

The Power Of A National Climate Emergency Declaration

By **Marcella Burke, Ethan Davis and Cason Hewgley**

(February 11, 2021, 4:10 PM EST)

Local, regional and national governments across the globe — including those of New Zealand, Japan and the U.K. — have issued emergency declarations pertaining to climate change. Echoing these concerns, during his inaugural address, President Joe Biden spoke of "a climate in crisis," and stated that "[w]e will be judged, you and I, for how we resolve the cascading crises of our era."

His comments reflected a familiar theme from the campaign, where Biden called climate change "the existential threat of our time," and stated that "[w]e need to meet the moment with the urgency it demands, as we would with any national emergency."

Indeed, in its opening days, the Biden administration has taken aggressive steps to address climate change, including imposing a freeze on new oil and gas leases on federal lands and offshore waters, pending a review of existing leasing and permitting practices.

Biden's calling climate change a "crisis," "existential threat" and "national emergency" could simply be an indication of how his administration intends to implement new policies. But if he were to formally declare climate change a national emergency, as he characterized it in his inaugural address, he could tap into a wellspring of executive powers that could make the administration's climate change initiatives more difficult to challenge in court.

The National Emergencies Act, or NEA,[1] authorizes the president to declare a national emergency, provided the declaration is "transmitted to the Congress and published in the Federal Register."^[2] Past presidents have used the NEA for various reasons tied to foreign policy and immediate security concerns. For instance, former President Bill Clinton invoked the NEA to prohibit new investment in Myanmar.

Former Presidents George W. Bush and Barack Obama used the NEA to block transactions involving the property of certain persons "contributing to the conflict in Côte d'Ivoire," and "threatening the peace, security, or stability of Yemen," respectively. More recently, former President



Marcella Burke



Ethan Davis



Cason Hewgley

Donald Trump invoked the NEA in an attempt to accelerate construction of a wall at the southern border, and in response to the COVID-19 outbreak.

Declaring a national emergency activates over 100 special or extraordinary statutory powers, several of which Biden could use to address climate change. For example, he could invoke the statutorily required clause in every outer continental shelf lease to suspend operations "during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953."^[3]

Biden could rely on this provision to suspend offshore drilling operations in the Gulf of Mexico. Under Title 42 of the U.S. Code, Section 6212a(d)(1)(A):

The President may impose export licensing requirements or other restrictions on the export of crude oil from the United States for a period of not more than one year, if the President declares a national emergency and formally notices the declaration of a national emergency in the Federal Register.

Biden could use this provision to limit or altogether preclude exports of domestically produced oil to international markets.

It is also possible that Biden could invoke Title 10 of the U.S. Code, Section 2802, to direct the U.S. Department of Defense to construct clean energy systems through the emergency redirection of military funds, in a move similar to the one Trump made in support of border wall construction.

National emergency declarations are generally nonjusticiable because they involve "political questions" that "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," under the standard explained in the U.S. Supreme Court's 1986 decision in *Japan Whaling Association v. American Cetacean Society*.^[4]

So, for example, in dismissing a challenge to Trump's declaration regarding the border wall, the U.S. District Court for the District of Columbia held last year in *Center for Biological Diversity v. Trump* that "[t]he NEA provides no 'judicially discoverable and manageable standards' to help the Court determine whether the situation at the border is a 'national emergency.'"^[5]

Similarly, a court would be unlikely to second-guess Biden's determination that climate change is a national emergency. As the D.C. district court put it in the aforementioned case: "Although presidential declarations of emergencies — including this Proclamation — have been at issue in many cases, no court has ever reviewed the merits of such a declaration."^[6] A climate change declaration by Biden is unlikely to be the first one subjected to judicial review on the merits.

It is possible, however, that a court would permit a challenge to the particular government actions taken as a result of the emergency declaration, rather than a direct challenge to the emergency declaration itself. Challengers could bring suit under the Administrative Procedure Act.^[7]

Possible arguments would include that the action is not rationally related to the declared emergency, that the government failed to consider the action's potential negative ramifications, or that the action is arbitrary and capricious. In response, the government would likely argue that any actions taken in accordance with an emergency declaration are also nonreviewable because they are "committed to agency discretion by law" under the Administrative Procedure Act.^[8] But in *Citizens to Preserve Overton Park Inc. v. Volpe* in 1971, the Supreme Court called this a "very narrow exception."^[9]

Challengers could also bring a nonstatutory ultra vires challenge, which, as the U.S. Court of Appeals for

the District of Columbia Circuit said in *Griffith v. Federal Labor Relations Authority* in 1988, can be available "where Congress is understood generally to have precluded review."^[10] A nonstatutory ultra vires claim is an obscure and rarely used equitable cause of action that can be used to enjoin unlawful government action.

Here, such a claim would allege that the government has exceeded the authority granted by the statute authorizing the emergency powers. Courts might be receptive to the argument that the government's emergency powers are supposed to be wielded in circumstances where exigencies mean that, as a practical matter, Congress is unable to act in a timely manner.

This line of argument would assert that such powers cannot be used in circumstances involving longer-term policy questions, where Congress could act but has chosen not to act in a manner consistent with the administration's policy preferences.

There may also be another limited avenue for challenging the use of an emergency powers where other conditions in the authorizing statute are not met. Reviewing Trump's funding of the border wall under Section 2802, the U.S. District Court for the Northern District of California held in *California v. Trump* in 2019 that "whether the national emergency truly exists, and requires use of the armed forces, are nonjusticiable political questions."^[11]

But the court also held that other conditions in Section 2802, such as the project's "requir[ing] use of the armed forces," being a "military construction project" and being "necessary to support such use of the armed forces," were not political questions.^[12] The court held that Trump's use of Section 2802 was unlawful, and the U.S. Court of Appeals for the Ninth Circuit affirmed.^[13] The case is currently before the Supreme Court, which stayed the decision below to allow construction, and is set for argument on Feb. 22.

A similar challenge may be possible if Biden attempts to rely on Section 2802 to fund climate-change related projects, or attempts to invoke other emergency powers, without satisfying the criteria specified in the authorizing statute.

Of course, there are also political considerations that could weigh against an expansive use of the president's emergency powers. Biden may choose to continue his climate change policy through incremental, piecemeal measures as he has done so far, rather than declaring a national emergency. But the power to proceed under an emergency declaration is likely there, should he choose to exercise it.

Marcella Burke and Ethan Davis are partners, and I. Cason Hewgley IV is an associate, at King & Spalding LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 50 U.S.C. §§ 1601, et seq.

[2] Id. § 1621.

[3] 43 U.S.C. § 1341(c).

[4] Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230 (1986).

[5] Center for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 32 (D.D.C. 2020) (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

[6] Center for Biological Diversity, 453 F. Supp. 3d at 31.

[7] 5 U.S.C. §§ 701, et seq.

[8] Id. § 701(a)(2).

[9] Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[10] Griffith v. Federal Labor Relations Authority, 842 F.2d 487, 492 (D.C. Cir. 1988).

[11] California v. Trump, 407 F. Supp. 3d 869, 891 (N.D. Cal. 2019), aff'd sub nom. Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020).

[12] Id. at 887-88.

[13] See 977 F.3d 853.