

## Learning about Legislation #39 - What is a national emergency?

We often discuss the balance of powers built into the Constitution, and how the Framers, ever fearful of unchecked tyranny, built a system where each of the three branches of the government were in some means constrained by the others. This is a system that has endured and thrived in normal circumstances, but what happens when something unusual occurs when decisive action must be swiftly implemented? As the incomparable Lin-Manuel Miranda wrote (from the [‘The Room Where It Happens’](#)) how do we “[grapple] with the fact that not ev'ry issue can be settled by committee?” In such cases the President generally steps in and Congress has granted the executive varying levels of deference for such emergencies.

Key to granting power is a definition of what constitutes an emergency. A *Congressional Research Service* [white paper](#) on the topic of National Emergency Powers describes an emergency in this manner:

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. An eminent constitutional scholar, the late Edward S. Corwin, explained emergency conditions as being those “which have not attained enough of stability or recurrency to admit of their being dealt with according to rule.” 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.” 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.”

That same paper also shows, in the words of two presidents, how an executive’s own view of the powers granted to them, and thus how they might act in an emergency, can differ drastically. Theodore Roosevelt felt that “executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers.” Compare that to his successor, William H. Taft’s impression “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.” There is a wide range of interpretation between those two extremes.

After a series of presidential actions in the mid-20th century drew us into extended military conflicts (but not wars, since the Congress never declared them as such), in 1974 the Congress undertook the creation of the Special Committee on National Emergencies and Delegated Emergency Powers to assess what presidents were enabled to do under law, and then determine if this should be amended by statute. This resulted, eventually, in the 1976 National Emergencies Act. As described in a *Lawfare* [article](#):

First, the act revoked (two years after its enactment) any powers granted to the president under the four states of emergency still active at the time. Next, it prescribed procedures for invoking these powers in the future. No longer can a president give force to the hundreds of emergency provisions by mere proclamation. Instead, he must specifically declare a national emergency in accordance with the act and identify the statutory basis for each emergency power he intends to use. Each state of emergency is to end automatically one year after its declaration, unless the president publishes a notice of renewal in the Federal Register within 90 days of the termination date and notifies Congress of the renewal. Finally, the act requires that each house of Congress meet every six months to consider a vote to end the state of emergency.

Unfortunately, the Congress has never exerted itself to perform that ‘every 6 month’ review of existing emergencies, and there are [31 national emergencies still in effect](#) that presidents continue to renew and Congress has never bothered to end.

*The Atlantic* has produced an amazing [article](#) titled “The Alarming Scope of the President's Emergency Powers” that should be required reading (or listening - they have an audio link tucked into that article for those who, like me, prefer to listen to long form journalism) now that President Trump has declared a national emergency to raid the military budget to fund his wall. That piece explains:

The moment the president declares a “national emergency”—a decision that is entirely within his discretion—more than 100 special provisions become available to him. While many of these tee up reasonable responses to genuine emergencies, some appear dangerously suited to a leader bent on amassing or retaining power. For instance, the president can, with the flick of his pen, activate laws allowing him to shut down many kinds of electronic communications inside the United States or freeze Americans’ bank accounts. Other powers are available even without a declaration of emergency, including laws that allow the president to deploy troops inside the country to subdue domestic unrest.

This edifice of extraordinary powers has historically rested on the assumption that the president will act in the country’s best interest when using them. With a handful of noteworthy exceptions, this assumption has held up. But what if a president, backed into a corner and facing electoral defeat or impeachment, were to declare an emergency for the sake of holding on to power? In that scenario, our laws and institutions might not save us from a presidential power grab. They might be what takes us down.

Thankfully, there is a way out of this... if Congress can be convinced to act. The Supreme Court, in the 1983 decision in [INS v Chadha](#), clarified the nature of Congress’s role in relation to veto powers. Thus, the 1976 National Emergencies Act was adjusted to show how an emergency declared by a president may be brought to an end by the Legislative branch. Congress may compose and pass a joint resolution to end a national emergency. It must be able to withstand a presidential veto, so a supermajority of  $\frac{2}{3}$  would be needed in both houses.

Just such a [resolution](#) has been drafted by Rep. Joaquin Castro (D-Texas). Since he released it on Friday afternoon in draft form, it has yet to receive an official joint resolution number. It reads as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, pursuant to section 202 of the National Emergencies Act (50 U.S.C. 1622), the national emergency declared by the finding of the President on February 15, 2019, in the proclamation entitled “Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States” is terminated on the date of enactment of this resolution.

It’s now up to us to pressure our legislators to support such an effort.