

Inquiring Minds topic – 4 October 2019

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Limits of Presidential Power

Twenty two score and two years ago our forefathers set forth a separation of powers in our Constitution. Article I Section 7 provided "All Bills raising Revenue shall originate in the House of Representatives ..." and in section 8 "The Congress shall have power To lay and collect Taxes, Duties, Imports and Excises...To declare War...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers..."

Congress has not always acted in an efficient manner. Other governments with power vested in a legislature have also not been efficient. For instance the city state of Athens during the Fifth Century BC made a provision to have a tyrant elected for a defined term usually one year when "efficient" action was needed.

Congress has authorized emergency powers for the President or allowed Presidents to act as if they had emergency powers from time to time. Attached is a Wikipedia article on the National Emergencies Act. You may also want to look at the Politico article of January 14, 2019 entitled Stop Complaining About Trumps Emergency Powers, Congress.

Congress retained some ability to restrain the emergency power by the ability to object with a resolution passer both by the House and the Senate. However, that resolution had to be signed by the President who could veto it. Thus one third of either house could block the restriction of the power of the President . It is reported that not once in the 42 years since the National Emergency Act was passed has Congress passed such a resolution and in fact Congress has not debated or reviewed most of the national emergencies that have been declared despite a requirement to do so in the Act.

The rationale for emergency power for the President is that Congress may not act with sufficient speed to protect vital interests of the country. Does this rationale fit current practice? For instance, after Congress did not approve appropriation of funds for a wall on the Mexican border, Mr Trump has ordered funds specifically appropriated for military construction projects and for FEMA to be used for the wall. In like fashion tariffs have been set for imports from many countries and

with regard to China are referred to as a trade war. An article in the September 16, 2019 Time suggests that this trade war will cost American households \$970 each this year.

The provenance of our constitution includes The Magna Carta. By that document control of taxation was taken away from the King and the King's authority restrained. This restraint of executive power is an essential part of our constitution. That the President asserts that by emergency power he can move any funds specifically designated by Congress or that he can impose tariffs on any imports that he wishes goes a long way toward power without restraint.

Does any effective check exist on the power of the President to act in anyway he may choose? Has Congress abdicated the checks and balances provided by the Constitution? Is this a constitutional crisis?

In 1887 John Emerich Edward Dalberg, Lord Acton, wrote to Bishop Creighton: "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favorable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as power increases. ... Power tends to corrupt and absolute power corrupts absolutely. ... There is no worse heresy than that the office sanctifies the holder of it."

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Please also read [<https://en.wikipedia.org/wiki/National-Emergencies-Act>]:

The **National Emergencies Act** (NEA) ([Pub.L. 94-412](#), 90 [Stat. 1255](#), enacted September 14, 1976, codified at [50 U.S.C. § 1601-1651](#)) is a [United States federal law](#) passed to end all previous [national emergencies](#) and to formalize the emergency powers of the President.

The Act empowers the President to activate special powers during a crisis but imposes certain procedural formalities when invoking such powers. The perceived need for the law arose from the scope and number of laws granting special powers to the [executive](#) in times of national emergency. [Congress](#) can terminate an emergency declaration with a joint resolution signed into law.^[1] Powers available under this Act are limited to the [136 emergency powers](#) Congress has defined [by law](#).^[2]

The legislation was signed by President [Gerald Ford](#) on September 14, 1976.^[3] As of February 2019, [59 national emergencies](#) have been declared, more than 30 of which remain in effect.^{[1][4]}

The first President to issue an emergency proclamation^{[5][6]} was [Woodrow Wilson](#), who on February 5, 1917, issued the following:

I have found that there exists a national emergency arising from the insufficiency of

maritime tonnage to carry the products of the farms, forests, mines and manufacturing industries of the United States, to their consumers abroad and within the United States[7]

This proclamation was within the limits of the act that established the [United States Shipping Board](#).

Starting with [Franklin D. Roosevelt](#) in 1933, presidents asserted the power to declare emergencies without limiting their scope or duration, without citing the relevant statutes, and without congressional oversight.[8] The [Supreme Court](#) in [Youngstown Sheet & Tube Co. v. Sawyer](#) limited what a president could do in such an emergency, but did not limit the emergency declaration power itself. A 1973 Senate investigation found (in [Senate Report 93-549](#)) that four declared emergencies remained in effect: the 1933 banking crisis with respect to the hoarding of gold,[9] a 1950 emergency with respect to the [Korean War](#),[10] a 1970 emergency regarding a [postal workers strike](#), and a 1971 emergency in response to [inflation](#). [11] Many provisions of statutory law are contingent on a declaration of national emergency, as many as 500 by one count.[12] It was due in part to concern that a declaration of "emergency" for one purpose should not invoke every possible executive emergency power, that Congress in 1976 passed the National Emergencies Act.

Presidents have continued to use their emergency authority subject to the provisions of the act, with 42 national emergencies declared between 1976 and 2007.[13] Most of these were for the purpose of restricting trade with certain foreign entities under the [International Emergency Economic Powers Act](#) (IEEPA) (50 U.S.C. 1701–1707).

A prior Senate investigation had found 470 provisions of federal law that a President might invoke via a declaration of emergency.[14] The Act repealed several of these provisions and stated that prior emergency declarations would no longer give force to those provisions that remained. Congress did not attempt to revoke any outstanding emergency declarations *per se*, as these remained the President's prerogative under [Article Two of the United States Constitution](#). [15]

The Act authorizes the President to activate emergency provisions of law via an emergency declaration on the condition that the President specifies the provisions so activated and notifies Congress. An activation would expire if the President expressly terminated the emergency, or did not renew the emergency annually, or if each house of Congress passed a resolution terminating the emergency. After presidents objected to this "Congressional termination" provision on [separation of powers](#) grounds, and the Supreme Court in [INS v. Chadha \(1983\)](#) held such provisions to be an unconstitutional [legislative veto](#),[16] it was replaced in 1985 with termination by an enacted [joint resolution](#). A joint resolution passed by both chambers requires presidential signature, giving the president veto power over the termination (requiring a [two-thirds majority](#) in both houses in the case of a contested termination).[17] The Act also requires the President and executive agencies to maintain records of all orders and regulations that proceed from use of emergency authority, and to regularly report the cost incurred to Congress.

Certain emergency authorities were exempted from the act at the time of its passage:

- [10 USC 2304\(a\)\(1\)](#) – allowing exemption of national defense contracts from competitive

bidding

- 10 USC 3313, 6386(c) and 8313 – regulating the promotion, retirement and separation of military officers
- 12 USC 95(a) – regulating transactions in foreign gold and silver
- 40 USC 278(b) – regulating federal property purchases and contracts
- 41 USC 15 and 203 – limiting the assignment of claims against the federal government
- 50 USC 1431–1435 – enabling the President to make national defense contracts outside of otherwise applicable rules

The list of exceptions has from time to time been revised. For example, Public Law 95-223 (1977) repealed the emergency clause of 12 USC 95(a) and arranged for its authority to expire according to the normal provisions of the NEA.

Congress has delegated at least 136 distinct statutory emergency powers to the President, each available upon the declaration of an emergency. Only 13 of these require a declaration from Congress; the remaining 123 are assumed by an [executive](#) declaration with no further Congressional input.[\[2\]](#)

Congressionally authorized emergency presidential powers are sweeping and dramatic, and range from suspending all laws regulating chemical and biological weapons, including the ban on human testing ([50 U.S.C. § 1515](#), passed 1969); to suspending any [Clean Air Act](#) implementation plan or excess emissions penalty upon petition of a state governor ([42 U.S.C. \(f\) § 7410 \(f\)](#), passed 1977); to authorizing and constructing military construction projects ([10 U.S.C. \(a\) § 2808 \(a\)](#), passed 1982) using any existing defense [appropriations](#) for such military constructions (\$10.4 billion in FY2018[\[18\]](#)); to drafting any retired Coast Guard officers ([14 U.S.C. § 331](#), passed 1963) or enlisted members ([14 U.S.C. § 359](#), passed 1949) into active duty regardless of ineligibility for [Selective Service](#).

As of February 2019, 59 national emergencies had been declared, with 31 of them being renewed annually. These include the eight that were declared prior to the passage of the 1976 Act.[\[1\]\[4\]\[19\]](#) The longest continuing national emergency dates back to November 1979 by the Carter administration [blocking Iranian government property](#) under the [International Emergency Economic Powers Act](#).[\[20\]](#)

Since passage of the National Emergencies Act in 1976, every U.S. President has declared multiple national emergencies: Carter (2); Reagan: (6); H.W. Bush (4); Clinton (17); W. Bush (12); Obama: (13); Trump (4).[\[21\]](#)

Beyond the National Emergencies Act, Congress has established three other emergency power frameworks:

- [42 U.S.C. § 247d](#) – [Public Health Service Act](#) (1944), as amended.
- [42 U.S.C. § 5121](#) et seq. – [Stafford Act](#) (1988), replacing the [Disaster Relief Act of 1974](#), as amended in 2000 and 2006.
- [22 U.S.C. § 2318\(a\)\(1\)](#) – Foreign Assistance Act of 1961, as amended, including by the [Arms Export Control Act](#) (1962)