

WHITE HOUSE

Trump's Emergency Declaration Is Contemptuous of the Rule of Law

By DAVID FRENCH | February 15, 2019 6:29 PM



President Trump declares a national emergency at the U.S.-Mexico border while speaking about border security at the White House, February 15, 2019. (Carlos Barria/Reuters)

This is no *Trump v. Hawaii*; the president's discretion is dramatically limited.

One thing that is abundantly clear from reading the **full text** of President Trump's declaration of a national emergency on the southern border — he's barely even deigning to explain why there is a particular crisis

today, or why that crisis is so grave that it requires the military to combat it. At its heart it's a contemptuous document. It's the proclamation of a monarch, not an argument by a president. And it should fail in court.

Before today, legal writers were guessing at the statutes the president would use to justify defying the will of Congress and using the military to build his border wall. Now we know. In his declaration, he's exclusively using 10 U.S.C. 2808 to **reallocate up to \$3.6 billion** from Department of Defense construction projects — more than double the amount that Congress allocated for wall construction in its border compromise. (He intends to use other funds as well for wall construction, but those aren't applicable to the emergency declaration.)

This statute bears virtually no resemblance to the sweeping congressional grants of presidential discretion that allowed Trump to lawfully implement his travel ban or that allow presidents to declare national emergencies. Instead, it's a much more carefully drafted law, with carefully defined terms. A court that does its job — applying the plain meaning of the words on the page — should have little patience for the Trump administration's arguments.

I do not dispute that Trump likely can declare a national emergency, in large part because Congress has placed few meaningful restraints on that power, but such declarations don't allow him to do anything he wants; they mainly serve to unlock *other* statutes which grant him *other* powers. In this case it **unlocks Section 2808**:

In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total

amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

As statutes go, that's relatively clearly and cleanly written. For Trump to use his \$3.6 billion for the wall, he has to show that the emergency "requires the use of the armed forces" and that the relevant funds are being used to "undertake military construction projects . . . that are necessary to support such use of the armed forces."

First, let's consider whether Trump's national emergency actually "requires the use of the armed forces." In this regard, the declaration itself damages Trump's case. He claims it "threatens core national security interests" yet then goes on to describe *civilian* challenges. Here's the key language:

The southern border is a major entry point for criminals, gang members, and illicit narcotics. 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. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate.

Look at the list carefully. He's listing criminal challenges. He's listing humanitarian challenges. He's listing the problems on the border that have existed for decades and that Congress has enacted comprehensive statutory schemes (including funding *civilian* wall construction and *civilian* immigration authorities) to combat. Gang activity and drug-smuggling are grave problems, but they are *crimes*, not acts of war. The declaration doesn't even try to argue that there is a precise, unique challenge that only the military can counter —

such as a national disaster that would require the use of the military's unrivaled heavy-lift capabilities or its immediate access to manpower.

Instead, the declaration cites the wasteful 2018 border deployment, but that is only evidence that the military *has* been used, not that it *must* be used. If the mere fact of a deployment were proof of the necessity of military intervention, then there would be no limiting principle on a president's action. The message is clear — the military is “required” simply because he says it is required.

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But let's suppose that a court decides to grant even that degree of deference to the president. Let's suppose that even in the total absence of armed conflict or the prospect of armed conflict that courts will buy Trump's argument that the armed forces must deploy to the border. Even then, the statute limits their use. They can only “undertake military construction projects . . . that are necessary to support such use of the armed forces.”

The border wall does not fit that definition. How do we know? Because Congress has defined these terms. Let's turn over to 10 U.S.C. 2801. It defines "military construction" as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road."

The intent is clear — to grant the military the power to build out military installations, and a "military installation" is a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or . . . without regard to the duration of operational control." Each of the precisely described forms of installation represents facilities that support the troops. Under basic rules of statutory construction, the "other activity" must also fulfill that same purpose. As the Supreme Court held in *Circuit City Stores v. Adams*, when "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."

A border wall, by contrast, is a civilian structure to be manned by civilian authorities to perform a civilian mission. The troops would not be creating a military fortification for military use. Not only is it not "military construction," it's also not "necessary" in order to support the use of the armed forces — unless one wants to make the fantastical argument that the wall somehow "protects" the troops who are building the wall. They are not defending the border from actual invasion as defined by the law of armed conflict or relevant American law. They are assisting in a law-enforcement mission that is mainly designed to prevent the commission of federal misdemeanors, not to stop an army that intends to take and hold American territory.

We've grown sadly accustomed to presidents' abusing poorly drafted statutes to stretch their power well beyond the Founders' intent. It's strangely comforting to read a statute like Section 2808 that's competently written and precisely

drafted. While a court isn't likely to overturn the emergency declaration itself, it is unlikely to believe the administration's fiction that a civilian wall is true "military construction" or that it is any way "necessary" to support the use of the armed forces. Indeed Trump's declaration hardly even tries to make the case.

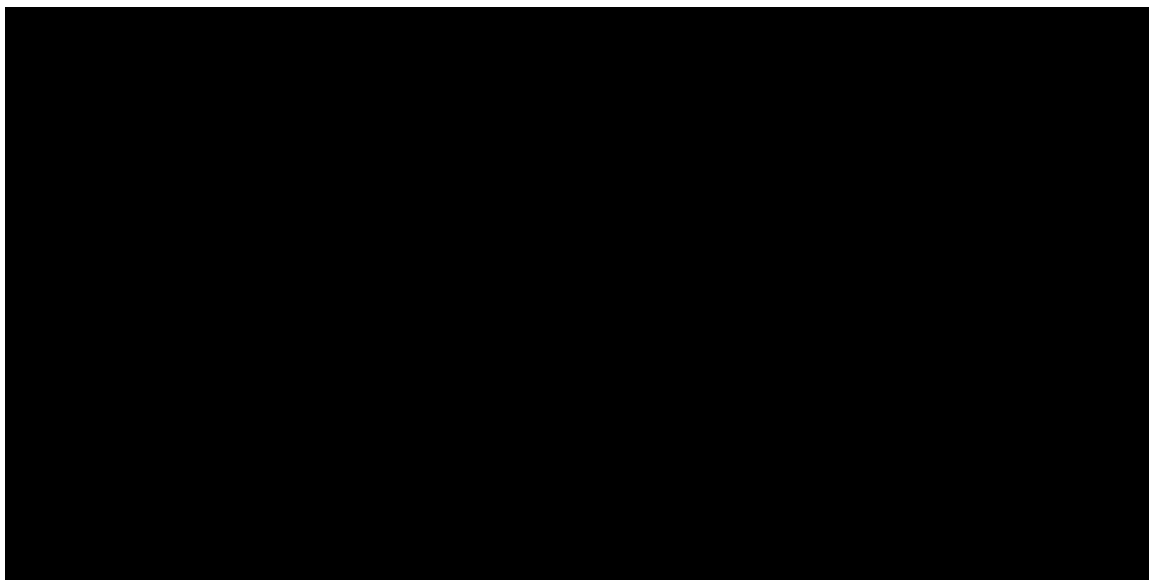


DAVID FRENCH — David French is a senior writer for National Review, a senior fellow at the National Review Institute, and a veteran of Operation Iraqi Freedom.

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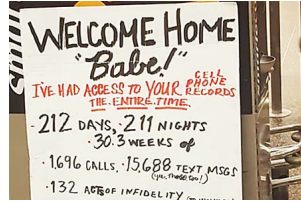
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