Trump's Non-Emergency Emergency

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US President Donald Trump declared a state of emergency on Friday in petulant assertion of his executive power to build a wall separating the US from Mexico. The Congress had denied him the funds for this purpose in the appropriations bill that it passed this week. And so Donald Trump decided to take the money anyway, even if Congress had said no. Suddenly the US has an emergency on its southern border.

The modern framework for states of emergency in US law is provided by the National Emergencies Act 50 U.S.C. § 1601–1651. This law, passed in 1976 as part of the post-Watergate restoration of a balance of powers between the executive and legislative branches, requires the president to make a formal declaration of an emergency and then to specify which emergency powers *already delegated to the president by Congress* he plans to use to cope with that emergency. The president can't just improvise, but must invoke a statute in which Congress has already given the president the contingent power to redirect funds or suspend the application of an existing law or to do something else that would be unlawful under ordinary circumstances – as long as he takes the political heat in declaring an emergency.

Emergency powers in US law, then, are not quite as lawless as they look. Through the emergency powers framework, Congress delegates to the president powers to act whenever the president deems the situation he is facing an emergency. The president must first flip the switch publicly to say he is using emergency powers, and then he can use whatever powers the Congress has reserved for him. It's like breaking the glass box with the fire extinguisher inside and then using the extinguisher to put out the fire. The extinguisher was prepositioned there for just this purpose – but first, the situation must be desperate enough to break the glass.

That said, emergency powers in the US raise serious constitutional questions that have never been legally tested. In this case, Trump is breaking the glass to seize funds for his pet project – a wall along the Southern border. But the Constitution says that Congress alone has the power to appropriate funds. If there were a sudden crisis at the Southern border that occurred so quickly that the Congress had no time to meet to reallocate funds in the budget to meet the crisis, then one can see why the Congress might have provided some leeway for the president to act. But that is not the case here. Congress has considered the president's request and said no. Once Congress refuses to allocate money, this refusal would seem to put an end to the president's constitutional ability to raid the budget. But no – he is invoking emergency powers to do so.

Trump will be therefore be challenging Congress in one of its core competencies in the US Constitution, which looks like a constitutional showdown. Who can tell the president that the Constitution requires him to cease and desist?

The answer is, perhaps surprisingly, no one. Or at least, no one yet.

Congress

When Congress wrote the National Emergencies Act in 1976, it obviously thought that the powers it was ceding to the president might well be abused. So it built a backstop into the act. If the Congress disagreed with the president that an emergency was warranted, the Congress could veto the declaration of emergency by concurrent resolution. A concurrent resolution passes and has legal effect when a majority of both houses of Congress votes for it.

But the Supreme Court had other ideas. In the 1983 case of *INS v. Chadha*, the Supreme Court held that there is only one way to make law in the US – and

that is by majority vote of both houses of Congress and presidential signature. Congress had inserted in many laws, including the one challenged in the *Chadha* case, mechanisms short of passing a new law for vetoing actions of the executive branch. At issue in *Chadha* was the "one house veto" which allowed the Congress to veto regulations enacted in the administrative lawmaking process with only one house's action. The *Chadha* case put an end to this practice, and to any other practice that attempted to enact law without going through the formal lawmaking process. *Chadha* therefore also eliminated the ability of Congress to veto an executive order declaring an emergency with a concurrent resolution. The protections that Congress wrote into the law to protect its own power when the president declared an emergency were eliminated by the Supreme Court.

Acknowledging the *Chadha* decision, the Congress then amended the National Emergencies Act to permit override of an executive order declaring an emergency with a *joint resolution* instead. A joint resolution requires a majority of both houses of Congress – and then it requires a presidential signature to become law.

So you can see the problem: The legal power to override the president now requires the president to agree. And this, of course, is unlikely.

If the president vetoes an attempt to rein in his power, Congress can override a presidential veto in only one way: by a *two-thirds* vote of *both* Houses. That is unlikely to happen in the case of the Trump emergency because the Senate leader Michael McConnell has already said he would support the declaration of emergency. One can imagine that McConnell could get other Republicans in the Senate to follow him. It wouldn't take much to acquiesce in the president's veto: a two-thirds majority in the Congress – in either house – is nearly impossible to muster. With Republican leadership accommodating the president's fit of pique, on this issue as on so many others, the emergency is likely to stand.

Lawsuits

So, then, what about a legal challenge? As I write, American journalists are warning about the flood of lawsuits that will challenge Trump's order. But here, too, the path to legally constraining the president is not so clear. To bring a case challenging the president's emergency powers, a litigant has to have standing. Standing requires that the person bringing the case be injured – either already or imminently. And the injury can't be something that all citizens are injured by – a general constitutional violation, for example.

Proving concrete injury with a general constitutional violation is very difficult. We've seen this before, since Trump isn't the first president to exceed his constitutional powers. When the Vietnam War raged on as public sentiment turned against it, lawsuits attempted to stop it. But the courts deflected all attempts to invoke the Constitution. The courts at that time turned away suits by individual members of Congress that argued that separation of powers were violated with an undeclared war. The courts turned away suits by individual taxpayers who tried to assert that their tax monies were spent on unconstitutional conflict. The courts turned away every imaginable kind of lawsuit that tried to legally enforce the Constitutional clause that only the Congress may declare war.

With a declaration of a state of emergency, we are in much the same position. The courts would almost surely turn away a lawsuit brought by Congress, even by a whole house of Congress. Taxpayer suits would almost surely go nowhere. Civil sector groups, opponents of President Trump, even the members of the military who may be called upon to build the wall – who would have standing to sue? Unless there are some very creative legal arguments or the federal courts have changed their minds about standing for a general constitutional violation, I don't see a clear path to a legal challenge the emergency declaration as such.

Once it is clear where the wall will go, however, then the lawsuits would start. Property owners whose property would have to be seized in an eminent domain procedure can challenge the seizure. But these suits would not be challenging the declaration of emergency directly, only collaterally. States with Democratic governors along the border might be

tempted to challenge the building of a wall on their territory without first getting their consent. But that would be a federalism case, not a direct challenge to the emergency. Someone who was expecting to benefit from the spending of funds that were now directed to another purpose might be able to sue – but most of the funds that would be seized by the president to build his wall are probably not allocated with such specificity that one could easily tell which concrete individuals would have benefited if the funds had not been redirected. Still, there might be someone who is hurt by Trump's emergency. But most likely that person would have to sue against the concrete act that caused the injury, not against the declaration of emergency as such. And of course, there is no guarantee that any of these suits would successfully change the course of the emergency, only the little piece of it that has generated a specific victim.

Politics

With the legal framework we currently have for regulating emergencies in the US, formal law runs out quite fast. This is where politics begins.

Many members of Congress, civil sector groups and public commentators have argued that there is no emergency at the border. They rely on the common sense that an emergency must mean some suddenly deteriorating situation. But the number of people crossing illegally at the border has been declining for years. There is no emergency. But only a public shaming of the president for trying to assert extraordinary powers to fix a crisis that doesn't exist can rein him in.

Unfortunately, as any observer of the US will know, this president is not easily shamed.

The US has entered a state of emergency that is almost surely unconstitutional. But it says something about the state of US constitutional law that it is hard to see how the president can be stopped. Perhaps the Congress or the courts will rise to the challenge. Perhaps public opinion will beat the president back. But we are now at a point where the weakness of the US Constitution is on full display. It will take an act of extraordinary constitutional imagination to get back onto a constitutional path.

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