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National Emergency Powers

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Summary

The President of the United States has available certain powers that may be exercised in the event that the nation is threatened by crisis, exigency, or emergency circumstances (other than natural disasters, war, or near-war situations). Such powers may be stated explicitly or implied by the Constitution, assumed by the Chief Executive to be permissible constitutionally, or inferred from or specified by statute. Through legislation, Congress has made a great many delegations of authority in this regard over the past 230 years.

There are, however, limits and restraints upon the President in his exercise of emergency powers. With the exception of the habeas corpus clause, the Constitution makes no allowance for the suspension of any of its provisions during a national emergency. Disputes over the constitutionality or legality of the exercise of emergency powers are judicially reviewable. Both the judiciary and Congress, as co-equal branches, can restrain the executive regarding emergency powers. So can public opinion. Since 1976, the President has been subject to certain procedural formalities in utilizing some statutorily delegated emergency authority.

The National Emergencies Act (50 U.S.C. §§1601-1651) eliminated or modified some statutory grants of emergency authority, required the President to formally declare the existence of a national emergency and to specify what statutory authority activated by the declaration would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought. The development of this regulatory statute and subsequent declarations of national emergency are reviewed in this report.

On three occasions, Presidents have activated Title 10, Section 2808, of the *United States Code* (10 U.S.C. §2808)—one of the standby authorities available to a President when he declares a national emergency or subsequently issues a related executive order or proclamation. Upon being activated, Section 2808 is notable for permitting, under certain conditions, the use of military construction (MILCON) funds for a declared national emergency. Most recently, President Donald J. Trump invoked Section 2808 upon declaring an emergency involving the southern border of the United States. Congressional efforts to terminate the emergency were unsuccessful.

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Federal law provides a variety of powers for the President to use in response to crisis, exigency, or emergency circumstances threatening the nation. They are not limited to military or war situations. Some of these authorities, deriving from the Constitution or statutory law, are continuously available to the President with little or no qualification. Others—statutory delegations from Congress—exist on a standby basis and remain dormant until the President formally declares a national emergency. Congress may modify, rescind, or render dormant such delegated emergency authority.

Until the crisis of World War I, Presidents utilized emergency powers at their own discretion. Proclamations announced the exercise of exigency authority. During World War I and thereafter, Chief Executives had available to them a growing body of standby emergency authority that became operative upon the issuance of a proclamation declaring a condition of national emergency. Sometimes such proclamations confined the matter of crisis to a specific policy sphere, and sometimes they placed no limitation whatsoever on the pronouncement. These activations of standby emergency authority remained acceptable practice until the era of the Vietnam War. In 1976, Congress curtailed this practice with the passage of the National Emergencies Act.

Background and History

The exercise of emergency powers had long been a concern of the classical political theorists, including the 18th-century English philosopher John Locke, who had a strong influence upon the Founding Fathers in the United States. A preeminent exponent of a government of laws and not of men, Locke argued that occasions may arise when the executive must exert a broad discretion in meeting special exigencies or "emergencies" for which the legislative power provided no relief or existing law granted no necessary remedy. He did not regard this prerogative as limited to wartime or even to situations of great urgency. It was sufficient if the "public good" might be advanced by its exercise.[1]

Emergency powers were first expressed prior to the actual founding of the Republic. Between 1775 and 1781, the Continental Congress passed a series of acts and resolves that count as the first expressions of emergency authority.[2] These instruments dealt almost exclusively with the prosecution of the Revolutionary War.

At the Constitutional Convention of 1787, emergency powers, as such, failed to attract much attention during the course of debate over the charter for the new government. It may be argued, however, that the granting of emergency powers by Congress is implicit in its Article I, Section 8, authority to "provide for the common Defense and general Welfare;" the commerce clause; its war, armed forces, and militia powers; and the "necessary and proper" clause empowering it to make such laws as are required to fulfill the executions of "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

There is a tradition of constitutional interpretation that has resulted in so-called implied powers, which may be invoked in order to respond to an emergency situation. Locke seems to have

[1] John Locke, *Two Treatises of Government*, ed. Thomas I. Cook (New York: Hafner, 1947), pp. 203-207; Edward S. Corwin, *The President: Office and Powers, 1787-1957*, 4th revised edition (New York: NYU Press, 1957), pp. 147-148.

[2] See J. Reuben Clark Jr., comp., *Emergency Legislation Passed Prior to December 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare, Presidential Proclamations and Executive Orders Thereunder, to and Including January 31, 1918, to Which Is Added a Reprint of Analogous Legislation Since 1775* (Washington: Government Publishing Office [GPO], 1918), pp. 201-228.

anticipated this practice. Furthermore, Presidents have occasionally taken an emergency action that they *assumed* to be constitutionally permissible. Thus, in the American governmental experience, the exercise of emergency powers has been somewhat dependent upon the Chief Executive's view of the presidential office.

Perhaps the President who most clearly articulated a view of his office in conformity with the Lockean position was Theodore Roosevelt. Describing what came to be called the "stewardship" theory of the presidency, Roosevelt wrote of his "insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers." It was his view "that every executive officer, and above all every executive officer in high position, was a steward of the people," and he "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it." Indeed, it was Roosevelt's belief that, for the President, "it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[3]

Opposed to this view of the presidency was Roosevelt's former Secretary of War, William Howard Taft, his personal choice for and actual successor as Chief Executive. He viewed the presidential office in more limited terms, writing "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." In his view, such a "specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is," Taft concluded, "no undefined residuum of power which he can exercise because it seems to him to be in the public interest."[4]

Between these two views of the presidency lie various gradations of opinion, resulting in perhaps as many conceptions of the office as there have been holders. One authority has summed up the situation in the following words:

> Emergency powers are not solely derived from legal sources. The extent of their invocation and use is also contingent upon the personal conception which the incumbent of the Presidential office has of the Presidency and the premises upon which he interprets his legal powers. In the last analysis, the authority of a President is largely determined by the President himself.[5]

Apart from the Constitution, but resulting from its prescribed procedures, there are statutory grants of power for emergency conditions. The President is authorized by Congress to take some special or extraordinary action, ostensibly to meet the problems of governing effectively in times of exigency. Sometimes these laws are of only temporary duration. The Economic Stabilization Act of 1970, for example, allowed the President to impose certain wage and price controls for about three years before it expired automatically in 1974.[6] The statute gave the President emergency authority to address a crisis in the nation's economy.

Many of these laws are continuously maintained or permanently available for the President's ready use in responding to an emergency. The Defense Production Act, originally adopted in 1950

[3] Theodore Roosevelt, *An Autobiography* (New York: Macmillan, 1913), pp. 388-389.

[4] William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), pp. 139-140. For a direct response to Theodore Roosevelt's expression of presidential power, see William Howard Taft, *The Presidency* (New York, Charles Scribner's Sons, 1916), pp. 125-130.

[5] Albert L. Sturm, "Emergencies and the Presidency," *Journal of Politics*, vol. 11 (February 1949), pp. 125-126.

[6] See 84 Stat. 799-800, 1468; 85 Stat. 13, 38, 743-755; and 87 Stat. 27-29.

to prioritize and regulate the manufacture of military material, is an example of this type of statute.[7]

There are various standby laws that convey special emergency powers once the President formally declares a national emergency activating them. In 1973, a Senate special committee studying emergency powers published a compilation identifying some 470 provisions of federal law delegating to the executive extraordinary authority in time of national emergency.[8] The vast majority of them are of the standby kind—dormant until activated by the President. However, formal procedures for invoking these authorities, accounting for their use, and regulating their activation and application were established by the National Emergencies Act of 1976.[9]

The Emergency Concept

Relying upon constitutional authority or congressional delegations made at various times over the past 230 years, the President of the United States may exercise certain powers in the event that the continued existence of the nation is threatened by crisis, exigency, or *emergency* circumstances. What is a national emergency?

In the simplest understanding of the term, the dictionary defines *emergency* as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[10] In the midst of the crisis of the Great Depression, a 1934 Supreme Court majority opinion characterized an emergency in terms of urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation.[11] An eminent constitutional scholar, the late Edward S. Corwin, explained emergency conditions as being those that "have not attained enough of stability or recurrency to admit of their being dealt with according to rule."[12] During congressional committee hearings on emergency powers in 1973, a political scientist described an emergency in the following terms: "It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits."[13] Corwin also indicated it "connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal."[14]

There are at least four aspects of an emergency condition. The first is its temporal character: An emergency is sudden, unforeseen, and of unknown duration. The second is its potential gravity: An emergency is dangerous and threatening to life and well-being. The third, in terms of governmental role and authority, is the matter of perception: Who discerns this phenomenon? The Constitution may be guiding on this question, but it is not always conclusive. Fourth, there is the

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[7] See 64 Stat. 798; 50 U.S.C. §§4501-4568. (The latter citation was originally 50 U.S.C. App. 2061 *et seq.* (1994). Subsequently, the appendix in Title 50 of the *U.S. Code* was eliminated.)

[8] U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes*, 93rd Cong., 1st sess., S.Rept. 93-549 (Washington: GPO, 1973).

[9] 90 Stat. 1255; 50 U.S.C. §§1601-1651.

[10] *Webster's New Collegiate Dictionary* (Springfield, MA: G & C Merriam, 1974), p. 372.

[11] *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 440 (1934).

[12] Edward S. Corwin, *The President: Office and Powers, 1787-1957*, p. 3.

[13] U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, hearings, 93rd Cong., 1st sess., April 11-12, 1973 (Washington: GPO, 1973), p. 277.

[14] U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, hearings, 93rd Cong., 1st sess., April 11-12, 1973 (Washington: GPO, 1973), p. 279.

element of response: By definition, an emergency requires immediate action but is also unanticipated and, therefore, as Corwin notes, cannot always be "dealt with according to rule." From these simple factors arise the dynamics of national emergency powers.[15] These dynamics can be seen in the history of the exercise of emergency powers.

Law and Practice

In 1792, residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing the collection of a federal excise tax on whiskey. Anticipating rebellious activity, Congress enacted legislation providing for the calling forth of the militia to suppress insurrections and repel invasions.[16] Section 3 of this statute required that a presidential proclamation be issued to warn insurgents to cease their activity.[17] If hostilities persisted, the militia could be dispatched. On August 17, 1794, President Washington issued such a proclamation. The insurgency continued. The President then took command of the forces organized to put down the rebellion.[18]

Here was the beginning of a pattern of policy expression and implementation regarding emergency powers. Congress legislated extraordinary or special authority for discretionary use by the President in a time of emergency. In issuing a proclamation, the Chief Executive notified Congress that he was making use of this power and also apprised other affected parties of his emergency action.

Over the next 100 years, Congress enacted various permanent and standby laws for responding largely to military, economic, and labor emergencies. During this span of years, however, the exercise of emergency powers by President Abraham Lincoln brought the first great dispute over the authority and discretion of the Chief Executive to engage in emergency actions.

By the time of Lincoln's inauguration (March 4, 1861), seven states of the lower South had announced their secession from the Union; the Confederate provisional government had been established (February 4, 1861); Jefferson Davis had been elected (February 9, 1861) and installed as president of the confederacy (February 18, 1861); and an army was being mobilized by the secessionists. Lincoln had a little over two months to consider his course of action.

When the new President assumed office, Congress was not in session. For reasons of his own, Lincoln delayed calling a special meeting of the legislature but soon ventured into its constitutionally designated policy sphere. On April 19, he issued a proclamation establishing a blockade on the ports of the secessionist states,[19] "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war."[20] Congress had not been given an opportunity to consider a declaration of war.

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[15] While some might argue that the concept of emergency powers can be extended to embrace authority exercised in response to circumstances of natural disaster, this dimension is not within the scope of this report. Various federal response arrangements and programs for dealing with natural disasters have been established and administered with no potential or actual disruption of constitutional arrangements. With regard to Corwin's characterization of emergency conditions, these long-standing arrangements and programs suggest that natural disasters do "admit of their being dealt with according to rule."

[16] 1 Stat. 264-265.

[17] This authority may presently be found at 10 U.S.C. §254.

[18] See James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. 1 (New York: Bureau of National Literature, 1897), pp. 149-154.

[19] Richardson, *A Compilation of the Messages and Papers of the Presidents*, vol. 7, pp. 3215-3216.

[20] Clinton L. Rossiter, *Constitutional Dictatorship* (New York: Harcourt, Brace, and World, 1963), p. 225.

The next day, the President ordered the addition of 19 vessels to the navy "for purposes of public defense."[21] A short time later, the blockade was extended to the ports of Virginia and North Carolina.[22]

By a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 men, that navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated for three-year terms of service.[23] The directive antagonized many Representatives and Senators, because Congress is specifically authorized by Article I, Section 8, of the Constitution "to raise and support armies."

In his July message to the newly assembled Congress, Lincoln suggested, "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed," he wrote, "that nothing has been done beyond the constitutional competency of Congress."[24]

Congress subsequently did legislatively authorize, and thereby approve, the President's actions regarding his increasing armed forces personnel and would do the same later concerning some other questionable emergency actions. In the case of Lincoln, the opinion of scholars and experts is that "neither Congress nor the Supreme Court exercised any effective restraint upon the President."[25] The emergency actions of the Chief Executive were either unchallenged or approved by Congress and were either accepted or—because of almost no opportunity to render judgment—went largely without notice by the Supreme Court. The President made a quick response to the emergency at hand, a response that Congress or the courts might have rejected in law but, nonetheless, had been made in fact and with some degree of popular approval. Similar controversy would arise concerning the emergency actions of Presidents Woodrow Wilson and Franklin D. Roosevelt. Both men exercised extensive emergency powers with regard to world hostilities, and Roosevelt also used emergency authority to deal with the Great Depression. Their emergency actions, however, were largely supported by statutory delegations and a high degree of approval on the part of both Congress and the public.

During the Wilson and Roosevelt presidencies, a major procedural development occurred in the exercise of emergency powers—use of a proclamation to declare a national emergency and thereby activate all standby statutory provisions delegating authority to the President during a national emergency. The first such national emergency proclamation was issued by President Wilson on February 5, 1917.[26] Promulgated on the authority of a statute establishing the U.S. Shipping Board, the proclamation concerned water transportation policy.[27] It was statutorily terminated, along with a variety of other wartime measures, on March 3, 1921.[28]

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[21] Rossiter, *Constitutional Dictatorship*, p. 225.

[22] See Richardson, *A Compilation of the Messages and Papers of the Presidents*, vol. 7, p. 3216.

[23] Richardson, *A Compilation of the Messages and Papers of the Presidents*, vol. 7, pp. 3216-3217.

[24] Richardson, *A Compilation of the Messages and Papers of the Presidents*, vol. 7, p. 3225.

[25] James G. Randall, *Constitutional Problems Under Lincoln* (Urbana, IL: University of Illinois Press, 1951). See also Wilfred E. Binkley, *President and Congress* (New York: Alfred A. Knopf, 1947), pp. 124-127; Rossiter, *Constitutional Dictatorship*, pp. 233-234; and Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1907), p. 58.

[26] 39 Stat. 1814.

[27] 39 Stat. 728.

[28] 41 Stat. 1359.

President Franklin D. Roosevelt issued the next national emergency proclamation some 48 hours after assuming office.[29] Proclaimed March 6, 1933, on the somewhat questionable authority of the Trading with the Enemy Act of 1917,[30] the proclamation declared a "bank holiday" and halted a major class of financial transactions by closing the banks. Congress subsequently gave specific statutory support for the Chief Executive's action with the passage of the Emergency Banking Act on March 9.[31] Upon signing this legislation into law, the President issued a second banking proclamation, based upon the authority of the new law, continuing the bank holiday until it was determined that banking institutions were capable of conducting business in accordance with new banking policy.[32]

Next, on September 8, 1939, President Roosevelt promulgated a proclamation of "limited" national emergency, though the qualifying term had no meaningful legal significance.[33] Almost two years later, on May 27, 1941, he issued a proclamation of "unlimited" national emergency.[34] This action, however, did not actually make any important new powers available to the Chief Executive in addition to those activated by the 1939 proclamation. The President's purpose in making the second proclamation was largely to apprise the American people of the worsening conflict in Europe and growing tensions in Asia.

These two war-related proclamations of a general condition of national emergency remained operative until 1947, when certain of the provisions of law they had activated were statutorily rescinded.[35] Then, in 1951, Congress terminated the declaration of war against Germany.[36] In the spring of the following year, the Senate ratified the treaty of peace with Japan. Because these actions marked the end of World War II for the United States, legislation was required to keep certain emergency provisions in effect. Initially, the Emergency Powers Interim Continuation Act temporarily maintained this emergency authority.[37] It was subsequently supplanted by the Emergency Powers Continuation Act, which kept selected emergency delegations in force until August 1953.[38] By proclamation in April 1952, President Harry S. Truman terminated the 1939 and 1941 national emergency declarations, leaving operative only those emergency authorities continued by statutory specification.[39]

President Truman's 1952 termination, however, specifically exempted a December 1950 proclamation of national emergency he had issued in response to hostilities in Korea.[40] This condition of national emergency would remain in force and unimpaired well into the era of the Vietnam War.

Two other proclamations of national emergency would also be promulgated before Congress once again turned its attention to these matters. Faced with a postal strike, President Richard Nixon

[29] 48 Stat. 1689.

[30] 40 Stat. 411.

[31] 48 Stat. 1.

[32] 48 Stat. 1691.

[33] 54 Stat. 2643.

[34] 55 Stat. 1647.

[35] 61 Stat. 449.

[36] 65 Stat. 451.

[37] 66 Stat. 54; extended at 66 Stat. 96, 137, and 296.

[38] 66 Stat. 330; extended at 67 Stat. 18 and 131.

[39] 66 Stat. c31.

[40] 64 Stat. A454.

declared a national emergency in March 1970,[41] thereby gaining permission to use units of the Ready Reserve to assist in moving the mail.[42] President Nixon proclaimed a second national emergency in August 1971 to control the balance of payments flow by terminating temporarily certain trade agreement provisos and imposing supplemental duties on some imported goods.[43]

Congressional Concerns

In the years following the conclusion of U.S. armed forces involvement in active military conflict in Korea, occasional expressions of concern were heard in Congress regarding the continued existence of President Truman's 1950 national emergency proclamation long after the conditions prompting its issuance had disappeared. There was some annoyance that the President was retaining extraordinary powers intended only for a time of genuine emergency and a feeling that the Chief Executive was thwarting the legislative intent of Congress by continuously failing to terminate the declared national emergency.[44]

Growing public and congressional displeasure with the President's exercise of his war powers and deepening U.S. involvement in hostilities in Vietnam prompted interest in a variety of related matters. For Senator Charles Mathias, interest in the question of emergency powers developed out of U.S. involvement in Vietnam and the incursion into Cambodia. Together with Senator Frank Church, he sought to establish a Senate special committee to study the implications of terminating the 1950 proclamation of national emergency that was being used to prosecute the Vietnam War "to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary." Such a panel was initially chartered by S.Res. 304 as the Special Committee on the Termination of the National Emergency in June 1972, but it did not begin operations before the end of the year.[45]

With the convening of the 93rd Congress in 1973, the special committee was approved again with S.Res. 9. Upon exploring the subject matter of national emergency powers, however, the mission of the special committee became more burdensome. There was not just one proclamation of national emergency in effect but four such instruments, issued in 1933, 1950, 1970, and 1971. The United States was in a condition of national emergency four times over, and with each proclamation, the whole collection of statutorily delegated emergency powers was activated. Consequently, in 1974, with S.Res. 242, the study panel was rechartered as the Special Committee on National Emergencies and Delegated Emergency Powers to reflect its focus upon matters larger than the 1950 emergency proclamation. Its final mandate was provided by S.Res. 10 in the 94th Congress, although its termination date was necessarily extended briefly in 1976 by S.Res. 370. Senators Church and Mathias co-chaired the panel.[46]

[41] 84 Stat. 2222.

[42] See 10 U.S.C. §12302.

[43] 85 Stat. 926.

[44] The historical record suggests that, prior to 1973, when congressional research revealed their existence, other outstanding proclaimed national emergencies were not apparent to, or much discussed by, Members of Congress.

[45] U.S. Congress, House Committee on the Judiciary, *National Emergencies Act*, hearings, 94th Cong., 1st sess., March 6, 13, 19, and April 9, 1975 (Washington: GPO, 1975), p. 20.

[46] Other members of the Special Committee included Senators Clifford P. Case, Clifford P. Hansen, Philip A. Hart, James B. Pearson, Claiborne Pell, and Adlai E. Stevenson III.

The Special Committee on National Emergencies and Delegated Emergency Powers produced various studies during its existence.[47] After scrutinizing the *U.S. Code* and uncodified statutory emergency powers, the panel identified 470 provisions of federal law that delegated extraordinary authority to the executive in time of national emergency. Not all of them required a declaration of national emergency to be operative, but they were, nevertheless, extraordinary grants. The special committee also found that no process existed for automatically terminating the four outstanding national emergency proclamations. Thus, the panel began developing legislation containing a formula for regulating emergency declarations in the future and otherwise adjusting the body of statutorily delegated emergency powers by abolishing some provisions, relegating others to permanent status, and continuing others in a standby capacity. The panel also began preparing a report offering its findings and recommendations regarding the state of national emergency powers in the nation.

The National Emergencies Act

The special committee, in July 1974, unanimously recommended legislation establishing a procedure for the presidential declaration and congressional regulation of a national emergency. The proposal also modified various statutorily delegated emergency powers. In arriving at this reform measure, the panel consulted with various executive branch agencies regarding the significance of existing emergency statutes, recommendations for legislative action, and views as to the repeal of some provisions of emergency law.

This recommended legislation was introduced by Senator Church for himself and others on August 22, 1974, and became S. 3957. It was reported from the Senate Committee on Government Operations on September 30 without public hearings or amendment.[48] The bill was subsequently discussed on the Senate floor on October 7, when it was amended and passed.[49]

Although a version of the reform legislation had been introduced in the House on September 16, becoming H.R. 16668, the Committee on the Judiciary, to which the measure was referred, did not have an opportunity to consider either that bill or the Senate-adopted version due to the press of other business—chiefly the impeachment of President Nixon and the nomination of Nelson Rockefeller to be Vice President of the United States. Thus, the National Emergencies Act failed to be considered on the House floor before the final adjournment of the 93rd Congress.

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[47] See U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Brief History of Emergency Powers in the United States*, committee print, 93rd Cong., 2nd sess. (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Recommended National Emergencies Act*, 93rd Cong., 2nd sess., S.Rept. 93-1170 (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Orders in Times of War and National Emergency*, committee print, 93rd Cong., 2nd sess. (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Replies*, 3 parts, committee print, 93rd Cong., 2nd sess. (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, 94th Cong., 2nd sess., S.Rept. 94-922 (Washington: GPO, 1976); U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes*, 93rd Cong., 1st sess., S.Rept. 93-549 (Washington: GPO, 1973); U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, 3 parts, hearings, 93rd Cong., 1st sess., April 11-12, July 24, and November 28, 1973 (Washington: GPO, 1973).

[48] See U.S. Congress, Senate Committee on Government Operations, *National Emergencies Act*, 93rd Cong., 2nd sess., S.Rept. 93-1193 (Washington: GPO, 1974).

[49] See *Congressional Record*, vol. 120, October 7, 1974, pp. 34011-34022.

With the convening of the next Congress, the proposal was introduced in the House on February 27, 1975, becoming H.R. 3884, and in the Senate on March 6, becoming S. 977. House hearings occurred in March and April before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary.[50] The bill was subsequently marked up and, on April 15, was reported in amended form to the full committee on a 4-0 vote. On May 21, the Committee on the Judiciary, on a voice vote, reported the bill with technical amendments.[51] During the course of House debate on September 4, there was agreement to both the committee amendments and a floor amendment providing that national emergencies end automatically one year after their declaration unless the President informs Congress and the public of a continuation. The bill was then passed on a 388-5 yea and nay vote and sent to the Senate, where it was referred to the Committee on Government Operations.[52]

The Senate Committee on Government Operations held a hearing on H.R. 3884 on February 25, 1976,[53] the bill was subsequently reported on August 26 with one substantive and several technical amendments.[54] The following day, the amended bill was passed and returned to the House.[55] On August 31, the House agreed to the Senate amendments,[56] clearing the proposal for President Gerald Ford's signature on September 14.[57]

In its final report, issued in May 1976, the special committee concluded "by reemphasizing that emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the National Emergencies Act to end a potentially dangerous situation."[58]

Other issues identified by the special committee as deserving attention in the future, however, did not fare so well. The panel, for example, was hopeful that standing committees of both houses of Congress would review statutory emergency power provisions within their respective jurisdictions with a view to the continued need for, and possible adjustment of, such authority.[59] Actions in this regard were probably not as ambitious as the special committee expected. A title of the Federal Civil Defense Act of 1950 granting the President or Congress power to declare a civil defense emergency in the event of an attack on the United States occurred or was anticipated

[50] See U.S. Congress, House Committee on the Judiciary, *National Emergencies Act*, hearings, 94th Cong., 1st sess., March 6, 13, 19, and April 9, 1975 (Washington: GPO, 1975).

[51] U.S. Congress, House Committee on the Judiciary, *National Emergencies*, 94th Cong., 1st sess., H.Rept. 94-238 (Washington: GPO, 1975).

[52] *Congressional Record*, vol. 121, September 4, 1975, pp. 27631-27647; *Congressional Record*, vol. 121, September 5, 1975, p. 27745.

[53] See U.S. Congress, Senate Committee on Government Operations, *National Emergencies Act*, hearing, 94th Cong., 2nd sess., February 25, 1976 (Washington: GPO, 1976).

[54] See U.S. Congress, Senate Committee on Government Operations, *National Emergencies Act*, 94th Cong., 2nd sess., S.Rept. 94-1168 (Washington: GPO, 1976).

[55] See *Congressional Record*, vol. 122, August 27, 1976, pp. 28224-28228.

[56] *Congressional Record*, vol. 122, August 31, 1976, p. 28466.

[57] 90 Stat. 1255; 50 U.S.C. §§1601-1651 (1988). See U.S. Congress, Senate Committee on Government Operations and Special Committee on National Emergencies and Delegated Emergency Powers, *The National Emergencies Act (*P.L. 94-412*). Source Book: Legislative History, Texts, and Other Documents*, committee print, 94th Cong., 2nd sess. (Washington: GPO, 1976).

[58] U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, p. 19.

[59] U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, p. 10.

expired in June 1974 after the House Committee on Rules failed to report a measure continuing the statute.[60]

A provision of emergency law was refined in May 1976. Legislation was enacted granting the President the authority to order certain selected members of an armed services reserve component to active duty without a declaration of war or national emergency.[61] Previously, such an activation of military reserve personnel had been limited to a "time of national emergency declared by the President" or "when otherwise authorized by law."[62]

Another refinement of emergency law occurred in 1977 when action was completed on the International Emergency Economic Powers Act (IEEPA).[63] Reform legislation containing this statute[64] modified a provision of the Trading with the Enemy Act of 1917, authorizing the President to regulate the nation's international and domestic finance during periods of declared war or national emergency.[65] The enacted bill limited the President's Trading with the Enemy Act power to regulate the country's finances to times of declared war. In IEEPA, a provision conferred authority on the Chief Executive to exercise controls over international economic transactions in the future during a declared national emergency and established procedures governing the use of this power, including close consultation with Congress when declaring a national emergency to activate IEEPA. Such a declaration would be subject to congressional regulation under the procedures of the National Emergencies Act.[66]

Other matters identified in the final report of the special committee for congressional scrutiny included

- investigation of emergency preparedness efforts conducted by the executive branch,
- attention to congressional preparations for an emergency and continual review of emergency law,
- ending open-ended grants of authority to the executive,
- investigation and institution of stricter controls over delegated powers, and
- improving the accountability of executive decisionmaking.[67]

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[60] See U.S. Congress, House Committee on Armed Services, *Extending Civil Defense Emergency Authorities*, 93rd Cong., 2nd sess., H.Rept. 93-1243 (Washington: GPO, 1974); Associated Press, "Rules Panel Halts Bill on War Powers," *Washington Post*, September 19, 1974, p. A5.

[61] 90 Stat. 517; 10 U.S.C. §12304.

[62] 10 U.S.C. §12302.

[63] 50 U.S.C. §§1701-1708.

[64] 91 Stat. 1625.

[65] 50 U.S.C. §4305(b) and 50 U.S.C. §§4301-4341. (The latter citation was originally 50 U.S.C. App. 5(b) (1976). Subsequently, the appendix in Title 50 of the *U.S. Code* was eliminated.)

[66] Of related interest to these statutory developments, President Ford, by a proclamation of February 19, 1976, gave notice that Executive Order 9066, providing for the internment of Japanese-Americans in certain military areas during World War II, was canceled as of the issuance of the proclamation formally establishing the cessation of World War II on December 31, 1946. See 3 C.F.R., 1976 Comp., pp. 8-9. Certain statutory authority relevant to this executive order, concerning the creation of military areas and zones, was canceled by the National Emergencies Act. See 18 U.S.C. §1383.

[67] See U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, pp. 11-18.

There is some public record indication that certain of these points, particularly the first and the last, have been addressed in the past two decades by congressional overseers.[68]

As enacted, the National Emergencies Act consisted of five titles. The first of these generally returned all standby statutory delegations of emergency power, activated by an outstanding declaration of national emergency, to a dormant state two years after the statute's approval. However, the act did not cancel the 1933, 1950, 1970, and 1971 national emergency proclamations, because the President issued them pursuant to his Article II constitutional authority. Nevertheless, it did render them ineffective by returning to dormancy the statutory authorities they had activated, thereby necessitating a new declaration to activate standby statutory emergency authorities.

Title II provided a procedure for future declarations of national emergency by the President and prescribed arrangements for their congressional regulation. The statute established an exclusive means for declaring a national emergency. Emergency declarations were to terminate automatically after one year unless formally continued for another year by the President, but they could be terminated earlier by either the President or Congress. Originally, the prescribed method for congressional termination of a declared national emergency was a concurrent resolution adopted by both houses of Congress. This type of "legislative veto" was effectively invalidated by the Supreme Court in 1983.[69] The National Emergencies Act was amended in 1985 to substitute a joint resolution as the vehicle for rescinding a national emergency declaration.[70]

When declaring a national emergency, the President must indicate, according to Title III, the powers and authorities being activated to respond to the exigency at hand. Certain presidential accountability and reporting requirements regarding national emergency declarations were specified in Title IV, and the repeal and continuation of various statutory provisions delegating emergency powers was accomplished in Title V.

Emergency Declarations in Effect and Emergency Declarations No Longer in Effect

Since the 1976 enactment of the National Emergencies Act, various national emergencies have been declared pursuant to its provisions. Some were subsequently revoked, while others remain in effect. **Table 1** displays the number of national emergencies in effect (some may refer to these as "active") and the number of national emergencies no longer in effect (some may refer to these as "inactive"), by President. Detailed information regarding the 33 national emergencies in effect may be found in **Table 2**. Similar information regarding the 23 national emergencies no longer in effect may be found in **Table 3**.

[68] See, for example, U.S. Congress, House Committee on Government Operations, *Presidential Directives and Records Accountability Act*, hearing, 100th Cong., 2nd sess., August 3, 1988 (Washington: GPO, 1989); U.S. Congress, House Committee on Interior and Insular Affairs, *Emergency Preparedness and the Licensing Process for Commercial Nuclear Power Reactors*, 2 parts, hearings, 98th Cong., 1st sess., April 18 and July 8, 1983 (Washington: GPO, 1985).

[69] See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

[70] See 99 Stat. 405, 448.

Table 1. Number of Emergencies in Effect and Emergencies No Longer in Effect, by President

1979-2019

President	Number of National Emergencies in Effect	Number of National Emergencies No Longer in Effect[a]	Total
James E. Carter	1	1	2
Ronald W. Reagan	0	4	4
George H. W. Bush	0	4	4
William J. Clinton	5	10	15
George W. Bush	10	2	12
Barack H. Obama	10	2	12
Donald J. Trump	8	0	8
Total	**34**	**23**	**57**

Source: Information compiled by CRS.

Note:

a. This column includes three national emergencies whose status is unknown. One each is associated with Presidents Carter, Clinton, and Obama. Searches for information involving the three presidential directives (which are identified in the text below and in **Table 3**) did not yield any results indicating whether each declaration has been modified, continued, or revoked.

The second column in **Table 2** and **Table 3** identifies the national emergency declaration, which is either an executive order (E.O.) or a presidential proclamation (Proc.).

Table 2. Declared National Emergencies Under the National Emergencies Act in Effect

President	Declaration and Date Signed	*Federal Register* (FR) Citation[a]	Title
Carter	E.O. 12170 Nov. 14, 1979	44 FR 65729	Blocking Iranian Government Property
Clinton	E.O. 12938 Nov. 14, 1994	59 FR 58099	Proliferation of Weapons of Mass Destruction
Clinton	E.O. 12957 Mar. 15, 1995	60 FR 14615	Prohibiting Certain Transactions With Respect to the Development of Iranian Petroleum Resources
Clinton	E.O. 12978 Oct. 21, 1995	60 FR 54579	Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers
Clinton	Proc. 6867 Mar. 1, 1996	61 FR 8843	Declaration of a National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels
Clinton	E.O. 13067 Nov. 3, 1997	62 FR 59989	Blocking Sudanese Government Property and Prohibiting Transactions With Sudan
G.W. Bush	E.O. 13219 June 26, 2001	66 FR 34777	Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans

President	Declaration and Date Signed	*Federal Register* (FR) Citation[a]	Title
G.W. Bush	Proc. 7463 Sept. 14, 2001	66 FR 48199	Declaration of National Emergency by Reason of Certain Terrorist Attacks
G.W. Bush	E.O. 13224 Sept. 23, 2001	66 FR 49079	Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism
G.W. Bush	E.O. 13288 Mar. 6, 2003	68 FR 11457	Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe
G.W. Bush	E.O. 13303 May 22, 2003	68 FR 31931	Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest
G.W. Bush	E.O. 13338 May 11, 2004	69 FR 26751	Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria
G.W. Bush	E.O. 13405 June 16, 2006	71 FR 35485	Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus
G.W. Bush	E.O. 13413 Oct. 27, 2006	71 FR 64105	Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo
G.W. Bush	E.O. 13441 Aug. 1, 2007	72 FR 43499	Blocking Property of Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions
G.W. Bush	E.O. 13466 June 26, 2008	73 FR 36787	Continuing Certain Restrictions With Respect to North Korea and North Korean Nationals
Obama	E.O. 13536 Apr. 12, 2010	75 FR 19869	Blocking Property of Certain Persons Contributing to the Conflict in Somalia
Obama	E.O. 13566 Feb. 25, 2011	76 FR 11315	Blocking Property and Prohibiting Certain Transactions Related to Libya
Obama	E.O. 13581 July 24, 2011	76 FR 44757	Blocking Property of Transnational Criminal Organizations
Obama	E.O. 13611 May 16, 2012	77 FR 29533	Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen
Obama	E.O. 13660 Mar. 6, 2014	79 FR 13493	Blocking Property of Certain Persons Contributing to the Situation in Ukraine
Obama	E.O. 13664 Apr. 3, 2014	79 FR 19283	Blocking Property of Certain Persons With Respect to South Sudan
Obama	E.O. 13667 May 12, 2014	79 FR 28387	Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic
Obama	E.O. 13692 Mar. 8, 2015	80 FR 12747	Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela
Obama	E.O. 13694 Apr. 1, 2015	80 FR 18077	Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities
Obama	E.O. 13712 Nov. 22, 2015	80 FR 73633	Blocking Property of Certain Persons Contributing to the Situation in Burundi

President	Declaration and Date Signed	*Federal Register* (FR) Citation[a]	Title
Trump	E.O. 13818 Dec. 20, 2017	82 FR 60839	Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption
Trump	E.O. 13848 Sep. 12, 2018	83 FR 46843	Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election
Trump	E.O. 13851 Nov. 27, 2018	83 FR 61505	Blocking Property of Certain Persons Contributing to the Situation in Nicaragua
Trump	Proc. 9844 Feb. 15, 2019	84 FR 4949	Declaring a National Emergency Concerning the Southern Border of the United States
Trump	E.O. 13873 May 15, 2019	84 FR 22689	Securing the Information and Communications Technology and Services Supply Chain
Trump	E.O. 13882 July 26, 2019	84 FR 37055	Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Mali
Trump	E.O. 13894 Oct. 14, 2019	84 FR 55851	Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria
Trump	Proc. 9994 Mar. 13, 2020	85 FR 15337	Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak

Source: Adapted from CRS Legal Sidebar LSB10252, *Declarations under the National Emergencies Act, Part 1: Declarations Currently in Effect*, by Emily E. Roberts, and updated as of December 3, 2019.

Note:

a. The citation format in this column shows the volume number and then the page number. For example, the citation for E.O. 13857 (84 FR 509) shows that it may be found in volume 84 of the *Federal Register*, p. 509.

Table 3 includes declared national emergencies that are no longer in effect.

Table 3. Declared National Emergencies Under the National Emergencies Act No Longer in Effect

President	Declaration and Date Signed	*Federal Register* (FR) Citation[a]	Title	Action That Rendered Declaration Inactive and Date Signed	FR Citation[a]
Carter	E.O. 12211 Apr. 17, 1980	45 FR 26685	Further Prohibitions on Transactions with Iran	The *prohibitions* were revoked by E.O. 12282. Jan. 19, 1981. There is no notice of continuation of the *national emergency declaration* itself as of April 17, 1981.[b]	46 FR 7925

President	Declaration and Date Signed	*Federal Register* (FR) Citation[a]	Title	Action That Rendered Declaration Inactive and Date Signed	FR Citation[a]
Reagan	E.O. 12513 May 1, 1985	50 FR 18629	Prohibiting Trade and Certain Other Transactions Involving Nicaragua	Revoked by E.O. 12707 Mar. 13, 1990	55 FR 9707
Reagan	E.O. 12532 Sept. 9, 1985	50 FR 36861	Prohibiting Trade and Certain Other Transactions Involving South Africa	Revoked by E.O. 12769 July 10, 1991	56 FR 31855
Reagan	E.O. 12543 Jan. 7, 1986	51 FR 875	Prohibiting Trade and Certain Transactions Involving Libya	Revoked by E.O. 13357 Sept. 20, 2004	69 FR 56665
Reagan	E.O. 12635 Apr. 8, 1988	53 FR 12134	Prohibiting Certain Transactions With Respect to Panama	Revoked by E.O. 12710 Apr. 5, 1990	55 FR 13099
G.H.W. Bush	E.O. 12722 Aug. 2, 1990	55 FR 31803	Blocking Iraqi Government Property and Prohibiting Transactions with Iraq	Revoked by E.O. 13350 July 29, 2004	69 FR 46055
G.H.W. Bush	E.O. 12735 Nov. 16, 1990	55 FR 48587	Chemical and Biological Weapons Proliferation	Revoked by E.O. 12938 Nov. 14, 1994	59 FR 58099
G.H.W. Bush	E.O. 12775 Oct. 4, 1991	56 FR 50641	Prohibiting Certain Transactions With Respect to Haiti	Revoked by E.O. 12932 Oct. 14, 1994	59 FR 52403
G.H.W. Bush	E.O. 12808 May 30, 1992	57 FR 23299	Blocking "Yugoslav Government" Property and Property of the Governments of Serbia and Montenegro	Revoked by E.O. 13304 May 28, 2003	68 FR 32315
Clinton	E.O. 12865 Sept. 26, 1993	58 FR 51005	Prohibiting Certain Transactions Involving UNITA	Revoked by E.O. 13298 May 6, 2003	68 FR 24857
Clinton	E.O. 12868 Sept. 30, 1993	58 FR 51749	Measures To Restrict the Participation by United States Persons in Weapons Proliferation Activities	Revoked by E.O. 12930 Sept. 29, 1994	59 FR 50475
Clinton	E.O. 12930 Sept. 29, 1994	59 FR 50475	Measures to Restrict the Participation by United States Persons in Weapons Proliferation Activities	Revoked by E.O. 12938 Nov. 14, 1994	59 FR 58099
Clinton	E.O. 12947 Jan. 23, 1995	60 FR 5079	Prohibiting Transactions With Terrorists Who Threaten to Disrupt the Middle East Process	Revoked by E.O. 13886 Sept. 9, 2019	84 FR 48041
Clinton	Proc. 6907 July 1, 1996	61 FR 35083	Declaration of a State of Emergency and Release of Feed Grain From the Disaster Reserve	There is no notice of continuation as of July 1, 1997.[b]	N/A

President	Declaration and Date Signed	*Federal Register* (FR) Citation[a]	Title	Action That Rendered Declaration Inactive and Date Signed	FR Citation[a]
Clinton	E.O. 13047 May 20, 1997	62 FR 28301	Prohibiting New Investment in Burma	Revoked by E.O. 13742 Oct. 7, 2016	81 FR 70593
Clinton	E.O. 13088 June 9, 1998	63 FR 32109	Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting New Investment in the Republic of Serbia in Response to the Situation in Kosovo	Revoked by E.O. 13304 May 28, 2003	68 FR 32315
Clinton	E.O. 13129 July 4, 1999	64 FR 36759	Blocking Property and Prohibiting Transactions With the Taliban	Revoked by E.O. 13268 July 2, 2002	67 FR 44751
Clinton	E.O. 13159 June 21, 2000	65 FR 39279	Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons	Superseded by E.O. 13617 June 25, 2012	77 FR 38459
Clinton	E.O. 13194 Jan. 18, 2001	66 FR 7389	Prohibiting the Importation of Rough Diamonds From Sierra Leone	Revoked by E.O. 13324 Jan. 15, 2004	69 FR 2823
G. W. Bush	E.O. 13348 July 22, 2004	69 FR 44885	Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia	Revoked by E.O. 13710 Nov. 12, 2015	80 FR 71679
G. W. Bush	E.O. 13396 Feb. 7, 2006	71 FR 7389	Blocking Property of Certain Persons Contributing to the Conflict in Cote d'Ivoire	Revoked by E.O. 13739 Sept. 14, 2016	81 FR 63673
Obama	Proc. 8443 Oct. 23, 2009	74 FR 55439	Declaration of a National Emergency With Respect to the 2009 H1N1 Influenza Pandemic	There is no notice of continuation as of Oct. 23, 2010.[b]	N/A
Obama	E.O. 13617 June 25, 2012	77 FR 38459	Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons	Revoked by E.O. 13695 May 26, 2015	80 FR 30331

Source: Adapted from CRS Legal Sidebar LSB10253, *Declarations under the National Emergencies Act, Part 2: Declarations No Longer in Effect*, by Emily E. Roberts, and updated as of December 3, 2019.

Notes:

a. The citation format in this column shows the volume number and then the page number. For example, the citation for E.O. 13617 (77 FR 38459) shows that it may be found in volume 77 of the *Federal Register*, p. 38459.

b. Per 50 U.S.C. §1622(d), "Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary."

Invoking 10 U.S.C. §2808

Declaring a national emergency pursuant to the National Emergencies Act does not automatically provide access to funds, or a means for obtaining funds, to be used to respond to or mitigate an emergency. As discussed above, when a President declares a national emergency or subsequently issues a related executive order or proclamation, he may invoke or activate one or more so-called standby authorities. Upon being activated, Section 2808 is notable for permitting, under certain conditions, the use of military construction (MILCON) funds for a declared national emergency.[71]

To date, three Presidents have activated Section 2808 when declaring a national emergency or subsequent to the declaration of a national emergency. President George H. W. Bush declared a national emergency in 1990 in E.O. 12722, Blocking Iraqi Government Property and Prohibiting Transactions with Iraq. Invocation of Section 2808 occurred in a separate yet related executive order, E.O. 12734, which reads in part: "To provide additional authority to the Department of Defense to respond to [the threat described in E.O. 12722] … I hereby order that the emergency construction authority at 10 U.S.C. 2808 is invoked."[72] E.O. 13350 revoked both E.O. 12722 and E.O. 12734.[73] Five days after the 9/11 terrorist attacks, President George W. Bush declared a national emergency but did not include the activation of Section 2808 in his declaration (Proclamation 7463).[74] Approximately two months later, he issued E.O. 13235, which invoked Section 2808 pursuant to the national emergency declaration in Proclamation 7463 and included language similar to that found in E.O. 12734. As noted in **Table 2**, Proclamation 7463 remains in effect, as does E.O. 13235.[75]

Declaration of an Emergency at the Southern Border

In the third instance, President Trump released a proclamation that declared a national emergency concerning the southern border of the United States and that activated Section 2808 (and Title 10, Section 12302, of the *United States Code* (10 U.S.C. §12302). Proclamation 9844, dated February 15, 2019, remains in effect. The set of events that occurred prior to and after the proclamation was issued includes a dispute regarding the amount of funds appropriated for a border wall, a 35-day partial government shutdown, the eventual enactment of an appropriations bill to end the shutdown, and an unsuccessful effort by Congress to terminate the national emergency. The

[71] See CRS Insight IN11017, *Military Construction Funding in the Event of a National Emergency*, by Michael J. Vassalotti and Brendan W. McGarry.

[72] Executive Order 12734, "National Emergency Construction Authority," 55 *Federal Register* 48099, November 14, 1990.

[73] Executive Order 13350, "Termination of Emergency Declared in Executive Order 12722 with Respect to Iraq and Modification of Executive Order 13290, Executive Order 13303, and Executive Order 13315," 69 *Federal Register* 46055, July 30, 2004.

[74] Proclamation 7463, "Declaration of National Emergency by Reason of Certain Terrorist Attacks," 66 *Federal Register* 48199, September 14, 2001.

[75] National Archives and Records Administration, "2001 Executive Orders Disposition Tables," https://www.archives.gov/federal-register/executive-orders/2001-wbush.html.

circumstances surrounding Proclamation 9844 are potentially instructive from the perspectives of congressional oversight, legislative procedure, and appropriations.

The set of events that preceded the declaration of a national emergency and culminated in an unsuccessful congressional effort to terminate the emergency began in fall 2018. In September, President Trump signed two bills providing regular appropriations, which partially funded the federal government for FY2019. H.R. 5895, Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, was enacted as P.L. 115-244 on September 21, 2018. H.R. 6157, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, was enacted as P.L. 115-245 on September 28, 2018. Division C of this act provided continuing appropriations for the remainder of the federal government through December 7, 2018. On December 7, 2018, the President signed H.J.Res. 143 (P.L. 115-298), which provided an extension of continuing appropriations for the remaining agencies through midnight, December 21, 2018.

An ongoing disagreement between President Trump and Congress regarding the amount of funding to provide for construction of a wall along the border between the United States and Mexico was associated with the partial shutdown of the government through January 25, 2019. Throughout fall 2018 and early 2019, President Trump stated repeatedly that approximately $5.6 billion was needed for construction of a wall and indicated that he was stymied by Congress's refusal to provide this level of funding. For example, the President commented on January 2, 2019, that "they [Congress] won't approve $5.6 billion for a wall."[76] Two days later, in a letter to Congress, the President wrote that "current funding levels, resources, and authorities are woefully inadequate to meet the scope of the problem [concerning the southern border of the United States.]"[77] In mid-January, President Trump stated, "The federal government remains shut down because Congressional Democrats refuse to approve border security."[78] In December 2018, the *New York Times* reported that the shutdown occurred "after congressional and White House officials failed to find a compromise on a spending bill that hinged on President Trump's demands for $5.7 billion for a border wall."[79] Several weeks later, a *Washington Post* article stated that the President "has refused to sign any funding bill to reopen the federal agencies that doesn't include $5.7 billion to begin construction of the wall."[80]

The partial government shutdown continued until a continuing resolution, H.J.Res. 28 (P.L. 116-5), was enacted on January 25, 2019, which funded the remaining agencies through February 15. President Trump signed H.J.Res. 31 (P.L. 116-6), Consolidated Appropriations Act, FY2019, a full-year regular appropriations bill, on February 15.

Section 230(a)(1) of P.L. 116-6 provides $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector," which is less than the amount President Trump had sought for border wall construction. On the same day

[76] GPO, "Remarks in a Cabinet Meeting and Exchange with Reporters," *Weekly Compilation of Presidential Documents*, January 2, 2019, p. 3, https://www.govinfo.gov/content/pkg/DCPD-201900001/pdf/DCPD-201900001.pdf.

[77] GPO, "Letter to Members of Congress on Border Security," January 4, 2019, pp. 1-2, https://www.govinfo.gov/content/pkg/DCPD-201900004/pdf/DCPD-201900004.pdf.

[78] GPO, "Remarks by President Trump and Vice President Pence Announcing the Missile Defense Review," January 17, 2019, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-announcing-missile-defense-review/.

[79] Julie Hirschfeld Davis and Emily Cochrane, "Impasse Over Wall Shuts Down Government," *New York Times*, December 22, 2018, p. A1.

[80] Paul Sonne, "To Build Wall Under National Emergency, Trump Needs to Tap Existing Funds," *Washington Post*, January 8, 2019, p. A8.

he signed H.J.Res. 31, the President issued Proclamation 9844, which states that "a national emergency exists at the southern border of the United States." The President "invoked and made available" Section 12302 and "the construction authority provided in" Section 2808.[81] Section 2808(a) provides that, in "the declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act … that requires the use of the armed forces," the Secretary of Defense "may undertake military construction projects … not otherwise authorized by law that are necessary to support such use of the armed forces." However, only funds that have been appropriated for MILCON, including family housing projects, but have not been obligated can be accessed through the activation of Section 2808.[82] President Trump's letter to Congress regarding his declaration of a national emergency stated, in part, that in invoking Section 2808, he was authorizing the Secretary of Defense, "and at his discretion, the Secretaries of the military departments, to exercise the authority under [Section 2808] to engage in construction as necessary to support the use of the Armed Forces and respond to the crisis at our southern border."[83]

Congress's Response[84]

Congress responded to the declaration of the emergency by passing a joint resolution to terminate it. As originally enacted, the National Emergencies Act had allowed the House and Senate, acting together, to terminate a national emergency declared by the President. They could do this by approving a concurrent resolution under special, expedited legislative procedures intended to preclude a filibuster in the Senate. The Supreme Court, however, invalidated that process in 1983, when it ruled (in relation to a different statute) that taking such an action through a concurrent resolution would violate the Presentation Clause of the Constitution.[85] Congress and the President therefore amended the National Emergencies Act in 1985 to change the resolution that terminates a national emergency from a concurrent resolution (which only requires approval in the House and Senate) to a joint resolution (which requires approval in both chambers and the signature of the President).[86]

The special expedited legislative procedures of the act remained; they apply now to consideration of a qualifying joint resolution. The House passed H.J.Res. 46, a joint resolution to terminate the national emergency declared in Proclamation 9844, on February 26, 2019, by a vote of 245-182.[87]

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[81] GPO, "Declaring a National Emergency Concerning the Southern Border of the United States," Proclamation 9844, 84 *Federal Register* 4949, February 15, 2019.

[82] 10 U.S.C. §2808(a). A fact sheet posted on the White House website and dated February 15, 2019, indicated that "up to $8.1 billion … will be available to build the border wall once a national emergency is declared and additional funds have been reprogrammed, including: … Up to $3.6 billion reallocated from Department of Defense military construction projects under the President's declaration of a national emergency (Title 10 United States Code, section 2808)." The White House, "President Donald J. Trump's Border Security Victory," February 15, 2019, p. 3, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/.

[83] GPO, "Letter to Congressional Leaders on Declaring a National Emergency Concerning the Southern Border of the United States," February 15, 2019, https://www.govinfo.gov/content/pkg/DCPD-201900081/pdf/DCPD-201900081.pdf.

[84] This section was written by Elizabeth Rybicki, Specialist on Congress and the Legislative Process.

[85] *INS v. Chadha*, 462 U.S. 919 (1983). For more information, see CRS Report CRS Report RL33151, *Committee Controls of Agency Decisions*, by Louis Fisher.

[86] 99 Stat. 405, 448, §801 (1985).

[87] The House considered the joint resolution under the terms of a resolution reported by the Rules Committee (H.Res. 144), rather than under the procedures described in the National Emergencies Act. In the House, unlike the Senate, the same numerical majority that can pass a bill can set the terms for its consideration. For this reason, the House often

In the Senate, H.J.Res. 46 was eligible to be considered under the expedited procedures created by the National Emergencies Act. These procedures allow a joint resolution terminating an emergency to reach approval in the Senate with simple majority support.[88] Under regular Senate procedures, in contrast, it can be necessary to obtain agreement among at least three-fifths of the Senate (normally 60 Senators) to advance consideration of legislation. On March 14, the Senate passed the joint resolution by a vote of 59-41.

President Trump vetoed H.J.Res. 46 on March 15, 2019.[89] Bills vetoed by the President are returned to the originating chamber, which in this case was the House. On March 26, 2019, by a vote of 248-181, the House failed to achieve the necessary two-thirds vote required to override a veto.

When a President Does Not Explicitly Declare a National Emergency

An anomaly in the activation of emergency powers appears to have occurred on September 8, 2005, when President George W. Bush issued a proclamation suspending certain wage requirements of the Davis-Bacon Act in the course of the federal response to the Gulf Coast disaster resulting from Hurricane Katrina.[90] Instead of following the historical pattern of declaring a national emergency to activate the suspension authority,[91] the President set out the following rationale in the proclamation: "I find that the conditions caused by Hurricane Katrina constitute a 'national emergency' within the meaning of section 3147 of title 40, United States Code."[92] A more likely course of action would seemingly have been for the President to declare a national emergency pursuant to the National Emergencies Act and to specify that he was, accordingly, activating the suspension authority. Although the propriety of the President's action in this case might have been ultimately determined in the courts, the proclamation was revoked on November 3, 2005, by a proclamation in which the President cited the National Emergencies Act as authority, in part, for his action.[93]

brings up legislation eligible to be considered under statutory expedited procedures under the regular procedures used for other legislation.

[88] Specifically, under the special procedures of the act, a majority of Senators can discharge a committee from consideration of a joint resolution to terminate an emergency, and the Senate can take up the joint resolution without the need for a cloture process. In addition, the act requires the Senate to vote on the joint resolution within three calendar days of beginning consideration, again making a cloture process unnecessary. In the case of H.J.Res. 46, the Senate reached a unanimous consent agreement to discharge the Armed Services Committee and to take up the legislation the following day ("Orders for Thursday, March 14, 2019," *Congressional Record*, daily edition, vol. 165 [March 13, 2019], p. S1853). The unanimous consent agreement also prevented amendments from being offered. During debate on the joint resolution, the Senate reached a second unanimous consent agreement to limit further debate to 90 minutes ("Relating to a National Emergency Declared by the President on February 15, 2019," *Congressional Record*, daily edition, vol. 165 [March 14, 2019], pp. S1857-S1882).

[89] The White House, "Veto Message to the House of Representatives for H.J.Res. 46," veto message, March 15, 2019, https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/.

[90] See *Federal Register*, vol. 70, September 13, 2005, pp. 54227-54228.

[91] Currently found at 40 U.S.C. §3147; formerly codified at 40 U.S.C. §276a-5.

[92] *Federal Register*, vol. 70, September 13, 2005, p. 54227.

[93] *Federal Register*, vol. 70, November 8, 2005, p. 67899.

Concluding Remarks

The development, exercise, and regulation of emergency powers, from the days of the Continental Congress to the present, reflect at least one highly discernable trend: Those authorities available to the executive in time of national crisis or exigency have, since the time of the Lincoln Administration, come to be increasingly rooted in statutory law. The discretion available to a Civil War President in his exercise of emergency power has been harnessed, to a considerable extent, in the contemporary period.

Due to greater reliance upon statutory expression, the range of this authority has come to be more circumscribed, and the options for its use have come to be regulated procedurally through the National Emergencies Act. Since its enactment, the National Emergencies Act has not been revisited by congressional overseers. The 1976 report of the Senate Special Committee on National Emergencies suggested that the prospect remains that further improvements and reforms in this policy area might be pursued and perfected.

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