

## Why Trump's Emergency Declaration is Illegal

**The strongest legal argument against Trump's attempt to use emergency powers to build the wall is that declaring an emergency does not authorize him to spend money and condemn property for that purpose. But he also lacks grounds to declare an emergency in the first place.**

Ilya Somin|Feb. 23, 2019 5:35 pm



The strongest legal argument raised in the various lawsuits against President Trump's attempt to use emergency powers to build his border wall is that declaring an emergency does not authorize him to spend money and condemn private property to build the wall. That's the conventional wisdom among most legal scholars and commentators. But it is also important to recognize that it is illegal to for Trump to declare a "national emergency" over this issue in the first place. That point is important for reasons that go far beyond the the specific case of the border wall. If the president can declare an emergency and tap a vast range of special emergency powers anytime he wants for any reason he wants, that makes a hash of the whole concept of an emergency, raises serious constitutional problems, and creates a dangerous concentration of power in the hands of a single person.

It makes much more sense to interpret the National Emergencies Act as only allowing an emergency declaration in a situation where an emergency actually exists - defined as some sudden crisis that cannot be addressed swiftly enough through ordinary political processes. By that interpretation, the situation at the border doesn't even come close to qualifying.

**Why the President Cannot Just Declare a "National Emergency" Whenever he Wants**

The relevant section of the NEA, 50 USC Section 1621, says that "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." The Act does not define what counts as a "national emergency." But the fact that president is authorized to declare one does not mean he can do so at any time for any reason. It makes much more sense to interpret the Act as allowing the president to declare a legal state of emergency only in situations where an emergency actually exists.

The whole point of emergency powers is to enable the government to respond to a sudden crisis that cannot be addressed fast enough by ordinary political processes, not to give the president a blank check to use that authority whenever it might be politically convenient. One of the most basic rules of legal interpretation is that words used in laws must be understood in terms of their "ordinary meaning." The ordinary meaning of "emergency" is a sudden crisis of some sort, not just any issue of any kind.

If the term "national emergency" is interpreted broadly enough to allow the president to declare one anytime he wants, that would make Section 1621 unconstitutional. Declaring a national emergency allows the president to exercise a wide range of powers that normally belong to Congress, including spending money and imposing regulations on private parties. The "nondelegation" doctrine restricts Congress' ability to delegate its powers to another branch of government. For many years, the Supreme Court has taken a very permissive approach to delegation. All the Court requires is for the delegation to be constrained by an "intelligible principle." But allowing the president to tap congressional powers by declaring an emergency for any reason he wants runs afoul of even that weak restriction. There can be no "intelligible principle" when the whole question is entirely left up to executive discretion.

At the very least, interpreting "national emergency" to give total discretion to the president raises serious constitutional problems. And the Supreme Court has repeatedly ruled that judges must try hard to avoid interpreting statutes in ways that risk rendering them unconstitutional. The most famous recent example is *NFIB v. Sebelius*, where Chief Justice John Roberts famously reinterpreted the Obamacare individual health insurance mandate as a tax in order to save it from unconstitutionality, even though he admitted that was not the "most natural reading" of the law. He concluded that courts must adopt any available "reasonable" interpretation of a statute that would make it constitutional, even if it is not actually the best interpretation.

I am no great fan of this "avoidance canon." But as long as the Supreme Court requires federal judges to follow it, they must interpret "national emergency" in a way that doesn't give the president unconstrained discretion to declare one anytime he wants. Interpreting "emergency" to mean something like "sudden crisis" is at least a "reasonable" interpretation of the word, and it neatly avoids any possible constitutional problems.

Ironically, conservatives and libertarians are the ones who have long argued for stronger enforcement of the nondelegation doctrine, while most liberals have generally been hostile to the idea. Trump's national emergency declaration might perhaps lead the latter to reconsider their position.

Judges may face difficult decisions in situations where it is hard to tell whether the problem at hand really is a suddenly emerging crisis or not. But difficult borderline questions are common in judicial decision-making, particularly when interpreting imprecise terms like "emergency." When it comes to laws intended to trigger dangerous powers that circumvent the normal political process, it makes sense to put the burden of proof on the executive to show that a genuine emergency actually exists.

But even if courts should defer to the president's judgment in relatively close cases, that does not mean they should give him a blank check to declare an emergency anytime he wants. The current situation is not a close case at all.

### **The Situation at the Border is Not a Sudden Crisis - and therefore Cannot be Declared a National Emergency**

If a "national emergency" can only be declared in the event of a sudden crisis, Trump's declaration clearly doesn't qualify. Quite simply, there is no crisis at the border. To the contrary, crime and terrorism risks in the border area are very low, and the number of illegal border crossings has been dropping. The vast majority of undocumented immigration is a result of visa overstays, not illegal border crossings at all. Trump also cites the flow of illegal drugs as a justification for the declaration. But 80 to 90 percent such drugs are brought in through legal ports of entry that would not be affected by his proposed wall.

Moreover, it is implausible to claim that the president had declare an emergency because there is no time for ordinary legislative processes to work. To the contrary, Congress has been considering Trump's demand for a wall for over two years now. The issue is not that they haven't had time to authorize one, but that they simply disagree with Trump about the need for it. Disagreement between the legislature and the executive is not an emergency. It's a normal part of our system of separation of powers. If the president can't get Congress to pass the laws he wants, that doesn't justify circumventing it by declaring an "emergency."

The above assumes that current immigration restrictions and the War on Drugs are beneficial rather than harmful. I myself oppose both. Most of the real problems at the border arise from the grave injustices caused by these policies. But even observers more sympathetic to status quo policies than I am should be able to recognize that Trump's emergency declaration does not address any sudden crisis. Even Trump himself seems to understand that. He admits he "didn't need to do this" and only declared a national emergency because he'd "rather" build the wall "much faster" than Congress is willing to authorize.

The claim that the border situation is an emergency is also belied by the nature of Trump's proposed remedy for the supposed problem. Even setting aside delays likely to be caused legal challenges, the wall will probably take years to build. Any problem for which the wall is a plausible solution is by definition not an emergency. To claim otherwise is much like saying that we can put out a raging fire by building a new fire station over the course of several years.

The administration can argue that there is an emergency because illegal border crossings and drug flows still persist and are unlikely to be completely eliminated anytime soon, if ever. But by

that standard, there is an emergency any time any federal law is not perfectly enforced and some violations continue to occur. And that's true of almost every law on the books.

For example, surveys show that over 50 percent of adult Americans admit to violating federal laws banning possession of marijuana. Only a small fraction of them have ever been caught or prosecuted. Can the president declare a national emergency and start spending unauthorized money and condemning property to go after pot smokers?

If Trump's desire to build a wall qualifies as an emergency, then pretty much anything does. The president would have unlimited power to declare any real or imagined problem an emergency, and thereby tap a wide range of emergency powers.

### **The Perils of Setting a Dangerous Precedent**

If courts conclude that the president can declare any emergency for virtually any reason he wants, it would set a dangerous precedent that goes far beyond wall-building. The National Emergencies Act allows the president to use an emergency declaration to trigger a wide range of powers, including such extremely dangerous ones as shutting down electronic media (potentially including the internet), and even testing chemical and biological weapons on unwilling human subjects.

Even the wall-building situation is itself deeply problematic. After all, Trump is claiming not just the authority to spend money on the wall, but also the power to use eminent domain to seize the property of thousands of people. If he can do that to build a border wall, other presidents can do the same thing to take property for a wide range of other purposes.

No one person - especially a politician - can be trusted with such vast, nearly unconstrained power. Conservatives who may be comfortable trusting Trump with it are unlikely to be so happy when the next liberal Democratic president inherits the same authority and uses it to promote left-wing causes.

Some suggest we need not worry too much about setting a precedent, because there have already been numerous questionable emergency declarations, including some that have lasted for many years.

I won't try to go through all of the previous 58 emergency declarations issued since the NEA was enacted in 1976. But virtually all of them did in fact involve crises that emerged suddenly and at least plausibly required a swift response that did not leave time for ordinary political processes to react quickly enough. All or nearly all were also invoked to take measures to address the problem quickly, not ones like Trump's wall, that would take years to have any effect. And none involved the president appropriating and seizing private property for a project Congress had repeatedly refused to support on the scale the president wanted, as is the case with the wall.

It is admittedly problematic that many previous emergencies have lasted for years, without any additional congressional authorization. The NEA does not impose any time limit on an emergency declaration. So one can potentially go on indefinitely, if the president wants it to.

The NEA states that a declaration can be ended by Congress if it passes a resolution disapproving it, as congressional Democrats are now attempting to do. But any such resolution is subject to veto by the president. And he can almost always count on sufficient support from his own party to prevent his veto from being overridden by the necessary two-thirds majority in both houses of Congress.

But the failure of the NEA to effectively limit the duration of emergency declarations does not mean it also imposes no constraints on their initiation. The difficulty of terminating an emergency once it has been declared makes it all the more important to enforce legal constraints on declaring one in the first place, to ensure these powers cannot be used unless there is an actual emergency.

It is certainly possible that some previous emergency declarations were legally dubious. Trump is far from the first president to abuse his authority. But the fact that some of his predecessors may have acted illegally is no reason to let Trump get away with it, too. To the contrary, it is all the more reason to crack down on such abuses of power, so they will not be repeated.

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