



# **Law and Emergencies: A Comparative Overview**

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# Emergency Laws and Regulations in the United States: Executive Summary<sup>1</sup>

## Constitutional and Legislative Framework

The US Constitution includes just three mentions of emergencies. The first appears in Article 1, Section 9 and establishes that Habeas Corpus is to be suspended only in instances of rebellion or the invasion of the Republic. The second, in Article 1, Section 8, establishes that Congress has the right to declare war. The third mention appears in the Fifth Amendment to the Constitution and establishes a limitation of trial by a grand jury in times of service during wartime or “public danger.”

The principal legislation on the federal level regarding emergencies is the National Emergencies Act, 1976 (the NEA), which regulates the President’s powers to declare emergencies and the ensuing procedures. The NEA is a relatively brief law and does not include substantive discussion of emergencies; neither does it provide a positive definition of what constitutes an emergency. The American legislator has included powers relating to emergencies in various laws;<sup>2</sup> in order to exercise these powers, the President must declare an emergency in accordance with the NEA and specify in the declaration (or in a simultaneous or subsequent presidential order) the sections of the law in accordance with action in the framework of the emergency is requested.

The practical ramification of this is that when an emergency occurs, there is no certainty as to which legislative articles will be applied. Moreover, there is also no certainty as to whether the Administration will confine itself to the existing laws in the statute book or initiate ad hoc legislation. A further practical ramification is that the American response to significant emergencies is liable to take the form of a descent into a maelstrom of emergency powers and “tailor-made” legislation.

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<sup>1</sup> This summary discusses the federal constitutional framework for addressing emergencies

<sup>2</sup> For example, see Sections 123, 123a, 12302, 12006, 2201, and 527 discussing military personnel matters in: US Code Title 10 – Armed Forces, Subtitle A – General military law.

An emergency can be ended by means of a joint decision by both Houses of Congress or by a presidential declaration of the end of the emergency. Not later than six months after the date of declaration of an emergency, or of its extension, each of the Houses of Congress must convene to consider whether to reach a joint decision declaring the end of the emergency.<sup>3</sup> The declaration will expire automatically each year, on the day and month on which it was made, unless the President publishes a notice of extension during the 90 days preceding the expiry date.

Until 1976 some 470 articles in American legislation addressed emergencies. Over the years, many of these articles have been abolished, but even today it is possible to find numerous articles addressing emergencies and associated powers, from articles relevant to wartime<sup>4</sup> to others discussing economic restrictions in emergencies<sup>5</sup> and aspects relating to highways.<sup>6</sup>

Further American legislation addressing emergencies relates to federal aid in state emergencies. According to an amendment to the Disaster Relief Act of 1974,<sup>7</sup> the President is empowered to declare an emergency or “major disaster” at the request of the governor of the relevant state if he recognizes that the resources of the state in coping with the disaster are inadequate or have been exhausted. During the emergency the President is entitled to order any federal agency to use resources originating in federal legislation in order to assist a specific state or in the case of a local emergency. The federal aid is included in the Federal Emergency Management Agency (FEMA).

In addition to assistance in responding to disasters, FEMA also plays a significant role in contingencies for disasters. Among other

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<sup>3</sup> National emergency act- TITLE 50—WAR AND NATIONAL DEFENSE: § 1621(b) (Hereinafter USC Title 50.)

<sup>4</sup> Id. USC Title 50, Chapter International Emergency Economic Powers 35 [which discusses economic powers granted to the President to investigate, arrange, and even prohibit, for example, commerce or financial transfers.]

<sup>5</sup> Emergency mortgage relief in: US Code Title 12: Banks and Banking, Chapter 28 – Emergency Mortgage Relief, which establishes that if Congress notes a high rate of failure to meet mortgage payments, inter alia due to recession, it is permitted to provide emergency loan in order to prevent a foreclosure plague.

<sup>6</sup> US Code Title 23: Highways, Article 125 (Disaster Relief)..

<sup>7</sup> 42 USC §5192: Federal Emergency Assistance.

functions, the Agency provides consultation services, financing, analysis, and preparation for disasters such as hurricanes and earthquakes.<sup>8</sup> The various programs operated by FEMA include insurance and damage reduction programs approved by Congress.

According to the directives of the US Department of Defense, the US Army may provide assistance in cases of disaster.<sup>9</sup> In situations in which federal civilian agencies (such as FEMA) cannot provide a full response, they may ask the Department of Defense to deploy forces at the site of the disaster in order to assist in the response. The request to involve army forces may only be made by a federal agency (and not by the state itself); among other reasons, this is due to the fact that the activities of the armed forces must be financed from the budget of that authority.<sup>10</sup> After receiving the approval of the Department of Defense, military forces attend the place of the disaster and assist the civilian forces on the ground.

### **Legal Powers**

Emergency powers are dispersed in American legislation, including special and ad hoc legislation enacted following emergencies such as 9/11. Presidential powers in military and economic affairs may be found, as well as mentions of the powers of the Secretary of Health following emergencies resulting from epidemics. In this respect it is worth noting that emergencies can sometimes lead to the granting by legislation of the various powers that have a “permanent” character. An example is the Patriot Act, enacted following the terrorist attacks of 9/11, which grants the legal authorities broad powers.

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<sup>8</sup> Federal Emergency Management Policy Changes After Hurricane Katrina, Congressional Research Service.

<sup>9</sup> Department of Defense Directive 3025.18: Defense Support of Civil Authorities, December 29, 2010; it is worth noting that the armed forces in the US are prohibited from undertaking policing tasks and from enforcing state laws by virtue of 18 USC §1385, Posse Comitatus Act.

<sup>10</sup> See also the 2011 Defense Support of Civil Authorities (DSCA) Interagency Partner Guide at: [http://www.vaccines.mil/documents/1499DSCA\\_Interagency\\_Partner%20Guide.pdf](http://www.vaccines.mil/documents/1499DSCA_Interagency_Partner%20Guide.pdf) (last visited 12/24/2015)

## **Rights in a State of Emergency**

Since the Constitution does not include substantive discussion of emergencies, it also does not address the denial of liberties in emergencies, excluding the exception permitting the suspension of Habeas Corpus in cases of rebellion or the invasion of the Republic. Accordingly, it may be deduced that any negation of rights must be effected by way of purposeful legislation and, in some cases, must take place under judicial review. This does not imply that in practice, instances have not occurred in which rights have been violated in emergencies. The most prominent example of such a violation is the internment of US citizens of Japanese origin during the Second World War.

## Emergency Laws and Regulations in the United States: Synopsis

### ***Introduction***

The United States of America (US) is a federal republic comprising fifty states and one district. The executive branch of government is headed by the President. The legislative branch is the Congress, comprising two Houses: The Senate and the House of Representatives. The following abstract will focus on the federal legislative framework.

The federal legislative framework for regulating emergencies in the US differs from methods that include the declaration of a specific emergency leading to powers and forms of response determined by legislation. The declaration of and response to federal emergencies in the US include two stages. A generic law (the National Emergencies Act, or NEA, which will be discussed in detail below) primarily regulates the procedural framework for declaring emergencies and constitutes a kind of “entrance gate” leading to other legislative articles that grant the President and governmental bodies substantive powers in emergencies. When the President decides to declare an emergency, he is required to use the “entrance gate” of the generic law: To declare an emergency and to state in a declaration (or in a simultaneous or subsequent presidential order) the legal articles in accordance with which it is requested that action be taken in the emergency.

The practical significance of this arrangement is that when an emergency occurs there is no certainty as to which legislative articles will be applied. Moreover, there is also no certainty as to whether the Administration will confine itself to the existing laws in the statute book or initiate ad hoc legislation. A further practical ramification is that the American response to significant emergencies is liable to take the form of a descent into a maelstrom of emergency powers.<sup>11</sup> Among other reasons, this is due to the fact that the relevant legislation is dispersed in numerous legislative articles. Moreover, the absence of any specific regulation of emergency legislation may also lead to “tailor-made” legislation such as the Patriot Act, which will be discussed below.

At this moment several declarations of emergencies are valid in the US. One example is Declaration 7463, made by President Bush following the attacks of 9/11, which remains valid to this day (having been extended several times by President Obama). In addition,

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<sup>11</sup> Scheppele, Kim Lane, North American Emergencies: The Use of Emergency Powers in Canada and the United States, *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 4 (2), 213-2453 (2006). Professor Arnon Gottfeld discussed this subject at the “Round Table on Democracies Coping with Emergencies” held under the auspices of the Israel Democracy Institute (January 29, 2002). He commented: “Emotional reactions, violence, and extremism are a recurring theme throughout American history in emergencies.” <http://www.idi.org.il/פורום-השולחן-העגול/דמוקרטיה-במצבי-הירום> (Hebrew) (last visited 12/24/2015)

declarations such as Presidential Order 12947 from 1995, impose restrictions on trade with terrorists; these have also been extended several times and continue to apply to this day. These declarations enable the President to use legal powers in order to secure certain goals, such as the prevention of terrorism. From 1976 (when the National Emergency Act came into force) through 2001, some 40 declarations of emergencies have been made in order to address incidents,<sup>12</sup> such as terrorist attacks and economic crises.<sup>13</sup> It should be noted that as a federal republic many of the emergencies in the US, particularly those resulting from natural disasters, are emergencies on the state level, with relatively limited federal involvement. As noted, this document focuses on the federal level.

## 1. The Legislative Framework

The US Constitution includes just three mentions of emergencies. The first appears in Article 1, Section 9 and establishes that Habeas Corpus is to be suspended only in instances of rebellion or the invasion of the Republic. The second, in Article 1, Section 8, establishes that Congress has the right to declare war. The third mention appears in the Fifth Amendment to the Constitution and establishes a limitation of trial by a grand jury in times of service during wartime or “public danger.” It is worth noting that the powers mentioned in the Constitution are granted to Congress. Article II of the Constitution, which discusses the President’s authorities, makes no mention of emergency powers. The first President to assume the authority to declare an emergency was Abraham Lincoln who suspended habeas corpus in 1861 during the Civil War. Lincoln retroactively justified his decision before Congress by arguing that it had been unavoidable.

After the end of the Second World War the President’s emergency powers were extended. Fear of the Soviet nuclear superpower and a desire to ensure that the President can respond immediately to international crises led to the enactment of some 470 specific legislative articles from 1945 through to the passage of the National Emergencies Act in 1976. These powers were restricted on the enactment of the Act, but were strengthened to an unprecedented degree following the events of 9/11 after the White House demanded sweeping powers in order to cope with terrorism incidents.<sup>14</sup>

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<sup>12</sup> National Emergency Powers, Congressional Research Service, 13-16.

<sup>13</sup> An example is the declaration dated January 18, 2001 prohibiting the import of unprocessed diamonds from Sierra Leone.

<sup>14</sup> Aziz Z. Huq, Democratic Norms, Human Rights and State of Emergency: Lessons from the Experience of Four Countries, *Democracy, Conflicts and Human*

The National Emergencies Act<sup>15</sup> (NEA) was enacted in 1976 on the basis of the work of a Senate committee appointed to regulate the subject of emergencies in the US. The first chapter of the NEA establishes the termination of all the states of emergency that were in effect in the US up to two years before the date on which the Act came into force. One of the purposes behind the enactment of the NEA was to restrict the use of presidential powers through regulation and by ensuring that the exercising of these powers would be public.<sup>16</sup>

The NEA is a relatively brief law and does not include substantive discussion of emergencies; neither does it provide a positive definition of what constitutes an emergency. The American legislator has included powers relating to emergencies in various laws;<sup>17</sup> in order to exercise these powers, the President must declare an emergency in accordance with the NEA and state in the declaration (or in a simultaneous or subsequent presidential order) the specific section of the law in accordance with action in the framework of the emergency is requested, down to the resolution of sub-sections. In brief, the NEA effectively functions as an umbrella platform for the emergency laws dispersed throughout US legislation.

Until 1976, some 470 articles in American legislation addressed emergencies. Over the years, many of these articles have been abolished, but even today it is possible to find numerous articles addressing emergencies and associated powers, from articles relevant to wartime<sup>18</sup> to others discussing economic restrictions in emergencies<sup>19</sup> and aspects relating to highways.<sup>20</sup>

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*Security: Further Readings*, 125 (2006).

<sup>15</sup> FN 3, USC Title 50, Chapter 34.

<sup>16</sup> The committee was formed against the background of the Nixon presidency. Apart from the infamous Watergate scandal, this period was also marked by the occasional use of emergency powers in order to secure various goals, such as imposing economic arrangements.

<sup>17</sup> For example, see Sections 123, 123a, 12302, 12006, 2201, and 527 discussing military personnel matters in: US Code Title 10 – Armed Forces, Subtitle A – General military law.

<sup>18</sup> FN 3, USC Title 50, Chapter 35 [which discusses economic powers granted to the President to investigate, arrange, and even prohibit, for example, commerce or financial transfers.]

<sup>19</sup> Emergency mortgage relief in: US Code Title 12: Banks and Banking, Chapter 28 – Emergency Mortgage Relief, which establishes that if Congress notes a high rate of failure to meet mortgage payments, inter alia due to recession, it is permitted to provide emergency loan in order to prevent a foreclosure plague.

<sup>20</sup> Article 125 (Disaster Relief) in: US Code Title 23: Highways.

The table below provides a preliminary summary of the main acts of legislation addressing emergencies in the US **at the federal level**. As we noted above, this legislation is highly dispersed and accordingly this table **should not be considered exhaustive**.

Natural Disasters	National Security	Socio-Economic Meltdowns
Mainly in the FEMA Charter	Mainly through 50 U.S. Code: War and National Defense	Mainly through ad-hoc legislation. (Sub-Prime Crisis)
Disaster Relief Act	US Constitution. Article 1, Section 9	
	US Constitution. Article 1, Section 9	
	50 U.S. Code Chapter 34: National Emergencies	

## **The Federal and Institutional Framework for Responding to Emergencies: The Federal Emergency Management Agency (FEMA)**

### **Background**

Until 1950 the federal government coped with disasters by means of specific legislation. This legislation, required after each individual event, focused mainly on the allocation of resources to cope with the disaster and on defining the responsibilities of various governmental bodies, primarily the army or federal economic institutions. During this period the Emergency Management Office in the White House advised the President in responding to such events.

Enacted in 1950, the Disaster Relief Act permitted federal agencies, after receiving instruction from the President, to assist in emergencies on the state level through the allocation of federal personnel and resources. In 1958 the Federal Civil Defense Agency (FCDA) was established under the terms of an appropriate act. The FCDA, which had a primarily preventative function, was dismantled in 1958. In the same year a reorganization plan was implemented and the FCDA's powers were transferred to the Executive Office of the President (EOP). Additional changes to these powers were introduced in 1969, particularly regarding preparations for emergencies.

After the Disaster Relief Act of 1969 came into force in that year, President Nixon began to delegate additional powers to the EOP, which coordinated attention to the field of preparations for and responses to emergencies. Further changes were made over the following years. Until this stage the federal response had centered on the White House, but the changes led to the removal of powers and paved the way for the formation of an independent agency. The Federal Emergency Management Agency (FEMA) was eventually established on April 1, 1979. FEMA functioned as an independent agency for the following 24 years. Since 2003, following the reorganization introduced in the wake of 9/11, FEMA has functioned as part of the Department of Homeland Security.<sup>21</sup>

### **FEMA: Goals and Functions**

FEMA's purpose is defined as follows:

“The primary mission of the Agency is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation”.<sup>22</sup>

FEMA's secondary missions, which are also defined in legislation, state that the head of the Agency must act to prevent disasters, to prepare for them, and, of course, to provide assistance after a natural or other disaster as defined in the Agency's missions.<sup>23</sup> The head of FEMA acts as the chief advisor to the President, the Secretary of Homeland Security, and the National Security Council on all issues relating to disaster management.

In order to activate FEMA and provide assistance in disaster situations, the state governor must declare an emergency. After making the declaration, the governor must ask the President to instruct FEMA to provide assistance at the disaster site. The requirement to make a formal request to the President reflects FEMA's status as a federal agency. The President's order is based on an amendment to the Disaster Relief Act of 1974<sup>24</sup> permitting the President to declare an emergency or “major disaster” at the request of the relevant state governor if he recognizes that the resources of the state in coping with the disaster are inadequate or have been exhausted. During the emergency the President is entitled to order any federal agency to use resources originating in federal legislation in order

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<sup>21</sup> The Federal Emergency Management Agency Publication 1, 10.

<sup>22</sup> 6 USC §313: Federal Emergency Management Agency.

<sup>23</sup> About FEMA, see: <http://www.fema.gov/about>

<sup>24</sup> FN 7, 42 USC §5192.

to assist a specific state or in the case of a local emergency. The relevant article requires the President to publish guidelines in order to assist state governors to request federal aid. The federal aid is included in the Federal Emergency Management Agency (FEMA).<sup>25</sup> FEMA is critically important to disaster recovery because it coordinates all assistance provided directly by the federal government in response to declared emergencies and provides federal grants to cover many emergency costs.<sup>26</sup>

As noted, in addition to assistance in responding to disasters, FEMA also plays a significant role in contingencies for disasters. Among other functions, the Agency provides consultation services, financing, analysis, and preparation for disasters such as hurricanes and earthquakes. The various programs operated by FEMA include insurance and damage reduction programs approved by Congress.<sup>27</sup> According to the directives of the US Department of Defense, the US Army may provide assistance in cases of disaster.<sup>28</sup> In situations in which federal civilian agencies (such as FEMA) cannot provide a full response, they may ask the Department of Defense to deploy forces at the site of the disaster in order to assist in the response. The request to involve army forces may only be made by a federal agency (and not by the state itself); among other reasons, this is due to the fact that the activities of the armed forces must be financed from the budget of that authority.<sup>29</sup> After receiving the approval of the Department of Defense, military forces attend the place of the disaster and assist the civilian forces on the ground. Unlike National Guard forces, which are accountable to the relevant governor, army forces are attached and accountable to the North American Command.

Although FEMA holds extensive powers to use federal resources it cannot order army forces to perform any actions. In most cases, therefore, army forces are used only by way of a last resort, and in these instances FEMA functions as a federal agency requesting army intervention in accordance with Department of Defense directives. An example from recent years of the extensive use of army forces was the aftermath of Hurricane Katarina, which struck the southern United States in 2005.

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<sup>25</sup> See "A Guide to the Disaster Declaration Process and Federal Disaster Assistance," at [http://www.fema.gov/media-library-data/20130726-1811-25045-8194/fema\\_mitigation\\_strategic\\_plan\\_508.pdf](http://www.fema.gov/media-library-data/20130726-1811-25045-8194/fema_mitigation_strategic_plan_508.pdf)

<sup>26</sup> Position Paper on Emergency Preparedness in the State Courts Conference of State Court Administrators, 10.

<sup>27</sup> For example, see: FEMA Insurance and Mitigation Strategic Plan, 2-12-2014, at [http://wee.fema.gov/media-library-data/20130726-1811-25045-8194/fema\\_mitigation\\_strategic\\_plan\\_508.pdf](http://wee.fema.gov/media-library-data/20130726-1811-25045-8194/fema_mitigation_strategic_plan_508.pdf)

<sup>28</sup> Department of Defense Directive 3025.18: Defense Support of Civil Authorities, December 29, 2010; it is worth noting that the armed forces in the US are prohibited from undertaking policing tasks and from enforcing state laws by virtue of 18 USC §1385, Posse Comitatus Act.

<sup>29</sup> See also the 2011 Defense Support of Civil Authorities (DSCA) Interagency Partner Guide at: [http://www.vaccines.mil/documents/1499DSCA\\_Interagency\\_Partner%20Guide.pdf](http://www.vaccines.mil/documents/1499DSCA_Interagency_Partner%20Guide.pdf)

## 2. Declaration of a State of Emergency: A Table of Analysis

The legislative references detailed below are all from federal law, with the exception of one example taken from the statutes of the State of California. It should be reiterated that in declaring an emergency, the President must refer to the specific legislative articles he intends to use.

Situation	Definition of an “emergency”	Who may declare? under what conditions?	Emergency laws that come into effect	How does a state of emergency end?
Generic	No positive definition for “Emergency”	“With respect to acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency”. <sup>30</sup>	“Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President... specifically declares a national emergency, and (2) only in accordance with this chapter...” “When the	The law establishes modalities and procedures for the ending of an emergency by the President or Congress: “Any national emergency declared by the President in accordance with this subchapter shall terminate if: (1) there is enacted into law a joint resolution, by both houses <sup>32</sup> terminating the emergency; or (2) the President issues a proclamation terminating the emergency.” “Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint

<sup>30</sup> 50 USC §1621 and §1622

<sup>32</sup> A procedure requires that if one house votes to terminate an emergency, the matter must be forwarded to a committee of the other house and a law must be brought to a vote therein not later than 15 days after the date on which the proposal reached the committee. See also footnote 17.

			President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act..." <sup>31</sup>	resolution to determine whether that emergency shall be terminated." <sup>33</sup> Furthermore, the declaration will expire automatically each year, on the day and month on which it was made, unless the President publishes a notice of extension during the 90 days preceding the expiry date: "Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary."
Earthquake Fire Floods Tsunami Storms (Hurricanes, Tornados etc.)	Since for this purpose the important declaration is the original declaration by the governor, we include here an example from California regarding the definition of a state of emergency and the termination thereof: "State of emergency" <b>means</b>	State Governor, then requests the President that FEMA will respond.		The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant ( <u>California</u> Governance Code 8629).

<sup>31</sup> Id. 50 USC §1621 and §1622.

<sup>33</sup> The decision-making procedure for both houses is detailed in the proposed law attached as an appendix A to this abstract, see 50 USC §1622 (c).

	<p><b>the duly proclaimed existence of conditions</b> of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions....</p> <p><b>(California Governance Code 8558)</b></p> <p>After the relevant governor submits the request, the President examines the need to assist the state on the basis of the following parameters: "Emergency" means any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or</p>			
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	avert the threat of a catastrophe in any part of the United States.” <sup>34</sup>			
War	Has not been found in the course of our research.	“Congress shall have power to... declare war.” <sup>35</sup>		
Epidemic	“...a disease or disorder presents a public health emergency; or a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists” <sup>36</sup>	Secretary of Health	Public Health Emergency Fund Temporary reassignment of state and local personnel during a public health emergency	The authority to declare the termination of an emergency rests with the Secretary of Health, who is empowered to declare the termination of the emergency, or to refrain from renewing the declaration, after a period of 30 days. “(I) The Secretary's determination that the public health emergency no longer exists. (II) Subject to clause (ii), the expiration of the 30-day period following the date on which the Secretary approved the State or Indian tribe's request for such reassignment flexibility.”

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<sup>34</sup> FN 22, 6 USC 313.

<sup>35</sup> The United States Constitution, Article 1 Section 8.

<sup>36</sup> FN 7, 42 USC §247d.

### 3. Legal Powers

As noted above, federal emergency powers are dispersed throughout numerous laws, and when the President declares an emergency he must specify which laws he wishes to use. The following provisional table provides examples of the various powers that appear in the statute book, but it should not be considered exhaustive.

Situation	Powers	Powers conferred to	Powers exercised vis-à-vis	Conditions to be met when exercising the power
Generic	“When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.” <sup>37</sup>	President or other officers.	According to the specific law used.	According to the specific law used.
War	Suspension of the privilege of the Writ of Habeas Corpus	Non specific	All	“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” <sup>38</sup>
	Suspension of the right for a Grand Jury in cases of Capital or Infamous crimes <sup>39</sup>	Non specific	All	Cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.

<sup>37</sup> FN 30. 50 USC § 1631.

<sup>38</sup> FN 35, The Constitution, Article 1 Section 9; Title 50 of U.S. Code.

Elaborates powers to be exercised during war and national defense

<sup>39</sup> FN 35, The Constitution, 5th Amendment.

Situation	Powers	Powers conferred to	Powers exercised vis-à-vis	Conditions to be met when exercising the power
Invasion and domestic violence	"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." <sup>40</sup>	The Federal government (the United States)	States	Non-Republican Form of government; The occurrence of invasion or domestic violence.
Insurrection, domestic violence	Power of the president to use a militia of a State or the armed forces to suppress insurrections (domestic or national) or to enforce (State and/or United States) laws where it is impracticable to enforce them. <sup>41</sup>	The President	States, armed forces	According to the specific case, as stipulated in the aforementioned sections of 10 U.S Code.
National emergencies	The Secretary may waive any requirements in order to provide healthcare during a state of emergency (i.e. requirements that physicians and other health care professionals be licensed in the State in which they provide such services, if they have	Secretary of Health	Health System	State of emergency (not only during health crisis.)

<sup>40</sup> Id. Article 4 section 4.

<sup>41</sup> 10 U.S Code §331-334; It is important to note that the Insurrection Act was greatly amended in 2006. The 2006 amendment allowed the President to employ the armed forces in order to restore public order and enforce US laws in a wider range of events, including natural disaster, epidemic, serious public health emergency and terrorist attack. The amendment set a number of conditions that had to be met in order for the President to exercise the power. However, this amendment was later repealed completely in 2008. (For the current text of the sections) see: <https://www.law.cornell.edu/uscode/text/10/333> [Cornell University Law School, Legal Information Institute] (last visited 12/24/2015).

Situation	Powers	Powers conferred to	Powers exercised vis-à-vis	Conditions to be met when exercising the power
	equivalent licensing in another State and are not affirmatively excluded from practice in that State or in any State a part of which is included in the emergency area.) <sup>42</sup>			
Terrorism <sup>43</sup>	Enacted following the events of 9/11, the USA Patriot Act has wide-ranging ramifications and includes sections addressing interrogation, intelligence cooperation, border arrangements, economic arrangements, and amending legal definitions concerning terrorism. Thus, for example, the Act includes sections discussing such economic aspects as a requirement for bank customers to identify themselves alongside sections discussing the authorization of wiretapping. <sup>44</sup>	Law Enforcement	All	There is no need to declare an emergency or to activate the Act.

<sup>42</sup> FN 7, 42 USC § 1320b-5 [Authority to waive requirements during national emergencies; <http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0>]

<sup>43</sup> USA Patriot Act 2001; PATRIOT Sunsets Extension Act of 2011; **Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001** <http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0>

<sup>44</sup> See:  
<https://www.gwcu.org/compliance/patriot-act.aspx>  
[http://www.fincen.gov/statutes\\_regs/patriot/](http://www.fincen.gov/statutes_regs/patriot/)  
<http://www.justice.gov/archive/II/highlights.htm>

See also: Department of Justice: What is the Patriot Act HR 3162 – The USA Patriot ACT *Reclaiming Patriotism, A Call to Reconsider the Patriot Act*, ACLU, 2009.

Situation	Powers	Powers conferred to	Powers exercised vis-à-vis	Conditions to be met when exercising the power
Epidemic	The President may permit and direct the removal of any or all the public offices to such other place or places as he shall deem most safe and convenient for conducting the public business. <sup>45</sup>	President	Public offices	In case of the prevalence of a contagious or epidemic disease at the seat of government.
Earthquake, fire, tsunami and storms (e.g. Hurricanes, Tornados etc.)	Should further be researched.			
Financial Crisis	“The President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise— (A) investigate, regulate, or prohibit— (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities” <sup>46</sup>	President	People and institution	“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, if the President declares a national emergency with respect to such threat”

<sup>45</sup> 4 USC § 73 - Removal from seat of Government

<sup>46</sup> FN 30, 50 USC Ch. 35 §1701.

Situation	Powers	Powers conferred to	Powers exercised vis-à-vis	Conditions to be met when exercising the power
Other	The Act confers upon the President authority to force private industry to give priority to defense and homeland security contracts and to allocate the resources needed <sup>47</sup>	President	Private Industry	Use not only in times of war, was used by the Department of Defense to encourage creations of new technologies. <sup>48</sup>
	During such emergency period as the President of the United States by proclamation may prescribe, no member bank of the Federal Reserve System shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions... <sup>49</sup>	President Secretary of the Treasury may prescribe regulations, limitations and restrictions with the approval of the President.	Any member bank of the Federal Reserve System.	Emergency period as the President of the United States by proclamation may prescribe.

<sup>47</sup> Id. Appx. 2061 Defense Production Act.

<sup>48</sup> The Department of Defense encourages the promotion of new technologies by means of various articles in the Act, including the use of contracts and seed money. Among other advancements, the involvement of the Department of Defense has led to the manufacture of various materials, including barbed wire, superconductors, and other items. See: National Research Council, *Defense Manufacturing in 2010 and Beyond*, 1999, p. 7, at: [http://www.nap.edu/openbook.php?record\\_id=6373](http://www.nap.edu/openbook.php?record_id=6373)

<sup>49</sup> 12 USC § 95 - Emergency limitations and restrictions on business of members of Federal Reserve System

## 4. Rights in a State of Emergency

With the exception concerning habeas corpus, as mentioned above, US legislation does not permit the restriction of rights in emergencies in a manner different from that at other times. Any such restriction must be introduced through legislation passed by Congress.<sup>50</sup> In some instances, such violation of rights must be approved by a judicial instance.<sup>51</sup> This does not imply that in practice, instances have not occurred in which rights have been violated in emergencies. The most prominent examples of such violations are the internment of US citizens of Japanese origin during the Second World War and the Trading with the Enemy Act, 1917 (TWEA), which on occasion led to the seizure of merchandise and the violation of the right to property.<sup>52</sup>

An example of a principle requiring the restriction of human rights by way of legislation can be found in the Non-Detention Act, 1971. This law was enacted in order to nullify another law: the Detention Act, 1950. The original law permitted administrative detention, while the 1971 Act establishes that administrative detention may be used solely with the explicit consent by way of legislation in Congress. The Act states:

“No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

It should be noted that the Act uses the term “citizen” in restricting the authorities’ powers. In a different context, this aspect has been the subject of discussion in various articles raising the criticism that US law does not sufficiently restrict the violation of the human rights of non-citizens in emergencies.<sup>53</sup> A relevant instance occurred about the attacks of 9/11: On September 18, 2001, Congress passed a joint resolution:

“Authorizing ‘use [of] all necessary and appropriate force’ against ‘nations, organizations or persons’ the president deemed responsible for the attacks.”

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<sup>50</sup> For example, see the Patriot Act, 2001.

<sup>51</sup> A good example of this is the court established in accordance with the Foreign Intelligence Surveillance Act, 1978 (FISA). The court was established specifically in order to approve investigative actions targeting foreign citizens (50 USC Chapter 36). For further information about the court, see also: [http://www.fjc.gov/history/home.nsf/page/courts-special\\_fisc.html](http://www.fjc.gov/history/home.nsf/page/courts-special_fisc.html)

<sup>52</sup> In 1971 President Nixon used the legal framework of TWEA in order to enforce a de facto economic policy imposing a “tax” of tens of percent on imports to the US. In 1977 the International Emergency Economic Act was enacted, restricting the use of TWEA solely to the wartime.

<sup>53</sup> See FN 11 above.

## **Appendix A**

### **50 USC Chapter 34 (The National Emergency Law)**

#### **50 USC § 1601 - Termination of existing declared emergencies**

**(a)** All powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, as defined in section [105](#) of title [5](#), as a result of the existence of any declaration of national emergency in effect on September 14, 1976, are terminated two years from September 14, 1976. Such termination shall not affect—

**(1)** any action taken or proceeding pending not finally concluded or determined on such date;

**(2)** any action or proceeding based on any act committed prior to such date; or

**(3)** any rights or duties that matured or penalties that were incurred prior to such date.

**(b)** For the purpose of this section, the words “any national emergency in effect” means a general declaration of emergency made by the President.

#### **50 USC § 1621 - Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation**

**(a)** With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

**(b)** Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect

**(1)** only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and

**(2)** only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

#### **50 USC § 1622 - National emergencies**

##### **(a) Termination methods**

Any national emergency declared by the President in accordance with this subchapter shall terminate if—

**(1)** there is enacted into law a joint resolution terminating the emergency; or

**(2)** the President issues a proclamation terminating the emergency.

Any national emergency declared by the President shall be terminated on the date specified in any joint resolution referred to in

clause (1) or on the date specified in a proclamation by the President terminating the emergency as provided in clause (2) of this subsection, whichever date is earlier, and any powers or authorities exercised by reason of said emergency shall cease to be exercised after such specified date, except that such termination shall not affect—

**(A)** any action taken or proceeding pending not finally concluded or determined on such date;

**(B)** any action or proceeding based on any act committed prior to such date; or

**(C)** any rights or duties that matured or penalties that were incurred prior to such date.

**(b) Termination review of national emergencies by Congress**

Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.

**(c) Joint resolution; referral to Congressional committees; conference committee in event of disagreement; filing of report; termination procedure deemed part of rules of House and Senate**

**(1)** A joint resolution to terminate a national emergency declared by the President shall be referred to the appropriate committee of the House of Representatives or the Senate, as the case may be. One such joint resolution shall be reported out by such committee together with its recommendations within fifteen calendar days after the day on which such resolution is referred to such committee, unless such House shall otherwise determine by the yeas and nays.

**(2)** Any joint resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days after the day on which such resolution is reported, unless such House shall otherwise determine by yeas and nays.

**(3)** Such a joint resolution passed by one House shall be referred to the appropriate committee of the other House and shall be reported out by such committee together with its recommendations within fifteen calendar days after the day on which such resolution is referred to such committee and shall thereupon become the pending business of such House and shall be voted upon within three calendar days after the day on which such resolution is reported, unless such House shall otherwise determine by yeas and nays.

**(4)** In the case of any disagreement between the two Houses of Congress with respect to a joint resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such joint resolution within six calendar days after the day on which managers on the part of the Senate and the House have been appointed. Notwithstanding any rule in either House concerning the printing of conference reports or concerning any delay in the consideration

of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed in the House in which such report is filed first. In the event the conferees are unable to agree within forty-eight hours, they shall report back to their respective Houses in disagreement.

**(5)** Paragraphs (1)–(4) of this subsection, subsection (b) of this section, and section [1651 \(b\)](#) of this title are enacted by Congress—  
**(A)** as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of resolutions described by this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

**(B)** with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

**(d) Automatic termination of national emergency; continuation notice from President to Congress; publication in Federal Register**

Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary.

**50 USC § 1631 - Declaration of national emergency by Executive order; authority; publication in Federal Register; transmittal to Congress**

When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

**50 USC § 1641 - Accountability and reporting requirements of President**

**(a) Maintenance of file and index of Presidential orders, rules and regulations during national emergency**

When the President declares a national emergency, or Congress declares war, the President shall be responsible for maintaining a file and index of all significant orders of the President, including Executive orders and proclamations, and each Executive agency shall maintain a file and index of all rules and regulations, issued during such emergency or war issued pursuant to such declarations.

**(b) Presidential orders, rules and regulations; transmittal to Congress**

All such significant orders of the President, including Executive orders, and such rules and regulations shall be transmitted to the Congress promptly under means to assure confidentiality where appropriate.

**(c) Expenditures during national emergency; Presidential reports to Congress**

When the President declares a national emergency or Congress declares war, the President shall transmit to Congress, within ninety days after the end of each six-month period after such declaration, a report on the total expenditures incurred by the United States Government during such six-month period which are directly attributable to the exercise of powers and authorities conferred by such declaration. Not later than ninety days after the termination of each such emergency or war, the President shall transmit a final report on all such expenditures

**50 USC § 1651 - Other laws, powers and authorities conferred thereby, and actions taken thereunder; Congressional studies**

**(a)** The provisions of this chapter shall not apply to the following provisions of law, the powers and authorities conferred thereby, and actions taken thereunder:

**(1)** Chapters 1 to 11 of title [40](#) and division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of title [41](#);

**(2)** Section 3727(a)–(e)(1) of title 31;

**(3)** Section [6305](#) of title [41](#);

**(4)** Public Law 85–804 (Act of Aug. 28, 1958, [72 Stat. 972](#); [50 U.S.C. 1431](#) et seq.);

**(5)** Section [2304 \(a\)\(1\)](#) <sup>[1]</sup> of title [10](#); <sup>[2]</sup>

**(b)** Each committee of the House of Representatives and the Senate having jurisdiction with respect to any provision of law referred to in subsection (a) of this section shall make a complete study and investigation concerning that provision of law and make a report, including any recommendations and proposed revisions such committee may have, to its respective House of Congress within two hundred and seventy days after September 14, 1976.