law, and U.S. Constitutional law. What follows is a transcript from the fourth panel of the series, which took place on February 19, 2020. The transcript has been edited for clarity.*

**Engy Abdelkader:** Welcome to today's ABA webinar, "There is a National Emergency at the Southern Border: True or False?" My name is Engy Abdelkader and I'll be acting as the program's moderator. Today's webinar is hosted by the Section of Civil Rights and Social Justice, and it's sponsored by the Rights of Immigrants Committee. It is part of a six-part national lecture series with a new program on the third Wednesday of every month. Thank you for joining us today. This is, in fact, the fourth installment in our series and we're excited to have a number of important co-sponsors, including the ABA Commission on Immigration, the ABA Criminal Justice Section, the ABA Center for Public Interest Law, the ABA Section of International Law and the ABA Government and Public Sector Lawyers Division. We appreciate all of their support. It's also important to highlight that none of this would be possible without the technical and logistical support of ABA staff. Thank

<sup>∞</sup> A fellow with the Public Religion Research Institute and German Marshall Fund of the United States, Engy Abdelkader teaches at Rutgers University. She chairs the Rights of Immigrants Committee with the American Bar Association Section of Civil Rights and Social Justice. In that capacity, she designed, organized and moderated this panel series.

Erica Newland serves as Counsel with Protect Democracy. She most recently served as an Attorney Adviser at the Office of Legal Counsel in the Department of Justice (DOJ). Before joining the DOJ, she served as a law clerk to the Honorable Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit, and as a Senior Policy Analyst at the Center for Democracy & Technology. Newland received her J.D. from Yale Law School.

Seth Weinberger is Professor of Politics and Government at the University of Puget Sound. He received his B.A. in political philosophy from the University of Chicago, an M.A. in Security Studies from Georgetown University, and an M.A. and Ph.D. in political science from Duke University. He teaches courses on international relations, U.S. foreign policy, international security, terrorism, constitutional law, and political philosophy. Weinberger is the author of the book *Restoring the Balance: War Powers in an Age of Terror*, and articles such as *Enemies Among Us: The Targeted Killing of American Members of al Qaeda and the Need for Congressional Leadership*.

Laura Peña is the Pro Bono Counsel at the American Bar Association's Commission on Immigration. Prior to this position, she served as a visiting attorney with the Texas Civil Rights Project (TCRP), managing the family reunification efforts and fighting against zero tolerance policies along the U.S.-Mexico border. Laura was previously appointed as a foreign policy advisor at the U.S. State Department under the Obama Administration, and served as an immigration trial attorney at the U.S. Department of Homeland Security.

you to Paula Shapiro and Alli Kielsgard for all of your work to make these programs a success.

To better understand the significance of this discussion, it's important to take a step back to reflect how we arrived here. So I'm going to take a few moments to set the stage for our conversation today.

The 2016 US presidential election results and Donald J. Trump's political ascension to the White House not only polarized the American public but has also shaken the nation's democratic foundations. Specifically, President Trump's executive decisions, such as declaring a national emergency to fulfill a campaign promise to build a wall on the southern border, carried precedential value for executive power with largely negative implications for democratic governance and the rule of law. While seemingly enhancing the reach of his presidential authority, President Trump's actions have left many wondering about the constitutional limits of that power and its impact—now and in the future—on the Separation of Powers Doctrine in a federalist system.

We all know that the Declaration of Independence, US Constitution and Bill of Rights are our country's foundational documents, responsible for outlining national values, principles and laws. The balance of powers between the three branches of government, and between the federal and state governments, represents one of these foundational values. The Constitution specifically creates the three separate co-equal branches of federal government to guard against abuse of power by individuals or groups. By distributing the balance of power and providing for institutional checks, the framework of the Constitution sought to curb government abuses. This is known as a Separation of Powers Doctrine.

This particular webinar examines one of the many controversies—with legal, political, and sometimes social contours—involving the nature of executive power in the era of Trump as well as its implications for the Separation of Powers Doctrine in American democracy. Specifically, this program explores the President's declaration of a national emergency at the southern border last year and circumspection of congressional refusal to appropriate 5.8 billion dollars to build “the wall.”

Following his inauguration, pursuant to his promises on the presidential campaign trail, Trump issued an executive order making construction of the barrier wall across the southwest U.S. border a federal priority. The wall could not be built unless Congress provided him with the funds. While Trump insisted on five billion dollars to construct the barrier, House Democrats were only willing to give him 1.3 billion. During the negotiation process, the President repeatedly threatened to use his emergency powers in order to pressure Congress into giving him what he wanted. After the House refused to do so, the President held a press conference in the Rose Garden claiming a crisis at the border involving crime, drugs, and human trafficking despite evidence from the federal government showing otherwise. He declared a national emergency pursuant to the National Emergencies Act.

By way of background, Congress passed the National Emergencies Act in 1976. The Act permits the president to pronounce a national emergency when he considers it appropriate. It offers no specific definition of the “emergency” and, in fact, allows the president to declare one entirely at her discretion. Notably, almost

all such past emergencies involved sanctions against foreign governments or groups for reasons such as human rights violations, rather than to spend money Congress intended for other purposes. Upon declaring a national emergency, the president avails herself of a dozen specialized laws. Some have funds the president otherwise could not access.

To be sure, the declaration created a firestorm of controversy, with many claiming that Trump was creating a "fake emergency" in order to circumvent Congress, and thereby undermining the Separation of Powers Doctrine. As supporting evidence, they pointed to Trump's own words.

At the time of last year's Rose Garden press conference, for instance, President Trump declared, "I didn't need to do this ... I just wanted to do it faster." Members of the Administration have also made public statements with negative implications. For instance, in an interview on Fox News Sunday, White House senior policy adviser Stephen Miller attempted to convince a national audience that the emergency is real. He argued that there's an "increasing number of people crossing the southern border and a huge increase in drug deaths in the past decade." But, when Fox News host Chris Wallace challenged his assertion with government statistics evidencing attempted crossings at their lowest levels in almost four decades and that most drugs actually arrived at ports of entry rather than the border, Miller responded, "You don't know what you don't know and you don't catch what you don't catch but as a matter of national security you can't have uncontrolled unsecured areas of the border where people can pour in undetected."

Fox News aside, the declaration has also engendered a rebuke from Congress. For example, Congress has since passed two joint resolutions to terminate the public emergency. Unsurprisingly, Trump vetoed those measures each time. It's interesting to note that a number of Republicans have criticized the declaration because they see it as setting a negative precedent for executive power, [the] Separation of Powers Doctrine, as well as our democracy.

In addition to the Congressional rebuke, litigation ensued. For instance, a coalition of 16 states filed a federal lawsuit arguing that the President's decision to declare a national emergency is unconstitutional accusing the President of an unconstitutional unlawful scheme. The lawsuit says the states are trying to protect their residents, natural resources, and economic interests from President Donald J. Trump's flagrant disregard of fundamental separation of powers principles engrained in the United States Constitution.

In another lawsuit, groups argued that the President's actions threaten border communities, the environment, and the Constitution's separation of powers. In what some advocates are calling a temporary setback, the US Supreme Court allowed the construction of the border wall to proceed. In fact, one of our experts —Erica Newland—is with a group that is involved in related litigation, and she'll be speaking about the progress of that lawsuit.

To be sure, this controversy implicates the Separation of Powers Doctrine, as evidenced not only by the nature of the presidential action itself but subsequent responses by other branches of government, as well as the states. It also has implications for American democracy and the rule of law. And, of course, it sets a

precedent for executive power not only in terms of future presidents, but also for this particular President, should the people elect him to a second term.

Within a separation of powers framework, the constitutional contours, historical practices, and legal jurisprudence surrounding executive power is key to the border wall controversy. Article II of the US Constitution states, "The executive power shall be vested in a president." According to the Stewardship Theory or Inherent Powers Approach to understanding executive powers, the president has all the powers listed in Article II plus those additional powers needed to run a nation regardless of whether the Constitution specifically authorizes it. Proponents of the Stewardship Theory argue that as a national leader, the president must be empowered to exercise personal judgments in conducting the nation's affairs. To carry out Section 3 of Article II, which empowers the president to "take care that the laws be faithfully executed," she must have powers that go beyond those explicitly enumerated in the Constitution.

So, one way of understanding Stewardship Theory or the Inherent Powers approach to executive power is to think of an elementary school who has hired a 4th grade teacher. Her contract states that she's supposed to instruct the students in her fourth grade class. So inherent in those powers is the idea that she can actually use a chalkboard or she can use PowerPoint presentations or she can instruct her students to engage in classroom activities or organize field trips. While none of that is explicitly stated in her contract, it is inherent to her power to actually instruct her class. But, if the teacher shows up one day and tells all the students in the school—the first grade, the second grade, the third grade and fourth and fifth grade—that they have to bring in five dollars the next day for some charitable cause she favors, she would arguably be transgressing the authority set forth in her contract. Perhaps the principal has the authority to do that. Perhaps the school district has the authority to instruct all the students to donate five dollars in support of a particular cause. But, that particular teacher doesn't. And, that is one way of understanding executive power and the way it can interfere with the Separation of Powers Doctrine.

It's significant to note that the Supreme Court has traditionally supported the Stewardship Theory. In both *In re Neagle* (1890) and *In re Debs* (1895), the Supreme Court embraced the idea that the president is required to "take care that the laws be faithfully executed" and that the clause vested in the president implied powers beyond what is expressly listed in the Constitution and independent of congressional statutes. Still, and this is important in the era of Trump, the executive is subject to congressional checks pursuant to the Separation of Powers Doctrine. The *Youngstown* case, commonly referred to as the Steel Mill Seizure Case (1952), is instructive on this score. Legal scholars regard it as a leading Supreme Court decision addressing presidential power, and the concurring opinion of Justice Robert Jackson is particularly useful in this context.

In *Youngstown Sheet & Tube Company v. Sawyer*, the United States was at war in Korea when President Harry Truman ordered federal officials to seize and operate the nation's steel mills to avert a plant strike. Truman argued that the strike would interrupt steel production and disrupt the war effort as well as undermine the safety of our soldiers on the ground. Significantly, Truman had the option of using the Taft-Hartley Act, a federal statute passed by Congress, to obtain a court order

prohibiting a strike for 80 days. During those 80 days, he could have then asked Congress for permission for emergency legislation. But, politics prevented him from doing this. Specifically Truman was a Democratic president and the unions were an important component of his constituency. The unions despised the Taft-Hartley Act, which was enacted despite Truman's veto. Set against this political backdrop, Truman claimed presidential power pursuant to the US Constitution to seize the steel mills and have the federal government run them rather than resort to using the Taft-Hartley Act. To do so, Truman cited his powers as Commander in Chief in Article II allowing the president to "take care that the laws be faithfully executed" investing him with executive powers.

In response, the steel-mill owners sued, challenging the constitutionality of the President's action. Significantly, the Supreme Court rejected Truman's arguments. It found that none of the provisions that he cited authorized the President to nationalize the steel mills. The decision included both a majority and concurring opinion. While they both advanced the same result, they introduced two distinct approaches to understanding presidential power relevant in this context.

First, Justice Hugo Black wrote for the majority about what would be understood as the formalist approach to executive power. The majority reasoned that the steel mills were too far from the battlefield to trigger the commander-in-chief powers. The take-care power and the executive power both limited the president's power to executing laws that Congress had enacted. Here, the President's seizure of the mills, in absence of any corresponding legislation from Congress, was too similar to lawmaking which was Congress's purview rather than the law executing responsibilities that belongs to the executive. Truman's nationalization of the mills was unconstitutional because it violated a bright categorical divide between the formal powers given to Congress and that of the executive.

In contrast, Justice Jackson, in his concurring opinion, introduced a functionalist approach whereby presidents' powers are not rigidly fixed under the Constitution but adjustable. According to functionalism, the line separating the three branches of government are blurry and subject to ebbs and flows. Such variances are permissible as long as each branch retains its core functions and has capacity to check and balance the others. Significantly, Justice Jackson described three zones of presidential power that proved relevant to understanding the executive actions that are the subject of the instant inquiry.

First, executive power is strongest, Justice Jackson explained, when Congress authorizes the president to act. In this instance, the court should defer to the politically accountable branches of government. Next, executive power is weakest when Congress has acted to curb presidential authority. Last, Justice Jackson spoke of a "Zone of Twilight," the space between congressionally authorized and congressionally forbidden assertions of executive authority.

Regarding President Truman's seizure the steel mills, Justice Jackson reasoned that it would have been constitutional if no practical alternative existed. However, he could have availed himself of such an alternative. President Truman could have used the Taft-Hartley Act to secure an injunction regarding a strike for 80 days and then asked Congress for emergency legislation to authorize a seizure of the steel mills. Justice Jackson further explained that the Taft-Hartley Act tactfully

acknowledged that Congress did not intend the president to unilaterally coordinate federal takeovers of entire industries.

Justice Jackson's framework for understanding presidential authority is useful in analyzing the border wall controversy, the subject of this webinar. For instance, in this case, the administration claims to be acting pursuant to congressional authority found in the Emergency Powers Act. To that end, the statute is analogous to the Taft-Hartley Act that President Truman chose to ignore. Still, critics of the president's declaration of a national emergency cite to its pretextual nature. As evidence, they point not only to the declaration's timing. President Trump, after all, claimed a public emergency only after Congress denied him funding. His critics also point to the President's own words. Specifically, Trump stated during last year's press conference in the Rose Garden that he did not have to declare an emergency at all, but chose to do so in order to accelerate the process. Further, while the administration claims to have declared the emergency pursuant to statutory authority, it is clear that Congress rejected the President's request for additional funding. In fact, on two separate occasions Congress has attempted to terminate the National Emergency by joint resolution only to have the President veto their efforts.

Keeping Justice Jackson's framework in mind, has the President acted with or without congressional approval? Is that approval signified by virtue of statutory authority granted vis-a-vis the Emergency Powers Act or is Congress' disapproval signified by virtue of denying the President the funding that he wanted for his wall (not to mention two distinct congressional resolutions to terminate the public emergency). Regarding the Emergency Powers Act, is it time for legislative reform to curb potential executive abuses from happening again in future? To help us grapple with some of these questions and others not necessarily raised in my introduction we're joined by experts for what is certain to be an enlightening discussion.

First is Erica Newland. Erica most recently served as an attorney advisor at the Office of Legal Counsel in the Department of Justice before joining DOJ. She served as a law clerk to the Honorable Merrick B. Garland of the US Court of Appeals for the DC Circuit and as a senior policy analyst at the Center for Democracy and Technology. During law school, Erica worked for the National Security Division at DOJ as well as the Senate Judiciary Committee. Significantly, Erica received her JD from Yale Law School. Welcome Erica.

**Erica Newland:** Hi, I'm going to pull up this PowerPoint presentation to talk a little bit about some of the stuff that Engy has already hit and then about Protect Democracy's lawsuit at the southern border. Thank You, Engy, for that for that introduction. So before talking specifically about our lawsuit I want to go back over just a little bit of the recent history around this and I do want to emphasize some points of context here.

The place where we begin is with Congress. Congress has the exclusive power under the Constitution to decide how the government spends money, and that's set out in the Appropriations Clause and the Spending Clause.

When the President started talking about the possibility of declaring a national emergency back in January of 2019 we, and I think a lot of others, thought

“oh no, he's about to kind of open up this new route for abusing presidential authority. Obviously, there have been national emergencies declared ever since the Act, the National Emergencies Act was enacted in 1976, but we thought this was going to be the first of many of really, really tenuous national emergency declarations.

And perhaps it will be, but with the hindsight of one year, one thing that I know I've been giving a lot of thought to is that, actually, this was the beginning of a lot of abuses of the appropriations power: involving both the spending of unappropriated funds and the impoundment of funds that have been appropriated. The withholding of aid from Ukraine is a great example of that, and there are plenty of others.

So I think that is really just a helpful frame for looking back over the past year and thinking about how we can connect what happened with the national emergency declaration at the southern border with broader trends in recent governance.

So, of course, as Engy said, back in December of 2018 the President asks Congress to authorize and appropriate certain funding for the border. And the fight over this prompts the longest government shutdown in US history. As someone who lives in DC, I had a lot of friends and former colleagues who, of course, were not getting paid and for whom this was a period of real hardship.

So in January, as the shutdown drags on past the holidays, Trump starts making some noise that if Congress doesn't appropriate the border wall funding, he's going to invoke the National Emergencies Act and declare a national emergency. He's using this as a negotiation tactic, basically which of course raises the question of whether this was a real emergency. After all, it is the type of thing that Congress actually has had the time, and clearly the interest, in engaging on. The National Emergencies Act, which was one of the post-Nixon reforms (it was enacted in 1976), states that during the period of a national emergency, which is an undefined term, the president is delegated the authority to declare a national emergency, to invoke special powers that are only available once that national emergency has been declared, and that Congress retains the authority to terminate that emergency. So this is a constrained delegation of authority, and I will talk later on, and I know Seth will too, about Congress's continued role in this space.

It's important to recognize that when the NEA was enacted, it was designed to actually *curtail* the president's power to declare an emergency. The statute ended a lot of emergencies that had been declared decades before, some as early as the very beginning of the 20th century. And the legislative history makes it very clear that the NEA was designed to limit the declaration of national emergencies to the times when the emergency was unforeseen—when Congress as a body that might be in recess or that takes a while to reach consensus wouldn't be able to come to consensus, then the NEA is a stopgap measure.

But of course, during the shutdown, Congress was engaging very actively on the question of border security and nonetheless Trump was threatening a declaration of a national emergency—and you can see the quote here—“we can call a national emergency because of the security of our country, absolutely. No, we can do it. I haven't done it. I may do it. I may do it, but we could call a national emergency

and build [the wall] very quickly, and it's another way of doing it. But if we can do it through a negotiated process, we're giving that a shot." Trump is saying, this is not an emergency, we have time. And this is what I'm going to do if I don't get my way.

So a deal is finally reached to end the shutdown. Government workers go back to work, starting getting paychecks again, and Congress enacts—and Trump signs—the 2019 consolidated Appropriations Act. As Engy said, this Act included \$1.375 billion in funding for fencing in specific locations along the southern border. So this isn't a generic grant do whatever Trump wants with this money along the border. This is specific types of fencing in specific places. Trump signs the Act into law and the same day, as Engy said, he goes out into the Rose Garden and gives a speech in which he declares a national emergency—because he didn't get all of the money that he wanted.

As Engy said, I used to work at OLC, the Office of Legal Counsel at the Department of Justice. Part of what we did there was review proclamations and executive orders from the president. Obviously, I wasn't involved in this one but I always think not only about how the president is justifying a declaration of a national emergency but also how the lawyers were as well. And what you see here is an invocation of the humanitarian crisis at the border. And I think it's worth asking—a humanitarian crisis of who's making. There are I think very few people would dispute that there are a lot of crises near the border—for example, there's a crisis when children are separated from their parents, or when refugee camps are set up in Mexico because of MPP, or when a white-supremacist shooter massacres people in a Wal-Mart in El Paso—but a lot of that is of the making of this Administration.

Looking through the executive order, you see this kind of strange balancing in the text between, on the one hand, the acknowledgment there are long-standing debates over how porous our borders should be and, on the other hand, an effort to say the situation has worsened in certain respects in recent years. This is to try to make the emergency sound plausible. And then you see a statement that it is necessary for the Armed Forces to provide additional support to address the crime crisis, and then the declaration of the national emergency that follows from that. Of course, this implication of necessity of having the Armed Forces is an odds will put the president then ad-libbed in the in the Rose Garden, where he said "I didn't need to do this. But I'd rather do it much faster." It seems like the emergency was Trump's inability to persuade Congress to let him get his way.

So what did the proclamation do? The president's Proclamation declaring the emergency, and an accompanying White House statement, lay claim to \$6.7 billion that Congress had not appropriated for the purposes of building various forms of border security that Congress did not authorize.

There are basically three different funds that the declaration and the accompanying White House statement sought to get access to.

The first, described at 10 U.S.C. § 2808, is a statute that says when the president declares a national emergency, one that requires the use of the Armed Forces—this goes back to that statement by the President that use of the Armed Forces was necessary at the border—the Secretary of Defense may undertake military construction projects necessary to support such use of the armed forces. Military construction is defined pretty narrowly here and involves things that must



be under the jurisdiction of the Secretary of the military department. Historically, this provision has been used with respect to, for example, barracks and runways in Afghanistan and courthouse security at the U.S. naval base in Guantanamo Bay. These are indisputably military projects. Obviously that's not what was happening here.

Second, the White House statement invoked 10 U.S.C. § 284 which is a DoD pot of money for fighting for drug interdiction activities and it requires that money be used for small construction projects. Funds may only be transferred from this pot when there are “unforeseen military requirements.” Finally, they lay claim to the Treasury Department's asset forfeiture funds.

So a bunch of folks sued.

I want to just talk about two of the lawsuits: one was brought by Protect Democracy, my organization, and another was brought by the ACLU. These two cases have a lot of activity around them right now. So looking at the ACLU: the ACLU filed this lawsuit on behalf of the Sierra Club and the Southern Borders Communities Coalition. They filed it in the Northern District of California and they've had a positive outcome in the district court, which held that the government's use of military construction funds under Section 2808 was unlawful.

So going back for a second, if I can. Section 2808 is that statute that allows funding, during a national emergency, of projects that require the use of the Armed Forces. Under such circumstances, the Secretary of Defense may undertake military construction projects as necessary to support such use of the Armed Forces. The judge found that the “plain reality” in this case is that the border barrier projects are not necessary to support the use of the Armed Forces. Congress didn't appropriate the funds the president is using and so the use of them is unlawful. The court issued an injunction which has been stayed pending appeal. Appeal is ongoing and as the government has sought access to additional funds, the ACLU has sought review of those as well.

My organization Protect Democracy, joined by both right- and left-leaning lawyers in very much a bipartisan effort, filed a lawsuit in the Western District of Texas (down at the border) on behalf of the County of El Paso and the Border Network for Human Rights.

The Border Network for Human Rights is a nonprofit organization that works on the border with border communities. I would really encourage you to check out the website<sup>1</sup> that we've set up with information about our lawsuit. And [endtheemergency.org](https://endtheemergency.org) features some local voices from the border talking about some of the ways that the declaration of the emergency harmed the border communities, for example by making their communities seem dangerous when they are not, by making members of their communities seem dangerous when they are not. This is not an element of our case, but I will point out that when things like the shooting that happened down in El Paso take place and the perpetrator of the violence says that he was motivated by hatred against people coming across the border—well, what we see with the national emergency proclamation is a sanctioning by the

<sup>1</sup> *El Paso County v. Trump*, PROTECT DEMOCRACY, <https://protectdemocracy.org/project/el-paso-county-v-trump/> [<https://protectdemocracy.org/project/el-paso-county-v-trump/>] (last visited Apr. 19, 2020).

government of rhetoric that is resulting in mass murder. The stakes are very, real and very, very serious.

Moving on to the claims in our lawsuit. The proclamation violates the National Emergencies Act because there was not a real emergency, so the president did not have the authority to declare one. Congress only delegated the authority to declare an emergency in a period of an emergency; there is no emergency here so the president is acting in violation of the Act.

Second, we've argued that the government has construed this act so broadly that the term "emergency" is rendered devoid of all meaning. That interpretation of "emergency" violates the non-delegation doctrine because it suggests that what Congress has done is delegate to the president a completely unbounded authority.

Third, the use of these funds violates the Administrative Procedure Act because the use is not in accordance with law and of course it violates the aforementioned statutes as well.

Fourth, we've argued that the funding plan violates the Consolidated Appropriations Act, which put limits on when funds can be reprogrammed and transferred. What the government has done here is not consistent with those limits. Indeed, that's what you see the you see the District Court in California saying.

Finally, the proclamation violates the president's duty to faithfully execute the law under the Take Care Clause. Faithful execution is execution in good faith, trying your best to make sure that that you are honestly and accurately executing the law. When the president said I didn't need to do this and then issued a proclamation that says this is necessary, that shows a violation of that constitutional obligation.

As you all know, litigation just takes a really long time. And in October, Judge Briones in the Western District of Texas held that the proclamation is unlawful because the spending plan violates the Consolidated Appropriations Act. That's because section 739, which describes when transferring and reprogramming of funds can occur, expressly forbids the government's spending plan. The Court did not reach the other claims or the constitutional claims. The court issued a nationwide injunction. The Fifth Circuit has granted the government's motion to stay the injunction, pending appeal. So that's where that stands.

Meanwhile things have been moving on the Hill. As Engy mentioned, in the National Emergencies Act of 1976 Congress reserved the power to terminate a national emergency. This Act included two innovations. You also see these same innovations in the War Powers Act and in the Armed Export Control Act. These innovations, which I'll discuss momentarily, keep Congress involved in the president's decision to declare an emergency. If Congress was going to delegate this authority it wanted to retain some authority for itself to oversee how that power was delegated.

Originally, back in 1976, the NEA empowered Congress to override a declaration of a national emergency with a mere concurrent resolution. So that means a resolution supported by the majority of the House and the majority of the Senate; no presidential signature was necessary. Of course, those of you who have been trained in the law since 1983 will have lots of alarm bells going off in your head because in *INS v. Chadha*, the Supreme Court case declared resolutions like this unconstitutional, outside of constitutionally-delineated matters like treaty

approvals and confirmation votes by the Senate. With these exceptions, anything that Congress does has to then be presented to the president and get the president's signature or involve a veto override. So Congress now can't just deploy a concurrent resolution to terminate an emergency; they need a veto-proof majority to terminate an emergency. So they gave away this authority initially thinking, okay, we can claw it back with just majorities in each chamber. That's no longer the case.

The second innovation in the National Emergencies Act is expedited procedures, and these still matter post-*Chadha*, to make sure that termination votes actually make it to the floor—that the majority leader can't hold them up. Under the National Emergencies Act, expedited termination votes can come to the floor every six months for the duration of the emergency. So this has meant that termination resolutions, even ones that Mitch McConnell doesn't support in the Senate, for example, have come to the floor and the vote, as Engy mentioned, has been relatively bipartisan. It has been more bipartisan than just about anything else we've seen over the past three and a half years. You can see the numbers here: twelve Senate Republicans voted for the termination resolution in March 2019, 11 in September 2019 (the 12th wasn't present that day; we actually didn't lose any votes on support for termination). Same on the Democratic side. You had a lot of folks out campaigning for president and such during the during the votes.

It's interesting that all of Trump's vetoes—there have been six of them—have come in response to votes on statutes that, pre-*Chadha*, would have allowed one or both houses of Congress to rescind a delegation of authority to the president. I think Seth is probably going to talk about this more but that's the Yemen War Powers Resolution, arms sales disapprovals, and these two national emergency termination votes. It's really interesting to see what seems to get some bipartisan interest even if it's not enough to overcome a veto.

Recognizing the way that the National Emergencies Act has had to change with changing Supreme Court case law, there have been efforts to create reform and to change the delegation of authority to the president so that Congress can have more of a say.

In July 2019, the ARTICLE ONE Act, S. 764, was reported out of committee with an overwhelming bipartisan majority, 11-2. This act would amend the National Emergencies Act with what we call a sunset-and-approve mechanism. Basically, a national emergency would sunset within 30 days of being declared, consistent with the idea of this being a stopgap measure that the president is taking so Congress can then have time to decide whether or not to approve it. Any national emergency that Congress did approve, if it chose to approve the declaration within that sunset period, would require annual re-approval. And if Congress did not approve the national emergency, the president couldn't just issue a new one every 30 days. Also, expedited procedures would ensure that a resolution to approve the national emergency would get to the chamber floor for a vote, because we do recognize that there's this issue where a majority leader can hold up progress. The bill has 18 Republican co-sponsors, which is pretty incredible. We think this basic sunset mechanism would work for lots of other laws gutted by *Chadha*: the War Powers Act, the Arms Export Control Act, etc.

And so, finally, I want to just take a step back and look at where we are one year later. Litigation, of course, is continuing. We'll see where that goes. The emergency has been renewed and, as I said at the front, unlawful fund raids are continuing. The administration sought to divert \$3.8 billion from weapons programs, and then moved those funds into the drug interdiction funds, and then moved the money into border wall funding. The ACLU is seeking review of this as part of their case in the Northern District of California. And then, as I said before, we're seeing a lot of abuse of the appropriations power and this is something that my organization is really keeping an eye on right now.

As you know, in the first two years of this administration, there was a lot of talk about the administration undermining rule of law by undermining judicial orders, Andrew Jackson style: "let Chief Justice Marshall enforce it." And we haven't seen a lot of that. Instead it seems that Congress is being ignored and then the courts either aren't stepping in or, of course, they are very slow in doing so. And the abuse of—I wouldn't say abuse of the appropriations power because the president doesn't actually have that power—appropriated funds is the site for where this is happening, so that's something to keep an eye on as we go through this year. And, of course, legislative reform efforts continue because this should be a bipartisan issue about keeping the separation of powers and checks and balances in place.

**Engy Abdelkader:** Thank you so much, Erica. So, we're going to hear next from Seth and then Laura. Seth Weinberger is professor of politics and government at the University of Puget Sound. He received his BA in political philosophy from the University of Chicago, MA in Security Center Studies from Georgetown University and an MA and PhD in Political Science from Duke University. He teaches courses on international relations, U.S. foreign policy, international security, terrorism, constitutional law and political philosophy. His book, *Restoring the Balance: War Powers in an Age of Terror*, was published by Prager press in 2009. His recently published articles include, *Enemies Among Us: A Targeted Killing of American Members of al-Qaeda and the Need for Congressional Leadership* in the Georgetown Global Security Studies Review and *Institutional Signals: The Political Dimension of International Competition Law Harmonization* with Geoffrey Manne in the Anti-Trust Bulletin. His current research focuses on the decentralization structures of modern-day extremist groups with a particular focus on U.S.-based organizations. In 2011 as well as 2016 Professor Weinberger received the Thomas A. Davis Teaching Excellence Award. We're very excited to have him with us. Welcome, Seth, to the panel.

**Seth Weinberger:** Well thank you so much. I really appreciate it and I'm very happy to be here. As a political scientist and not a lawyer that means I tend to focus more on the role of power and governance and so I'm going to talk a little bit about some of the broader political implications of the National Emergency Act and of president Trump's declaration of emergency, as well as some other actions. So the webinar itself is entitled "Is There an Emergency at the Southern Border? True or False?" and I think the answer is actually simultaneously that it is both true and false. So I actually sort of refer to it as Schrodinger's emergency. In the world of reality no

there isn't an emergency and I think Erica did an excellent job of explaining that there wasn't a crisis, that the administration knows there isn't a crisis and that there still isn't a crisis. But in the world of politics there is an emergency because the president has said there's an emergency. The declaration of Proclamation 9844 pursuant to the National Emergency Act declared that there is a national emergency on the southern border of the United States and so this sort of creates a really interesting political problem. That while in the real world, the emergency, or maybe I guess the lack thereof, matters to the lives of people crossing the border there's actually a different dimension to this which is the political emergency that Erica laid out some of the way in which it actually threatens both our constitutional scheme of sharing and balancing powers amongst, in, and between the branches of government but also really affects the lives of vulnerable populations and not necessarily just those who might be crossing the border.

But as I will argue I think this poses broader problems for the way in which governance occurs and also poses particular threats to vulnerable or marginalized populations. To answer the question that Engy raised in her introduction, I would argue that the president is acting at least sort of strictly pursuant to Congressional legislation. The problem is that Congress, in its infinite wisdom, seems to repeatedly choose to give the president, in multiple ways some of which I'll talk about later, nearly unfettered power without giving itself a way to get that power back and that I think puts us in the problem that we're in.

So the Constitution--and Engy again addressed a little bit of this in her introduction sets out the process a legislative process which the National Emergency Act threatens to subvert. The NEA allows the President to assume legislative powers that affect the legal status and rights of individuals, American citizens and non-citizens, but doesn't have a meaningful way for Congress to block problematic presidential actions or even more importantly pull that emergency grant of power back and doesn't really have a meaningful check or any kind of thing that replicates the structural checks and balances that are built in to our system of government in the Constitution. So the declaration of emergency allows for the activation of multiple statutes and powers as Erica set out. Since its passage there have been 59 emergencies declared by presidents, 32 of these emergencies are actually still active. Now I think it's safe to say of those 59 emergencies only three of them actually are anything that you would actually call an emergency. Two of them were responses to the attacks of September 11th and then one was in 2009 that relaxed various regulations to allow hospitals to address the what was then the swine flu epidemic. So these were regulations that prevented them from using certain medicines or testing certain things and so the emergency was declared to allow for those regulations to be lifted. So in my estimation you have 56 emergencies that are not emergencies and many of these are still active, but Congress has not objected to any of these until this current one. Not only that but Congress has until now refused to engage even in its legally mandated oversight.

So the state of emergency lasts twelve months unless the president renews it and as Erica pointed out Congress is legally required—not just allowed but required—to meet every six months to consider whether or not the emergency should be terminated. So that leaves 1100 reviews that should have occurred over

those 59 emergencies and Congress has only met two or three times if you include the war power stuff. Twice or three times out of eleven hundred reviews. So here's the fundamental problem, which is the Congress is willing—and I'll talk about why I think it's willing to do this—it's willing to basically hand over to the president these expanded powers that it either then doesn't care about or that it doesn't give itself the ability to pull back. Now, most of these declarations of emergency were innocuous at least as we would think about it from a domestic standpoint. They were usually things that allowed the President to sanction foreign individuals who had been associated with acts of terror or drug smuggling. So an individual is suspected of bringing drugs into the United States or suspected of acts of terrorism and this would allow the President to freeze that person's assets or to put sanctions on them and so those were most of the emergencies were. So while they weren't maybe justified as emergencies it's hard to imagine the president needing the expanded power or that the timeliness was that important that the president couldn't have asked Congress to do this. So the president would declare an emergency and Congress didn't object to any of these presumably because the president was not using the powers that the emergency gave to the president domestically; he was only applying them to foreign individuals.

So this lack of concern from Congress over this period since 1983 well really since the beginning of the National Emergency Act really obscured what was the real fundamental problem that we can now see pretty clearly which is that the only thing preventing the president from abusing the National Emergency Act and using those emergency powers domestically in ways that might be problematic was really precedent right there was really no meaningful check because Congress was not interested and even if it had been interested it wasn't clear what it could do.

As Erica pointed out, the original national emergency act had what's called a legislative veto. Congress could use a concurrent resolution, so simple majorities in both houses not sent to the president as a law, a concurrent resolution could end the emergency. But *INS v. Chadha* in 1983 ends the legislative veto which now requires joint resolutions which have to be presented to the President and to be vetoed. Well this is not really a meaningful check in the history of the country only 4.3 vetoes have been overruled and concerning the current emergency the House of Representatives voted 245 to 182 to overturn the declaration of national emergency. The Senate agreed with the House and a vote of 59 to 41. Neither of those majorities are really I would say close to the two-thirds that you would need to override the veto, which of course was then vetoed. Trump did issue the veto. So when the legislative veto—this ability of Congress to block presidential action through simple majorities rather than super majorities that would be needed to overturn the veto—when *Chadha* ends that Justice White at the time issued a very prescient dissent and he said this without the legislative veto Congress is faced with a Hobson's choice either to refrain from delegating the necessary authority leaving itself with the helpless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape or in the alternative to advocate its lawmaking function to the executive branch and independent agencies to choose the former leaves major national problems unresolved to op for the latter risks unaccountable policymaking by those not elected to fill that role.

Unfortunately I think as we see now Congress often has chosen that second option, to delegate power to the President and to abdicate its lawmaking functions. Now interestingly, the legislative veto actually has continued. There have been more than 400 of them according to scholar Louis Fisher, who writes about this, since the *Chadha* decision said you can't use legislative vetoes in fact Congress continues to use them and I can talk a little bit more about that in Q&A if anyone is interested in knowing about that. But unfortunately the mechanisms that allow for legislative vetoes to persist aren't really functional or wouldn't really be applicable in things like the National Emergency Act and so this has left Congress with this fundamental problem: either you don't allow the emergency powers at all which if there were to be a real emergency of course would hamstring the president if there were a situation in which you actually need an emergency powers and it didn't exist then the president can't take the kind of swift and decisive and vigorous action necessary to protect the country. So the president, Congress - excuse me - has chosen the second of White's options to abdicate its legislative responsibilities to give this power to the president without a way of getting it back and again up until now hasn't paid attention as presidents have abused this repeatedly using emergencies in non-emergency situations getting us to where we are now. Now the danger as I see it is that this really threatens to subvert the constitutional structures of separation separating and balancing the powers of the branches of government and I think that the potential lurks for even worse abuses particularly against vulnerable marginalized populations, those populations who have already been targeted by many of the administration's current policies.

So for example the declaration of national emergency allows for the activation of the International Emergency Economic Powers Act or IEEPA, all but two of the existing emergencies of those what are the 39 that are active or sorry 32 that are active all but two of those extant emergencies are largely under the IEEPA. The IEEPA allows the President to respond to unusual and extraordinary threats that has its source in whole or substantial part outside the United States declaring something to be a threat under IEEPA allows the President to freeze assets, block financial transactions right so again most of these emergencies which are trying to put financial sanctions on individuals are using IEEPA. So during what we might call the Global War on Terror both President Bush and Obama use these powers under IEEPA and the national emergency that resulted from September 11th to designate U.S.-based charities and individuals as being suspected of providing material support to terrorists. The executive order that President Bush ordered that allowed this only requires that there is a reasonable basis and this then allowed several U.S.-based Islamic charities to have their assets frozen without any kind of due process and you know particularly I would say horrifying story a Somali-American named Garad Jama was designated as being involved providing material support to terrorism. He lost his business he had his bank account frozen he had to sue the government to be allowed to get a job as a grocery store cashier in order to pay his bills. By the time the government admitted that his designation was an error and unfroze his bank accounts his business had collapsed. So declaring emergencies activates these kinds of things that allow for this kind of targeting at that sort of level.

So the breakdown of the process and this transfer of legislative power that occurs under declarations of emergencies, threatens wider abuses. So things that we have seen occurring under emergencies some for example the internment of a hundred thousand Japanese-Americans during World War II, many of whom attended the University at which I now teach and we're remembering that right now on my campus was pursuant to an emergency obviously War Powers that the president assumed with the declaration of war in World War II, not the National Emergency Act.

But if we think just about some of the recent actions that we're seeing going on right now. The targeting of Iranian-Americans who work who were detained crossing borders when they were trying to return home after the assassination of the Iranian general Soleimani people were detained and harassed and targeted for extreme scrutiny. Or the recent announcement that the president is going to be sending tactical units SWAT teams associated with the Immigrations and Customs Enforcement though these BORTAC units that are going to be sent to Chicago and sanctuary cities not to do anything pursuant to that would require a SWAT unit but simply to support the regular run-of-the-mill that's a quote from the *New York Times* immigration effect right. So the president is actually militarizing standard immigration enforcement using SWAT units to carry out which should be normal routine kinds of operations.

On the other side of course in response to the president's declaration of emergency for the wall, Democratic presidential candidates are discussing their own uses of emergency powers to deal with climate change for example so use of IEEPA, a declaration of a national climate emergency for example could allow for the seizures of oil refineries, or the banning of import and export of oil which could of course impose massive financial costs especially on those least able to afford and to adapt. So yeah these all might be hypothetical right these things that I mentioned aren't occurring yet under emergencies but the time to address problems is before problems occur right. So the fact that this emergency act exists and allows for the activation of these kinds of powers creates the possibility that they will be used in these ways, ways that we're already seeing the president starting to experiment with other sorts of powers and of course as I mentioned Congress really doesn't have the ability to get that power back and to or to or to do anything about it right. So Congress is supposed to be or it is the most representative and deliberative body of government. It's supposed to represent all the varied interests in the nation and balance those interests against one another.

Of course sometimes in achieving one policy objective another group is harmed or gets some sort of detrimental outcome. But at a minimum the deliberative process of legislation ensures that the losers are at least represented in the process by which they're disadvantaged and at least have an opportunity for compensation and compromise through some kind of log rolling process. So that is at least what's supposed to occur as we make policy through a representative process interests are considered, interests are balanced and the process of building a winning coalition requires trading off you know a policy here to compensate someone for being harmed there. In its attempt to expedite governance in the complex world that we live in Congress wants to delegate authority with the president because as Justice



White suggested in his dissent you can't figure out how to legislate for every possible eventuality or outcome.

So the NEA rests on the premise that there might be an emergency that requires an immediate and vigorous response with unfettered executive power but I think that Congress has made one of two and maybe both of these mistakes. One, forgetting that the power you give to the president that you like will eventually belong to the president that you don't like right and so when you allow your president to do something eventually the other president their president is going to do similar things. And I think the other mistake that Congress might have made is the assumption that presidents will in fact be rational actors who will use their power in the best interest of the country and in line with existing norms and precedents. And so I just want to point out one more thing it's not actually connected to the National Emergency Act but it's consonant with this argument that I'm making. So Slate ran an article yesterday about the Real ID law. This has been a problem for a little while but it just was brought to a lot of people's attention yesterday.

The Real ID law which is the law about state identification cards and the requirements to get a driver's license and things like this also contain a clause that said the Secretary of Homeland Security shall have the authority to waive all legal requirements that she determines necessary to ensure expeditious construction of a border wall literally right. It is a law that says the Secretary of Homeland Security can waive state, local and federal law any of them as long as she thinks it's necessary to ensure the construction of a border wall. So right now there are at least 50 laws that are being waived: the Endangered Species Act, The Clean Water Act, The Solid Waste Disposal Act, the Native American Graves and Repatriation Act right. The President is just wiping all these things away in order to build the wall and Congress has acquiesced in this, wrote it into a law and now can't get that back. In Federalist Paper 10, Alexander Hamilton wrote about the problem of factions and he defined a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by a common impulse of passion or of interest that are adverse to the rights of other citizens and the permanent and aggregate interests of the community."

Their solution to the problem of factions was divided government, not just separate branches but specifically within the branch right. So in Federalist 10 he talks about the need for the House and the Senate to force them, to check Congress's own interests and own impulses to act averse to the permanent and aggregate interest. And what we've seen is that as the competency of the administrative state has grown and the scope the administrative state has grown and as Congress has become increasingly polarized and deadlocked, presidents are increasingly governing by executive order and Congress is increasingly willing to allow it to do so without the ability to get that power back.

So what's the solution to this? Well first Congress has to stop delegating its legislative authority. It has to think about what it has done it has to realize that even if at the time it might make sense, delegating legislative authority without the ability to retain a meaningful check is unacceptable. One possibility is to do what Erica mentioned to go what's known as the two-house approval in which the president declares an emergency but both houses have to agree in order for it to continue that

the article 1 piece of legislation that she mentioned is a step in the right direction. The president's certainly going to veto that and I would doubt that the Senate in particular is going to show enough backbone to overturn that veto. Another possibility is to at least require notification requirements as Jennifer Daskal pointed out in a Lawfare piece. At least make the president justify come before Congress and explain why he's doing it. What are the justifications? As we saw with the Soleimani attack, when the president is forced to justify something right the original claim was that there was a threat of imminent attack on American assets but then the actual justification no that's not there. The justification falls apart. Or even just a sense of Congress right, just symbolic resolutions but right now what we have is really nothing the only thing that Congress can do is pass laws that will be vetoed by the President and that I think is an unacceptable situation that really opens up the possibility of abuse of power and things that will affect the most vulnerable among us. And so until we get a congress that's willing to stand up for itself and until we get a president who is willing to maybe not veto a piece of legislation there's not much that I think that can be done and we're in a really problematic situation and I again I put a lot of that blame on Congress for doing this in the first place. So I'll stop there and hand things back to Engy who is going to then introduce our next speaker. Thanks very much.

**Engy Abdelkader:** Thank you so much Seth. That was a great presentation. So, next up is Laura. She is Pro Bono Counsel at the American Bar Association's Commission on Immigration. Prior to this position, she served as a visiting attorney with the Texas Civil Rights Project, managing the family reunification efforts in fighting against zero-tolerance policies on the U.S.-Mexico border. As a native of the Rio Grande Valley, Laura joined an organization to help those most vulnerable families being targeted by extreme law enforcement policies. She was previously appointed as a foreign policy advisor at the US State Department under the Obama administration and then later served as an immigration trial attorney at the US Department of Homeland Security. Laura has also worked in private practice managing corporate business immigration strategies for technology companies in Silicon Valley. Her presentation is going to be slightly different than our first two speakers because it will be more focused on what is actually happening at the border. Welcome, Laura.

**Laura Peña:** Thank you, Engy. Before jumping into the issue of asylum I just wanted to say as a border resident and living in an area of the border, which is the southernmost tip of Texas, you know the wall that has already been constructed from previous funding. I would just note from a personal perspective it is harmful. It is harmful to our communities. It separates communities that have a long history of interconnectivity. It also is harmful to the environment. We have a number of preservations [and] reserved areas that protect the wildlife [and] bird life. If you're a birder and love birds, the Rio Grande Valley is rich in a wide variety of birds, and there are a number of areas that are preserved specifically to ensure that this type of wildlife is protected, and any additional construction of border wall threatens our environment and also separates our communities.

From the perspective of the ABA, I wanted to talk about... physical border wall aside, what the administration has done is created an extremely effective virtual wall of policies that has effectively nearly eliminated asylum for individuals, for refugees who are seeking protection from the United States. I thought it might be helpful to just give a brief overview of what asylum is for those who don't probably know. Most folks here don't practice immigration law, so I'll just give a brief overview of what asylum is, and then I'm going to go through specific policies that have been implemented to dismantle the availability of asylum for individuals seeking protection.

The concept of refugee protection began after World War I, when millions of people fled their homelands looking for safety elsewhere. The focus was initially on governments coming together to reach agreements and provide travel documentation that would really facilitate the movement of individuals and protection for those in need. This was led by the League of Nations. The numbers increased dramatically after the atrocities of World War II, when millions more were forcibly displaced or deported and needed resettlement.

The international community came together more formally after World War II to create specific instruments defining who qualifies as a refugee and the kinds of legal protections and social services the refugees are entitled to receive. Now the two main instruments that resulted from this process were the 1951 Convention Relating to the Status of Refugees, which was later amended by the 1967 Protocol to expand the scope of the convention from World War II European refugees to others facing displacement around the world. Now, the basic concept is called non-refoulement. It's a rule of customary international law that provides that a refugee cannot be returned to a territory where his or her life or freedom is threatened. All right, it's very basic premise of our international legal obligations is that we cannot turn people to places where they might be harmed or where their freedom is threatened. The U.S. is a signatory to the 1967 Protocol only but it's also undertaken most of the convention as the supreme law of the land. The U.S. later went on to codify refugee protection in the Refugee Act of 1980.

Significant amendments to the application procedures and some eligibility requirements were made in the last major immigration reform which was in 1996. Now, the basic U.S. definition of a refugee is someone who is outside of their country of nationality and unable or unwilling to return, and who has a well-founded fear of persecution on account of one of five factors: race, religion, nationality, political opinion or membership in a particular social group. This last category is the most flexible and has also come under attack under the current administration. The persecutor must be a state actor or an entity that the home government cannot or will not control. Now, the only difference between eligibility for refugee status, which I just defined what a refugee is, eligibility for asylum is the place of application. So refugee status is adjudicated abroad but applications for asylum are made when the applicant is either at the border, which I'm going to discuss, or already within the interior of the U.S. The current statute also includes a number of bars to asylum which include some criminal offenses, terrorism, national security grounds or failure to apply within one year of arrival to the United States.

So that's a very quick and dirty overview of asylum. But, now, since we are all asylum experts, I'm going to go into the attacks on asylum that we're seeing specifically here on the border and I'm going to try and describe it in a way so you can sort of visualize and understand what it means both for the individuals who are seeking protection, but also for the individuals who are trying to render legal services, such as myself and other attorneys who may be interested in figuring out how they can help is specifically on the border with the number of these cases.

So one of the first attacks came in the form of a policy called metering. Since early on in the administration the Department of Homeland Security began piloting this program. What it is okay...hopefully, some folks on this webinar have actually traveled to Canada or to Mexico, but to enter those countries...it may be a bridge, it may be a land crossing...but to enter that country, you typically [go up to] a turnstile you pay a little money and you walk into...let's just say you're going to Mexico...and you're inspected by Mexican authorities. On your way back to the United States, you're also going to be required to be inspected by U.S. officials once you return to the United States. Now in that process, whether you're going to Mexico or coming back to the United States, that midway point—that's the international boundary line.

What metering did was instead of being inspected officially once you have presented in the United States after returning from Mexico, now you are inspected by Customs and Border Protection armed officials with riot gear. They are armed with pistols. They stand at the midway point of the bridge and the only individuals who can pass that midway point, that international boundary line, are people who have the appropriate documentation to enter the United States. That means you either have to be a US citizen, a lawful permanent resident, or if you're a non-citizen, then you have to have a valid travel document to enter the United States. What this has done is effectively pushed people back and prevented them from even [being allowed] the opportunity to ask for asylum. I spent nine hours on the bridge two weeks ago with a family that I was trying to get reunified. The father is in the United States. He's an asylee in the United States, and his wife and child are stuck in the Remain in Mexico Program. I was on the bridge trying to facilitate that reunification. But, in that process there were about ten families patiently sitting on their bridge for the same nine hours as I was. And these CBP agents, who are at that midway point, are telling them, "We're full, we don't have capacity to allow you to come seek asylum, put your name on the list, alright?" So these individuals who have fled from various countries have to figure out who in Mexico—sometimes it's the Mexican government, sometimes it's nonprofits—manage a list. They put their names on a list, and they wait. They wait until the United States government has "capacity" in order to accept them for processing for asylum. That is metering. That is sending individuals back to places where they are going to be harmed because these border towns, in particular, are extremely dangerous. Where I live, the state is called Tamaulipas. The State Department has classified the state of Tamaulipas as a level 4 danger security zone, which is the same as Syria and Afghanistan.

We are in violation with of our international obligations. So, okay, let's say that you're an asylum seeker. You've been turned away. You put your name on a list. You're waiting. You want to do this the right way. You wait three months. Your name gets called somehow and the CBP agent says, "Okay, we are going to process

you.” According to the Remain in Mexico Program, non-Mexican individuals from Spanish-speaking countries and Brazil, they are sent back to Mexico for the pendency of their immigration proceedings. And, so, if you are that asylum seeker, you've waited for months in Mexico, maybe in a shelter or maybe you've been able to cobble together some money to share a small apartment with other families who are waiting. You're sent back to Mexico and you are issued what's called a Notice to Appear. It's a charging document in immigration proceedings.

I'm cognizant of time. So, I'm going to go through the Remain in Mexico Program, but with a quick overview. Over 55,000 people have been returned to Mexico to wait during their proceedings, which includes at least 16,000 children and 500 babies. It also includes vulnerable groups such as individuals with disabilities, indigenous speakers, and LGBTQ. I was just in Matamoros earlier today and I was interviewing five people, five separate cases of victims of human trafficking. Okay, so these are incredibly vulnerable groups who are being sent back to Mexico. Where I am based, I'm with the ABA Commission on Immigration. I'm pro-bono counsel, but I am based at ProBAR, which is located in Harlingen, Texas. It's the ABA's largest asylum project. Now, in this specific area, in Matamoros which is the Mexican city closest to where we are located, nearly 2,000 asylum seekers are now in a refugee camp, which is very close to the U.S. port of entry. I just saw earlier today a family that took their vacation here to the border just to volunteer. They wrote an article, and it just came out in Bloomberg, about their experience and what they saw at this border refugee camp. This refugee camp that has been created as a result of US policies.

I want to tell you a little bit about what I've witnessed with my own eyes. Then, I'm going to talk about how you can help because I don't think I have enough time to go through all of the other policies. But, if you have specific questions, we can answer those during the Q&A. This is what I have witnessed. I have witnessed women traumatized by kidnappings and war and rape. Children developmentally delayed due to the trauma of their journey and continued insecurity in Mexico. I've seen children subjected to abuse by adult male predators in the refugee camp. I've seen a lack of meaningful access to counsel. Only four percent of individuals in the Remain in Mexico Program have attorneys. Contrast that with 32 percent of individuals who are allowed to seek asylum or other forms of relief in the U.S. I've seen grown men cry due to fear of a second kidnapping and extortion. Human Rights First has an excellent website where they are monitoring the kidnappings, extortions, and even murders of individuals who are sent back to the Remain in Mexico Program. Over eight hundred documented incidents of crime and violence have been reported by the NGOs. I've also witnessed outbreaks of chickenpox among children, severe hunger, dehydration, lack of access to clean water, homelessness, and a whole new level of family separations which are a direct result of new policies that this administration has implemented. Now, how can you help? There is a letter that I addressed to civil rights attorneys if you want to get involved in the border. I've provided specific links and specific advice. And with that I think I'm going to have to turn it over to Engy.

**Engy Abdelkader:** Thank You, Laura. So, just a reminder to our audience members: you do have an opportunity to post questions. We are going to start our Q&A session. So, we're going to ask all the panelists to resume their places and if the audience has any questions use your control panel to pose those questions. Laura, I do want to start with you and just give you a few more minutes to provide some specific information to those people who may be interested in volunteering or otherwise giving some guidance about how they can, members of the legal profession, how can we actually respond to some of these aggressive policies that you've outlined for us in the short time that you spoke.

**Laura Peña:** Sure. We're going to have a second webinar that's going to go more into detail about how attorneys can volunteer their time on the border. That will be on February 27th. But, in general, I would encourage anybody listening here to not look for a perfect case. Just look for the right partner. There are several border initiatives that are looking for pro-bono partners. Even if you're a solo practitioner, there are organizations that can use your help. My letter has a list of recent border organizations that you can reach out to and if they don't respond, don't give up. We're just so overwhelmed here on the border. But, we definitely need your help. I'd also recommend that you look to your local bar associations for connections to the border.

One example is an immigration attorney in Austin. I did a CLE with her with the Austin local bar, and she is training lawyers in terms of how to go about volunteering for cases in their specific communities. So, I'd encourage you to look locally, as well. I'd also say don't expect it to be tidy or neat. Immigration law is quite complicated, but don't let that intimidate you. Just be prepared to take time to invest actually in yourself. Investing in your own capacity, your own knowledge, your own learning of this area of the law will yield so much more in the future. So, I would encourage you: don't be shy. Invest time in yourself to be able to learn the law. That way you can lend your support to these cases. I would also say, come to the border. But, come to the border with a commitment in mind whether that's for humanitarian work or for legal work. And, some of the links that I give in my letter you can go ahead and reference those. As well as of course with the ABA Commission on Immigration, there's a link if you sign up you'll get emails from us with other volunteer opportunities.

**Engy Abdelkader:** Wonderful. Thank you so much, Laura. That was incredibly helpful. I know that your presentation focused exclusively on the border, local communities as well as related policies. I'd like to turn next to Seth. Seth, you mentioned in your presentation the fact that you believe that President Trump acted pursuant to congressional statutory authority when he declared the emergency by virtue of the fact that he was vested with this authority in the National Emergencies Act. I understand that position, but I wonder how you reconcile it with allegations of pretext. The fact that in his own words he did not have to declare the public emergency at all and rather it seemed like an issue of expediency. How do you reconcile that?

**Seth Weinberger:** Well first I don't doubt that in fact everything that is correct right I don't doubt that that there isn't an emergency that he does that it is a pretext. I don't doubt that this was an action taken because he, the president, was unable to get the money from Congress. I don't doubt any of that, but you know we also have to deal with the reality of politics and so that I would say there's a couple of things that make me basically argue that yes it is with President is acting pursuant to legislative authority. So the first is that you know while I think sort of it certainly makes sense to take into context all these different things that he said there's also there is some danger about this right which is that presidents say all kinds of things they make promises to people politicians make promises to people some of them they might mean, some of them they don't mean. You know, we, in political science we refer this as cheap talk. You can say things you know, you can lie and you can say things but until the rubber meets the road those things don't really matter. So for example they're right during the lawsuits over the travel ban, there were claims that you know the evidence that the travel bans were motivated by racial animus were in the statements that he said and I think the court, you know things that he had tweeted out, and I think the court and I think rightly said you know we can't get in the business of trying to parse everything that presidents have said and trying to figure out their motives, all we can do is look and see whether or not they are complying with the law right. And again I'm not saying those decisions were correct I'm just saying that in this specific I think that it becomes problematic to try to figure out which things that president say we should listen to in which things presidents say we shouldn't listen to.

Now again I you know the reality is I think you're exactly right, but the problem nonetheless exists. So that's the first thing. The second thing is that you know we see repeatedly that when Congress fails to do the proper kind of restraint or put sunset clauses in or things like this you know, this allows presidents to make what they will of it and you know the way that the process works until Congress can override vetoes they don't really have many options. So I'll just put us in a slightly different context if you look at the authorization for the use of military force from 2001, the one that that was the one that authorized essentially the invasion of Afghanistan and allowed the President to take military action against al-Qaeda, right President Obama used that in to go into Syria you know and used it to justify the operations against ISIS. Was ISIS covered under the 2001 AUMF absolutely not but the language of the AUMF basically says the president gets to determine who was responsible and involved in September 11th and if you write that then you can't then complain when the president makes a determination you don't like and there's nothing that really can be done about it, in theory, I guess unless they can overcome the bar of the veto right and figure out a way to block the president's actions right. So that AUMF is still being used to justify military operations in Somalia, all over the world, even though I think these things are clearly beyond the original intent and purpose of the AUMF right.

So I guess the reason I gave that answer is because politically that is the outcome that we are at now which is that the president is using a piece of legislation that Congress passed it could not figure out how to properly fix you know it would have been great if they had put as Erica mentioned that to house approval when they

had to pull the legislative veto out if they had been more aware been thinking a little bit better they could have figured out that this is a really dangerous thing we're doing. But they didn't do it and so now you know I guess I mean so again I think my sense is that in really sort of again it's like the Schrodinger's emergency thing. While I, while I completely agree that this is a pretextual eyes that this is a fake emergency and that it was a response to the failure to you know get the desired outcome through the proper process. The political reality is that doesn't matter right the matter is that there is a legally declared emergency that then activates certain powers and that is that is again there are specific questions that Erica pointed out that even if the emergency is properly declared then that still doesn't necessarily mean you can take all these monies from these different places right that's a separate legal question. But the legal aspect of it I think that we are essentially in that that category of pursuant to congressional authorization.

**Engy Abdelkader:** Erica, I want to turn to you. Seth is a political scientist and he provides us with a valuable perspective from that standpoint. From a legal perspective, it seems to me that pretext is key in terms of understanding whether or not the executive is in fact in compliance with the law right? Particularly given the litigation that both your organization and the ACLU are pursuing. So I do want to give you an opportunity to respond and also share your perspective as well.

**Erica Newland:** So you know Seth's point about the Supreme Court decision in the travel ban case, a decision I disagree with, is well taken. That at the court, at least, there was not much looking at the president's statements. I think that with this particular proclamation, it's different. Line drawing about different presidential statements can be difficult. of course. But this is a place that is so clearly over the line, I don't think you need to debate exactly where that line should be drawn. It's the president himself who's saying these things—it's not a surrogate, a campaign surrogate. He's making these statements when he's president, not when he's campaigning so you don't have the kind of puffery of campaign speak.

These statements are made in the Rose Garden as the President is announcing the proclamation itself, so they are contemporaneous with the proclamation. There's no question that these statements are about this proclamation, and in fact the declaration of a national emergency was also threatened before Trump issued the proclamation, so you know that during the entire process of crafting the Proclamation, and then upon its issuance, he was saying there is no actual emergency here.

I also think you know, for those who are thinking on more of a legal theory level, that the president and his Department of Justice ascribe to a unitary executive view and they base the legitimacy of that theory on the idea that the president is uniquely accountable to the American people. They can vote him out. But part of accountability is responsibility for what you say to the American people, who are who are the voters. And so there's quite the tension there between saying that the President's unique accountability justifies extraordinary powers but that he is also shielded from being held accountable in courts of law for what he is saying to those



American voters. So I don't think it holds up as a matter of theory or of where the law should be.

**Engy Abdelkader:** Thank you for that, Erica. My next question is for both Seth and Erica, and it speaks to the issue of partisanship. We've seen that immigration policy, in recent years if not longer, has really been ideologically driven. According to the public opinion polling it's clear that Republicans favor aggressive immigration policy whereas Democrats appear much more welcoming of immigrant populations. Specifically, for example, according to a public opinion survey from the Public Religion Research Institute, about sixty, sixty-three percent of Republicans favor a barrier wall along the border whereas approximately seventy percent of Democrats oppose it. Yet, what's interesting is that in relation to the declaration of a national emergency we have seen bipartisan support for resolutions to terminate. There's significant support from Republicans in the House and the Senate to terminate the public emergency. We've seen this twice. How do we grapple with the fact that Republicans are overwhelmingly in support of the barrier wall, yet are opposed to the declaration of a public emergency? Is it because it constitutes a threat to their own authority and has deeper implications for our democracy? Again, how do we reconcile this?

**Seth Weinberger:** You wanted to go first Erica? You want me to go first?

**Erica Newland:** Oh, why don't you go first. This is one I struggle with.

**Seth Weinberger:** So I would answer I would answer two things. I would say first that yes there is some sense of a threat to institutional authority, organizational theory, organizations have their own interests they want to retain their power you know that certainly when the president is usurping legislative power that threatens Congress's ability to legislate. So I would say there's certainly some of that and I guess I'm going to kind of echo my point from the last comment and take it in a different comment. You know I would say you have to be careful with looking at votes that don't actually get to the threshold because people who might not vote. So if you can imagine right the process of whipping votes in the House is really a complicated one right. So Congress people, both representatives and Senators, might feel that they want to vote one way but that their political dynamic forces them to vote in another way right. So you know I don't I you know my constituency wants this but I as a person don't want this and the job of the party whips in each house is to figure out how many people do we need and who can vote against something right.

So just because someone votes just because a senator, for example, or a Congress person votes to override a veto unless there were enough votes to actually override the veto you don't know what they would actually do in the case that they would actually override it right. I don't know if I'm I don't know if I'm explaining this properly but the fact that they're not going to get to two-thirds means that more senators, more Congress people can actually vote for the vote knowing it's not going to pass right to try to set to try to signal. If you're a moderate for example if you're a

moderate Republican and you don't want to alienate your moderate voters hey I stood up to the president but that vote actually has no effect so it's okay to vote against the president. But if your vote actually would contribute to getting over the two-thirds threshold then maybe you wouldn't vote right so you have to be a little bit careful. I mean it yes there does seem to be some evidence that you know there is a more bipartisan opposition to this kind of a usurpation. I'm not convinced it's actually as strong as it looks like on paper just politically in terms of the ways that the votes work so.

**Engy Abdelkader:** Interesting. Erica?

**Erica Newland:** I largely agree with Seth I hope I'm being too cynical but I fear not.

**Seth Weinberger:** Political scientists we can't be too cynical, so.

**Erica Newland:** I will simply add that I do think this is one place where people are still able to see that what is good for the goose is good for the gander, or what is bad for the goose is bad for the gander. That seems very rare these days. I think it's a fundamental kind of precept of rule of law and so I am heartened to see some recognition by folks on the Hill that if they let Trump do it then you know, what goes around could come around.

**Seth Weinberger:** Yeah I mean I do agree with that. I'd like to be a little bit more optimistic than I am. We'll see.

**Engy Abdelkader:** So, one last question before we wrap up. And, again, this is for Erica and Seth. Seth, during your presentation I was struck by some of the numbers that you provided. I think at one point you said that in the context of declarations of national emergencies that Congress should have engaged in 1100 reviews.

**Seth Weinberger:** Yep.

**Engy Abdelkader:** But, in reality only did so two to three times, right?

**Seth Weinberger:** Yep.

**Engy Abdelkader:** So, in the 1970s the National Emergencies Act originally came into effect and yet we are only seeing Congressional resolutions to terminate now. This seems noteworthy and clearly examples of the legislative branch reasserting itself and perhaps taking back its power. Is that a fair assessment? Perhaps this is a step towards the restoration of the Separation of Powers Doctrine undermined over the years by virtue of the fact that they were delegating authority. What is your interpretation of these recent events in terms of the legacy of these actions? What is its precedential value in terms of politics and government?

**Seth Weinberger:** Yeah I hope it's a sign that they've realized they've gone too far but I'm not so sure. I mean the problem I think is that we've become increasingly polarized as a country. Congress has become increasingly sclerotic and so I mean I think this sort of represents an extreme example that I think has produced some pushback. But you know I think both parties sort of realize that if you want to govern you know you just have to do it by executive fiat. And you know that you're just not going to get the kinds you know the kinds of majorities and the kinds of bipartisanship in particular that we used to have. I'm not an American—I don't study American politics. So you know I hope I'm not too sort of far afield here. I mean I think that in this case you know it really I think it comes down more to legislative sort of prerogative in the sense of the Congress that they are losing control of the ability to legislate. You know whether or not that leads them to sort of rethink all these various things that they've done again the AUMF, you know so they just they you know, the AUMF has no sunset in it. There's nothing they can do to get that power back and so as we've seen right it just keeps getting turned against different actors right.

The Real ID Act thing that I mentioned that allows the President to override you know all those things that Laura was talking about all the things that are happening. These are all things that should be protected by laws and the president can just waive them because Congress said you can waive anything you want to. You know I think what we Congress just I think has failed us in a lot of these ways and I mean I think also there is some responsibility on us. You know we can't like it when our president does it and you know we can't like it when our president rules by executive orders and does constitutionally problematic things. We have to stick to the framework that the Constitution sets up because opening that door, I think, gets problematic. So the door has been opened. Congress opened it. We sat back and sort of let it happen and now we've got this person who is an inveterate liar who I think I'm willing to say I don't think I don't I it's probably the first president maybe since Nixon right certainly since Nixon who I think doesn't act in in what that person believes to be the best interest of the country and has no respect for precedent or the norms of governance and this is what happens now. And so I mean I hope that you're right. I hope that this is the beginning of Congress trying to figure out ways to claw some of that power back. I hope that whoever is the next president following Trump is a president who's willing to allow Congress to pull those powers back and maybe not veto you know that the article 1 act and change some of this stuff. But that's a hard thing to ask any president to do. To give up the ability to govern and do the things you want to do. So I hope that it's that there's time to close the door before the horses, before the cows or horses. I can't remember what the analogy with the story is right. But before the barn door gets the, to close the barn door. But I don't know that that's possible you know. Is the next president going to be willing to not veto these things and allow Congress to take that back? We'll see. I don't know. I'm not hopeful.

**Engy Abdelkader:** I think that's a valuable message about what's good for your president is going to be good for my president. And you know an important lesson for us I think to keep in mind going forward. I think it's also important that you stress the character of the president. I know that there are commentators that have said that

Congress gave this much power to the president in the National Emergencies Act because they assumed that the president would always exercise self-restraint.

**Seth Weinberger:** Yeah right, right.

**Engy Abdelkader:** And, unfortunately, we're confronted with a president that has absolutely no self-restraint, whether it's in the context of social media or declaring public emergencies. Erica, I want to give you an opportunity to share your perspective as well.

**Erica Newland:** Yeah, so let me push back just a little bit about that point you just made Engy, and then I'll get to Seth's point a little bit. When the National Emergencies Act and the War Powers Act were passed, this was right after Vietnam, it's right after Nixon. There was, I think, an understanding that presidents could abuse their power and act in quasi-autocratic ways. I think the legislative history behind those acts shows that. But over the years, those acts have been taken, reinterpreted from constraints on executive authority to broad authorizations and empowerment. That's not saying you were twisting it, as you absolutely captured what the narrative has become. But I think that's a sign of how the folks who are very pro-executive authority have really succeeded in redefining the narrative of these laws and therefore making them more powerful than they were ever intended to be.

As for Congress's capacity to govern: there are some things that are really hard to fix about Congress and there are some things that are easier to fix about Congress. Partisanship in this country—that's above my pay grade. But you know what I can say is that when I spent some time on the Hill, there would be two or three legislative staffers, a maximum of three—extremely smart, extremely hardworking, extremely good people—working on legislation that the entire executive intelligence bureaucracy was weighing in on. This was the USA Freedom Act, so some Patriot Act revisions. There was no way that, as wonderful as these individuals were, they were going to be able to take in all of the information that was necessary in order to legislate independently from what the executive branch wanted. And so things like better staffing for Congress, more space for Congress, better resources for Congress to rely on, can promote the type of governance that we want and help give members of Congress and their staff more comfort and confidence in their ability to legislate intelligently. It's maybe not sufficient, but I think it's a necessary condition.

**Engy Abdelkader:** So, in wrapping up, I want to give each of you just a few moments to share any concluding thoughts that you might have before we adjourn. Laura, let's begin with you.

**Laura Peña:** Sure, thank you. I just want to thank honestly the panelists. It was very interesting to learn from you. And again, as a border resident, the declaration of a national emergency here on the border when most of these border places, at least on the US side, are safe places...and so I would encourage those who have listened to

the fascinating legal and policy and political issues along the border wall, [that] if you're interested, visit the border. Come see the environment that we have here. Like I said, it's a big birding destination. But there are also a lot of people in need, and the Remain in Mexico Program population [has] forced [people] to be in very dire circumstances. So I'd encourage you to read the letter that if it hasn't been issued will be issued and I appreciate your support.

**Engy Abdelkader:** Wonderful, thank you so much, Laura. Seth, any concluding thoughts?

**Seth Weinberger:** Sure. I mean as someone who teaches you know politics and teaches you know students who are hopefully going to go out and work to fix some of the problems that that we have. I mean I would say it's incumbent on all of us to be aware of the things that our government is doing right. I mean we can't go back in time and pay attention to the uses of the national emergency act right but we need to we need to push back when Congress is letting these things go unnoticed and we need to be more aware of the purpose of government and the structural processes that the founders created and what they were there to do. You know it's sort of I think one of the if there's sort of a silver lining of the Trump administration it's that I think we're going to realize how much of what we took for granted as to how this country operates was in fact simply precedent right, was not written into law and was simply that presidents behaved in certain ways and took things with a certain kind of gravitas or whatever. And now that's you know that all depends on the willingness of a president to behave in that way. And so I think as citizens you know it's our responsibility to know to notice when presidents are using their powers in ways that are not consonant with our governing principles, with our governing structures, with our governing documents and to keep that in mind and to you know and to you know write our congresspeople and do those things and let them know that we're aware of what's happening and that we want change. And that's you know that's that that's small but in theory at least in this country that's the way it's supposed to work and so I think we have to do that we can't just sit back and let this stuff happen because when it gets too late then it's too late.

**Engy Abdelkader:** Wonderful, thank you. Such important advice and reminders. Erica, let's conclude with you.

**Erica Newland:** You know one thing that folks in my organizations spend a lot of time talking about is how to make sure that law still matters. There are some communities in this country for whom law has never mattered as much as it should. I don't want to sound like we lived in an idyllic past. But we're thinking about with this national emergency litigation and then with our reform efforts. We have to make sure that our law still matters. That's the core of what the ABA is about and what we rely on to have a safe and healthy society.

**Engy Abdelkader:** Wonderful, thank you for that powerful message, Erica. I want to take a moment to thank each of our panelists again for actually sharing their time

and resources. We really value their expertise and perspectives and we're better off for it. I also want to thank all of our audience for joining us for this webinar. As you know this is part of our six-part national lecture series. Our next webinar, "Do We Treat America's Wartime Detainees Better Than Migrant Children?" is scheduled for Wednesday March 18th at 2:30 p.m. and we look forward to having you join us then. Thank you so much.