

Based on press reports, it now seems likely that Biden will soon declare climate change to be a national emergency. Would this be legal? Would it unlock important powers that could be used to fight climate change? My answers are: It would probably be legal, and it would unlock some significant powers. But an emergency declaration is not a magic wand that gives Presidents a blank check. It would allow some constructive steps to be taken, but within limits.

I wrote several blog posts about the idea of a climate emergency in 2019. Back then, interest in presidential emergency powers had been sparked by Trump's use of emergency power to help build his border wall. I've adapted the final post in that series to take account of intervening developments.

In 2019, I was worried that using this precedent to fight climate change will require some real soul-searching. Trump had violated a long-standing norm of presidential restraint in using emergency powers to address domestic policy. Whether to disavow or exploit that change in norms is a hard question. And declaring a climate emergency might help mobilize public opinion in support of legislative action, or it might cause a backlash that would make new legislation harder.

Something of a compromise position might be to declare that the resilience of the electrical grid is a national emergency, not climate change itself. That would still allow some important actions that would help reduce carbon emissions. Basically, many of the steps that are needed to decarbonize the grid would also increase its ability to resist and bounce back from disruptions due to national disasters or cyberattacks on the energy system.

With all that in mind, here's what you need to know about the issues.

## **Would Climate Change Qualify as a National Emergency?**

There is a genuine legal basis for calling climate change a national emergency, as opposed to Trump's ridiculous border-security declaration.

The U.S. government has already classified climate change as a serious threat to national security, and it is a threat that is getting stronger daily. Recent science indicates that climate action is even more urgent than we thought.

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unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years." Trump's stated justification in his [proclamation](#) was that "the problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years." Climate change, too, is a "longstanding problem," and it certainly has gotten worse despite the effort of the executive branch (Obama) to address the problem. Federal agencies, as well as Congress, have made it clear that climate is a serious threat to our nation.

**The Environmental Protection Agency.** EPA has made a formal finding, based on an exhaustive review of the scientific evidence, that greenhouse gases endanger human life and welfare both within the United States and globally. That finding was upheld by the D.C. Circuit. The Supreme Court reviewed other aspects of the D.C. Circuit's decision but pointedly turned down requests that it review this EPA finding. The scientific evidence is ironclad. If a foreign power had somehow invented a weather-control technique to impose these harms on the United States, no one would doubt that this was a very serious national security problem.

**Intelligence agencies.** National security agencies have consistently viewed climate change as a serious threat. In written testimony to Congress about threats to national security, the Trump Administration's own Director of National Intelligence (DNI) [discussed](#) climate change. His discussion didn't equivocate about the reality or dangers of climate change. Rather, he took the science, and the threat, seriously: "The past 115 years have been the warmest period in the history of modern civilization, and the past few years have been the warmest years on record. Extreme weather events in a warmer world have the potential for greater impacts and can compound with other drivers to raise the risk of humanitarian disasters, conflict, water and food shortages, population migration, labor shortfalls, price shocks, and power outages. Research has not identified indicators of tipping points in climate-linked earth systems, suggesting a possibility of abrupt climate change."

**The Pentagon.** The military has also taken a proactive stance on climate change. Former Secretary Mattis was [clear](#) about the impact of climate change on national security: "Climate change is impacting stability in areas of the world where our troops are operating today. . . It is appropriate for the Combatant Commands to incorporate drivers of instability that impact the security environment in their areas into their planning."

**Congress.** Congress has also recognized climate change as a threat to national security and

more specifically to military infrastructure and activities. The most significant action was the passage of the Defense Authorization Act of 2017, HR 1810. The Act was a funding statute for the Pentagon. Section 335 of the Act states that “climate change is a direct threat to the national security of the United States and is impacting stability in areas of the world both where the United States Armed Forces are operating today, and where strategic implications for future conflict exist.” In a crucial House vote, 46 Republicans crossed the aisle to vote against an effort to take out the climate provision. President Trump signed the bill.

The courts have never overturned a presidential emergency declaration. I do worry a bit, however, that the current Supreme Court could be more interventionist. It seemed to have little compunction about overturning state emergency COVID restrictions on churches. It also knocked out the OSHA vaccine mandate and the CDC's eviction moratorium, basically using the same “major questions doctrine” it applied more recently to axe Obama's Clean Power Plan. I still think that the Court is unlikely to overturn a presidential emergency declaration, but I'm not as confident of that as I might have been a few years ago.

## **What Legal Authority Would an Emergency Climate Declaration Give the President?**

What government powers would be unlocked by declaring a climate change emergency? One immediate possibility would be to use the same power that Trump used to divert military construction funds to other uses - in this case, perhaps building wind or solar farms or new transmission lines. But what else could Biden do?

The Brennan Center has compiled a [helpful list](#) of almost 150 statutes giving the President special powers during emergencies. The list doesn't map the outer perimeter of presidential powers - there are other laws that give Presidents powers to take action on the basis of national security, and the President also has some ill-defined, though not unlimited, powers to take action without explicit congressional authorization. But the list provides a good start.

Here are some of the possibilities:

- Oil leases are required to have clauses allowing them to be suspended during national emergencies. (43 USC 1341) If climate change is a national emergency caused by fossil fuels, then suspension seems like a logical response.
- The President has emergency powers to respond to industrial shortfalls in national

emergencies. (50 USC 4533). This could be used to support expansion of battery or electrical vehicle production. Another provision allows the President to extend loan guarantees to critical industries during national emergencies. (50 USC 4531). This could be used to support renewable energy more generally. Some of this has already been done, however, in an emergency response to disruptions of supply chains and the energy system caused by the Ukraine war.

- The Secretary of Transportation has broad power to “coordinate transportation” during national emergencies. (49 U.S.C 114). This might allow various restrictions on automobile and truck use to decrease emissions of greenhouse gases.
- The President may invoke the International Emergency Economic Powers Act to deal with “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States.” (50 USC 1701-1707). That description certainly applies to climate change. According to the Brennan Center, this Act “confers broad authority to regulate financial and other commercial transactions involving designated entities, including the power to impose sanctions on individuals and countries.” Conceivably, these powers could be deployed against companies or countries trafficking in fossil fuels.

There may well be others on the Brennan Center list that I missed. Moreover, as I said above, the President has other powers relating to national security, statutory and otherwise, that aren't keyed to a declaration of national emergency – for instance, the kinds of tariffs Trump has imposed on foreign goods (say those relating to oil and gas drilling, or to oil imports.)

It's possible that the Court would apply the major questions doctrine to limit some of these statutory authorities in the context of climate change. Historically, however, the courts don't seem to have questioned use of statutory authorities that are triggered by an emergency declaration.

## **What Would be the Possible Benefits of an Emergency Declaration?**

Declaring a climate emergency could have benefits even apart from any concrete follow-up. It would be a strong signal that the U.S. recognizes the urgent need to cut carbon emissions – a signal to the international community as well as courts and agencies in the U.S. That would be a plus by itself.

Beyond that, I would favor tying emergency actions (at least at the start) to recognized

issues that impact our society's security. One is grid resilience. Renewables and storage would make a particular contribution to resilience in areas where they have the least penetration, meaning the Southeast, but also in many other states. Microgrids combined with distributed solar could also be useful in the wake of natural disasters like the hurricanes endemic to the Gulf Coast. We need to jump-start the carbon transition in those parts of the country to pave the way for more comprehensive measures. We also need to upgrade the grid elsewhere. Doing so would allow much bigger cuts in emissions from the electricity sector.

Another security-related issue involves military installations. The military has already taken steps to increase use of renewables and to harden sites against sea level rise. But a lot more could be done, particularly in the way of much greater electrical storage capacity (which might include use of electric vehicle batteries). Military funds could be redirected for these purposes, and the military could also be involved in increasing grid resilience in areas surrounding military bases and for critical infrastructure more generally. This could be especially helpful in starting the ball rolling in the Southeast, which remains the most backward area in terms of renewable energy.

A third option would be to take America out of the business of encouraging the use of coal and oil in other countries. Emergency and national security powers give the President considerable leverage over exports and financing of foreign projects. We should not be devoting our resources or production to encouraging countries like India to build more coal plants.

It would take a lot more work to turn these ideas into actionable proposals. We'd need to know the effect of these measures, the available resources, and just what statutory provisions would support them. Closer study could also turn up additional possibilities. It would probably take a sustained effort, maybe by a small team, to actually work through the issues in-depth.

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My conclusion in 2019 was that Trump's "border wall" emergency was an abuse of power and shouldn't serve as precedent for a climate emergency. There was never a definitive ruling about Trump's (probably illegal) diversion of other funds to pay for the wall, because of issues about legal standing to challenge the action. I do remain concerned about using an expansive view of emergency power to take major domestic actions. But Biden finds himself in a situation where other avenues seem less promising. Given the deadlock in Congress and the Court's adverse ruling on EPA's power to regulate emissions from power

plants, the argument may be stronger for breaking the glass and pulling the red emergency lever.