

Emergency Executive Powers: Not Needed Indefinitely

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The US government's response to the COVID-19 crisis included an integrated exercise of emergency powers to suspend rules and regulations that hindered society's efforts to mitigate the pandemic. Although these emergency powers have played an integral role in the rapid and integrated federal response, it will be important to rescind or revise many of those regulations after the crisis. But we insist that this goal should be achieved through the legislative process. Effecting regulatory overhaul by extending the emergency powers may call into question the legitimacy of the new policies. Consequently, we recommend amending the National Emergencies Act to end the practice of extending special authorities indefinitely.

COVID-19 EMERGENCY POWERS

As the disease quickly spread in the United States, the Trump administration invoked emergency powers under existing statutes:¹

1. Under the Stafford Act, the administration bolstered the funding and authority of the Federal Emergency Management Agency to better coordinate and support state and local emergency assistance efforts.²
2. Under the National Emergencies Act, the administration declared a national emergency. This declaration allowed the secretary of the Department of Health and Human Services (HHS) to waive or modify legal restrictions, including, for instance, limits on the use of video conferences for medical appointments and requirements for hospitals and health-care providers to expand their capacity.³
3. Under the Defense Production Act, HHS may require private businesses to prioritize government contracts to produce medical equipment and supplies.⁴

This special edition policy brief is intended to promote effective ideas among key decision-makers in response to the COVID-19 pandemic. It has been internally reviewed but not peer reviewed.

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Declaring a national emergency in itself also allows the president to potentially access a host of other emergency powers, and the law does not require the exercise of those powers to be related to the crisis at hand. According to the Brennan Center for Justice, there are 136 statutory provisions available during national emergencies, 96 of which require nothing more than the president's signature.⁵ These powers are wide-ranging, covering not only public health but also the military, trade, agriculture, transportation, communications, criminal justice, and more.⁶

THE STICKINESS OF NATIONAL EMERGENCY POWERS

The National Emergencies Act (NEA) was enacted in 1976 as an effort by Congress to limit the president's emergency powers. A 1973 Senate report that set the stage for the NEA warned that the president's extraordinary emergency powers, ordinarily exercised by Congress, could "affect the lives of American citizens in a host of all-encompassing manners . . . without reference to normal Constitutional processes."⁷ The academic literature has also long established that, if the government's newfound authorities lingered after an emergency, its "visible hand" would burden the economy and undermine individual liberty.⁸ Consequently, the 1976 law rescinded previous long-lasting emergency declarations and laid down ground rules for the president to make new ones.⁹

The NEA has not worked as intended, with emergency declarations remaining in force long after their triggering events. The eight presidents since 1976 have declared a total of 64 national emergencies under the NEA, 35 of which are still in effect to this day and most of which outlasted their motivating emergencies.¹⁰ The oldest existing one, Blocking Iranian Government Property, was declared in 1979 following the Iran hostage crisis, an emergency that was resolved in 1981 by the signing of the Algiers Accords.

There are two obvious problems when emergency declarations outlast their triggering events. First, while there might be continued need for certain policies, implementing them through prolonged emergency powers was not the purpose of the NEA. It is one thing to argue for the necessity of continuously sanctioning the Iranian regime since 1979. It is quite another not to pass sanctions bills for that purpose for four decades. Emergency-facilitated policies, even if effectively achieving desired outcomes, circumvent the checks and balances of the legislative and judicial processes. They shouldn't.

Second, prolonged declarations can also be used as a pretext to serve other goals unrelated to the crisis. For instance, President Trump ordered the Air Force in 2017 to recall up to a thousand retired pilots for active duty in order to meet the flier shortage.¹¹ That was an exercise of emergency powers under the lasting 9/11 declaration, even though Osama bin Laden had been dead for six years. As another example, in 2009 President Obama reduced federal employees' statutory pay raises in order to curb the budget deficit. That was an exercise of emergency powers also under the

9/11 declaration.¹² In fact, federal workers' pay increases were reduced or eliminated throughout the Obama administration under various emergency excuses.¹³

Americans should not lose sight of the fact that if emergency declarations are not terminated after COVID-19, all 136 emergency powers will remain, as well as the possibility of their abuse.

MAKING POSITIVE CHANGES PERMANENT

Our colleagues at the Mercatus Center at George Mason University have proposed a reform modeled after the Base Realignment and Closure Commission that succeeded in the politically difficult task of closing 350 military bases. Their initiative would establish a similar commission to revise rules and regulations suspended under the COVID-19 crisis that have little or no reason to remain on the books.¹⁴ This brief recommends a complementary measure to that initiative. We propose to amend the NEA to limit emergency powers in the executive branch and consequently remove the path of regulatory overhaul by executive fiat under those special authorities.

Reforming the National Emergencies Regime

When the pandemic ends, the government should terminate the COVID-19 declaration and, more importantly, initiate a fundamental reform of the NEA. The status quo allows an emergency declaration to linger indefinitely because the president can renew it every year by giving notice to Congress. In turn, Congress can terminate a declaration at any time with a joint resolution, but a supermajority is required to override a presidential veto.¹⁵

The new national emergencies regime should contain the following provisions:

1. Each declaration of a national emergency should expire after a short period of time (e.g., six months) unless an extension is approved by Congress.
2. Each Congress-approved extension should also expire after the same amount of time (e.g., six months) unless a further extension is approved by Congress.
3. Declarations cannot be extended indefinitely; in total, they should last no longer than a few years.
4. All existing declarations should also be governed by these new rules.

This new regime would not only help restore the “emergency” nature of emergency powers but also affirm the role of Congress in deciding what policy changes introduced during the emergency are worth keeping.

Civil Society Participation

Civil society should also actively participate in the review of emergency powers. First, regardless of the status of an emergency declaration, there is much room for constructive conversations about whether the underlying crisis has subsided. In the case of an infectious disease, this might mean determining whether the number of new cases is significantly reduced or contained in limited regions, whether there is a vaccine or treatment, or simply whether society has decided to return to normalcy. There are no one-size-fits-all criteria for this or any other crisis, which is why we call for a national conversation on the half-life of the COVID-19 pandemic.

Second, taking stock of the major policy changes introduced by the COVID-19 emergency powers—including which new authorities were brought in and which outdated restrictions were lifted—is another worthwhile national conversation that needs input from both experts and nonexperts. This sort of deliberation should reconcile the values inherent to domains of expertise—policy, medicine, epidemiology, etc.—and the experience of communities and households who weathered the storm.

1. We advocate for an open platform where citizen journalists, healthcare professionals, policy analysts, and the public can report meaningful policy changes during crises and hold the government accountable for emergency-induced policymaking. A good model for this recommendation is the website [PauseRegulations.com](https://www.pauseregulations.com), created by economists Richard Thaler and Sendhil Mullainathan to elicit crowdsourcing of an inventory of restrictions that slowed down the response to COVID-19.
2. The National Academies of Sciences, Engineering, and Medicine have long been providing independent and science-based advice on important public policy issues.¹⁶ They can now host this deliberation that combines expert knowledge with the wisdom of regular citizens who understand how the crisis affected their lives.

Crises and civil society’s initiatives to avert them can present rare opportunities for “maintenance work” on public policy. The United States urgently needs to lighten the burdens of regulations. But policymakers must not sacrifice the legitimacy and sustainability of regulatory overhaul for expediency. The government’s powers under the NEA were not granted for that purpose. Reforming the regime of special authorities to remove the temptation to take shortcuts is necessary to maintain accountability and legitimacy of government.

ABOUT THE AUTHORS

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NOTES

1. For an overview of the COVID-19 emergency powers, see Masha Simonova and Nathaniel Sobel, “Federal Executive Emergency Authorities to Address COVID-19,” *Lawfare*, April 2020.
2. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5191 (1988).
3. National Emergencies Act, 50 U.S.C. §§ 1621, 1631 (1976); Social Security Act, 42 U.S.C. § 1320b-5 (1935).
4. Defense Production Act, 50 U.S.C. App. § 2071 (2009).
5. Of the remaining authorities, 27 require a certain degree of restriction, while 13 require a declaration by Congress. See Brennan Center for Justice, “A Guide to Emergency Powers and Their Use” (research report, Brennan Center for Justice at New York University School of Law, New York, September 2019).
6. Under the US Constitution, only the states have police power, which, in times of crises, could potentially be broader and more intrusive than the enumerated federal emergency powers. Michigan’s stay-at-home order, for example, even prohibits big box stores from selling nonessential goods and bans people from traveling to their second residence. Still, emergency declarations do not suspend the US or state constitutions, and some of those measures may successfully be challenged in court. While this brief focuses on federal emergency powers, we note that many of the arguments made below also apply to the state level.
7. US Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency*, Senate Report No. 93-549, November 1973.
8. See, for example, Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1987) and the references therein.
9. Congressional Research Service, *National Emergency Powers* (CRS Report No. 98-505, Congressional Research Service, Washington, DC, March 2020).
10. Brennan Center for Justice, “Declared National Emergencies under the National Emergencies Act,” accessed April 16, 2020, <https://www.brennancenter.org/sites/default/files/2020-04/Declared%20Emergencies%20under%20NEA0401020.pdf>.
11. Tom Vanden Brook and Gregory Korte, “Air Force Could Recall As Many As 1,000 Retired Pilots to Address Serious Shortage,” *USA Today*, October 20, 2017.
12. Sam Youngman, “Obama Cuts Pay Raises for Federal Workers,” *The Hill*, August 2009.
13. Brennan Center for Justice, “A Guide to Emergency Powers and Their Use.”

14. Patrick A. McLaughlin, Matthew D. Mitchell, and Adam Thierer, "A Fresh Start: How to Address Regulations Suspended during the Coronavirus Crisis" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, April 2020).
15. In fact, Congress is supposed to meet at least every six months to reconsider a vote on all existing declarations, but there has been only one such vote since the NEA was enacted in 1976: Congress passed a joint resolution in March 2019 to terminate President Trump's southern border emergency declaration, but it fell short of the supermajority to override the president's veto. See Deborah Pearlstein, "Could Congress End Trump's Declared Emergency at the Border?," *Expert Forum*, American Constitution Society, September 12, 2019.
16. See Peter D. Blair, "The Evolving Role of the US National Academies of Sciences, Engineering, and Medicine in Providing Science and Technology Policy Advice to the US Government," *Palgrave Communications* 2, no. 16030 (2016).