

Definition of National Emergency under the National Emergencies Act

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States and various organizations have filed a number of lawsuits challenging President Trump's proclamation of a national emergency in order to secure funding for the construction of physical barrier along the U.S. southern border. The lawsuits assert that no national emergency exists and that the President has overstepped his authority. Some observers are concerned that the declaration of a national emergency under present circumstances will set a precedent for future presidents to declare national emergencies to override Congress on other policy matters. Others have raised alarm about the number of and nature of statutes that provide the President specific authorities once he has proclaimed a national emergency.

The National Emergencies Act (NEA), described in a previous Legal Sidebar post, provides a framework for the President to declare a national emergency, but does not define what may constitute a national emergency. Accordingly, assuming that the plaintiffs have demonstrated standing to bring suit, a court may turn to statutory canons, such as the ordinary meaning doctrine, or to the legislative history of the NEA and related statutes to determine the meaning of *national emergency* for purposes of the NEA. A court could also look to pre-NEA precedent to evaluate whether a particular declaration squares with Congress's expectations at the time of the NEA's enactment. On the other hand, a court may also declare that the NEA provides insufficient judicially manageable standards according to which a court could review the validity of a national emergency declaration. In such a case, the court would find the question non-justiciable under the political question doctrine. Finally, a court may conclude that the absence of a definition and deference to the President's constitutional powers evidence an intent to leave the definition to the President's discretion. Still, a court may be able to determine the propriety of any action taken pursuant to an emergency statute without first having to determine whether a national emergency exists.

Ordinary Meaning

The Supreme Court has held that:

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

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A court [may turn to a dictionary](#) to discern ordinary meaning. *Merriam-Webster*, for example, [defines national emergency](#) to mean:

a state of emergency resulting from a danger or threat of danger to a nation from foreign or domestic sources and usually declared to be in existence by governmental authority.

Because the definition of *national emergency* includes the term *emergency*, further consultation is necessary. An *emergency*, [according to Merriam-Webster](#), is:

an unforeseen combination of circumstances or the resulting state that calls for immediate action.

Additionally, in differentiating *emergency* from related terms, *Merriam-Webster* [notes](#) that it:

applies to a sudden unforeseen situation requiring prompt action to avoid disaster.

Accordingly, assuming the dictionary definitions have not changed significantly since the time the NEA was enacted, a national emergency may be defined as a sudden unforeseen set of circumstances posing a danger to the nation to an extent that requires prompt action to avert disaster. Whether to adopt this definition and whether the situation at the southern border meets those criteria is subject to debate and may not be easily resolvable by a court.

Legislative History

Another means for a court to divine Congress's intent, particularly when the statute in question is ambiguous, is to look to the [legislative history](#) surrounding its enactment.

Enacted in 1976, the NEA was born out of [concern that Presidents had accrued too many extraordinary statutory powers](#) available during a national emergency and that Presidents were using national emergencies to invoke powers that were originally intended to be available only during wartime. The Senate Special Committee on the Termination of the National Emergency (later renamed the Special Committee on National Emergencies and Delegated Emergency Powers, "Special Committee") [concluded](#) that:

Over the course of at least the last 40 years ... Presidents have had available an enormous—seemingly expanding and never-ending—range of emergency powers. Indeed, at their fullest extent and during the height of a crisis, these "prerogative" powers appear to be virtually unlimited, confirming Locke's perceptions [that these prerogatives "should be left to the discretion of him that has the executive power"]. Because Congress and the public are unaware of the extent of emergency powers, there has never been any notable congressional or public objection made to this state of affairs. Nor have the courts imposed significant limitations.

The Special Committee [quoted](#) Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* as "sound guidance" with respect to the exercise of emergency powers:

The appeal ... that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work...

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency, Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. In 1939, upon congressional request, the Attorney General listed ninety-nine

such separate statutory grants by Congress of emergency or wartime executive powers. They were invoked from time to time as need appeared. Under this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless. The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties.

The Special Committee catalogued the statutes available to the President once he declares a national emergency, but did not make an effort to define what constitutes a national emergency. Its concern focused instead on the means for congressional review, oversight, and termination of a national emergency so that these powers were not available effectively on a permanent basis.

The House version of the National Emergencies Act, H.R. 3844 (94th Cong.), contained some qualifying language to describe the situations in which the proclamation of a national emergency was authorized. Section 201(a) would have provided:

In the event the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States, the President is authorized to proclaim the existence of a national emergency.

When the Senate Committee on Government Operations took up the bill, it eliminated the necessity for the finding of requisite circumstances, finding the language to be too broad as well as unclear and ambiguous. The Committee thought the language “might have been construed to confer upon the President statutory authority to declare national emergencies, other than that which he now has through various statutory delegations.” The Committee adopted the [present language](#) to clarify and narrow the authority in order to convey that the NEA is an effort to establish safeguards for the exercise of emergency powers already conferred upon the President by other statutes. The Committee “ma[de] no attempt to define when a declaration of national emergency is proper.” (S. Rept. 94-1168 at 3). Consequently, the validity of a particular national emergency may be inferred from the statutory authority the President invokes to confront it.

Some emergency authorities do in fact qualify the nature of the emergency. One of the statutes President Trump has exercised, [10 U.S.C. § 2808](#), for example, requires the existence of a national emergency “that requires use of the armed forces.” The [International Emergency Economic Powers Act](#) (IEEPA), the basis for [most currently existing national emergencies](#), may be exercised “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States....” Other emergency statutes do not qualify the term “national emergency,” but [many apply during situations of “war or national emergency,”](#) which may suggest an intent that the emergency be a crisis similar in impact to armed conflict.

National Emergencies: Precedent

In resolving questions involving the separation of powers between Congress and the President, courts often [turn to historical evidence](#) to ascertain how the branches have previously interacted. It may be useful to review the precedents involving declarations of national emergencies preceding or in effect at the time of the NEA’s enactment.

The Special Committee was apparently concerned that the following declarations of emergency remained in force in 1974:

- the national emergency proclaimed by President Truman on December 16, 1950, in response to the crisis in Korea;
- the national emergency declared by Franklin Roosevelt on March 9, 1933, to cope with the banking crisis;

- the national emergency declared by Richard Nixon on March 23, 1970, to deal with the Post Office strike;
- the national emergency declared by Richard Nixon on August 15, 1971, to implement currency restrictions and to enforce controls on foreign trade.

The Special Committee's report suggests that the nature of the national emergencies was less of a concern than their duration and the statutory authorities that could be brought to bear. It could be read to suggest that Congress did not disapprove of any particular national emergency, making a comparison with President Trump's declaration fruitful. It may be worth evaluating whether the national emergencies declared prior to the NEA meet the definition proposed above or they negated congressional action.

The Special Committee was [concerned](#) with other types of emergency actions taken by presidents to meet various situations, but actual proclamations of national emergencies appear to have been fairly rare, as the following table demonstrates.

Table 1. Pre-NEA Proclamations of National Emergencies

Date	President	National Emergency Declaration
February 5, 1917	Woodrow Wilson	Proclamation 1354—Emergency in Water Transportation of the United States
April 3, 1917	Woodrow Wilson	Executive Order 2572—Temporarily Suspending Eight-Hour Law Provisions in the Department of Agriculture
September 27, 1917	Woodrow Wilson	Executive Order 2718—Suspending the Eight-Hour Day in Construction of Immigrant Station at Baltimore, Md
March 6, 1933	Franklin D. Roosevelt	Proclamation 2039—Declaring Bank Holiday
August 28, 1933	Franklin D. Roosevelt	Executive Order 6260 on Hoarding and Exporting Gold.
September 8, 1939	Franklin D. Roosevelt	Proclamation 2352—Proclaiming a National Emergency in Connection with the Observance, Safeguarding, and Enforcement of Neutrality and the Strengthening of the National Defense Within the Limits of Peace-Time Authorizations
May 27, 1941	Franklin D. Roosevelt	Proclamation 2487—Proclaiming That an Unlimited National Emergency Confronts This Country, Which Requires That Its Military, Naval, Air and Civilian Defenses Be Put on the Basis of Readiness to Repel Any and All Acts or Threats of Aggression Directed Toward Any Part of the Western Hemisphere
December 16, 1950	Harry S. Truman	Proclamation 2914—Proclaiming the Existence of a National Emergency
March 23, 1970	Richard M. Nixon	Proclamation 3972—Work Stoppages in the Postal Service
February 23, 1971	Richard M. Nixon	Proclamation 4031—Proclaiming the Suspension of the Davis-Bacon Act of March 3, 1931

August 15, 1971	Richard M. Nixon	Proclamation 4074—Imposition of Supplemental Duty for Balance of Payments Purposes
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Source: Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu>

Note: CRS searched Executive Orders, Proclamations, and Declarations for the term *national emergency*, identifying those that contained an initial declaration of a national emergency.

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