

The Breakfast Club

Constitutional Minute for 26 July 2022

Emergency Executive Orders

Looking back on five years of writing nearly weekly essays on the Constitution, I was surprised to discover that I've never discussed Emergency Executive Orders, so this will be a new investigation for both of us.

The issue is timely due to the announcement that Joe Biden is about to declare two different states of emergency: one concerning climate change and one over the issue of abortion. This brings to mind the Democrats perpetual battle cry: "Never let a crisis go to waste, and if you lack a crisis, make one up." (OK, I made up the second clause. Sorry, couldn't help myself)

Emergency Executive Orders have been around a long time. Many were originated during the Kennedy administration, as short as it was. As the nation prepared for possible nuclear war with the USSR, Kennedy signed a plethora of Emergency Executive Orders. These stayed dormant for years, waiting for the proper declaration of emergency. Some notable ones:

E.O. 11002 - The Postmaster General creates a national registration of all persons

E.O. 11004 - The Housing and Finance Authority can relocate communities, build new housing with public funds, designate areas to be abandoned, and create new locations for populations.

E.O. 11051 – Authorization to put all Executive Orders into effect in times of increased international tensions and economic or financial crisis.

But the emergency EOs did not stop when tensions with the USSR subsided; LBJ signed E.O. 11310 which gave the Department of Justice the authority to control all aliens in the country, whatever their status, and to operate all the nation's correctional institutions (i.e. all jails in the nation would be federalized).

Gerald Ford signed E.O. 11921 which gave the Emergency Preparedness Agency the authority to control energy sources, wages, salaries, credit and the flow of money in all U.S. financial institutions.

Ronald Reagan signed E.O. 12656 which appointed the National Security Council as the principal body that should consider emergency powers. This allows the government to increase domestic intelligence and surveillance of U.S. citizens and would restrict the freedom of movement within the United States. It grants the federal government the right to isolate large groups of civilians.

George W. Bush declared a state of emergency three days after September 11, 2001 and it has been renewed every year since.

Barack Obama declared twelve states of emergency during his administration; and Donald Trump declared a state of emergency to move Department of Defense funds to build the Wall (which Biden promptly terminated on his first day in office).

What's an "Emergency?" Webster's New Collegiate Dictionary defines the word as: "An unforeseen combination of circumstances or the resulting state that calls for immediate action."

Question: How long have we been debating the issue of climate change? Do we suddenly have an "unforeseen combination of circumstances?"

Question: What is it in the Dobbs Supreme Court decision that constitutes a national emergency?

We may soon find out.

Behind all this is lies the National Emergencies Act of 1976 (Public Law. 94-412, 90 Stat. 1255, enacted September 14, 1976, codified at [50 U.S.C. § 1601-1651](#)). Beginning in 1917 U.S. Presidents had been given emergency declaration powers through the Trading With The Enemies Act (TWEA), but no limit was ever placed on the duration of these emergency declarations. A 1973 Senate investigation found that four declared emergencies, one dating to 1933, had remained in effect long after the situation was resolved. Congress passed the NEA (and Gerald Ford signed it) in order to stop open-ended states of national emergency and to formalize Congress' power of to "provide certain checks and balances on the emergency powers of the President."

The Act authorizes the President to declare a state of emergency as long as he specifies the emergency provisions being activated¹ and notifies Congress of his action. The President can announce an automatic termination of the emergency after a certain period or on a certain date, he can expressly terminate the emergency, or he can decline to annually renew the emergency, or Congress can pass a joint resolution terminating the emergency. It would appear that if Congress fails to pass a joint resolution terminating the emergency (i.e., there exists a compliant Congress) and if the President annually renews the emergency, the emergency stays in effect for – ev - er.

As of April 2022, 79 emergencies have been declared by U.S. Presidents; 37 have expired and another 42 are currently in effect, each having been renewed annually. To read a full list of declared emergencies, click [here](#).

I think we all want the President to be able to react quickly to a true emergency situation, particularly in his role as Commander in Chief, but a national emergency over a reversal of Roe v Wade? You gotta be kidding me!! If the amount of power Congress has given the President alarms you, what do you suppose I'm going to recommend you do?

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ⁱ The NEA does not itself provide any specific emergency authority, it allows the activation of emergency authorities found in other statutes.