

Trump's national emergency for border wall will 'quickly' face legal challenges and sets a dangerous precedent, experts say

John Haltiwanger

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President Donald Trump's declaration of a national emergency to obtain funding for a border wall will "very quickly" face legal challenges and presents an "immense danger" in terms of the precedent it sets, legal experts say.

Friday marked the 59th time a national emergency has been declared by a president since the National Emergencies Act was passed in 1976, and there are now 32 active national emergencies. Many national emergencies in the past imposed sanctions on people linked to human rights abuses in Africa and Central America.

Trump's declaration of a national emergency for a border wall is a highly controversial use of a president's emergency powers given the politicized nature of the border wall fight and the declaration's redistribution of roughly \$3.6 billion in military construction funding for what the president's opponents contend is a non-military purpose.

The president on Friday acknowledged the legal challenges he's likely to face. "I expect to be sued," Trump said.

The president's instincts were correct, as Citizens for Responsibility and Ethics in Washington (CREW) and the American Civil Liberties Union (ACLU) filed two lawsuits against the Trump administration over the national emergency declaration later on Friday.

Trump also said he "didn't need to" declare a national emergency but did so because he wanted to get the wall up faster. This statement could come back to haunt him during any court battles, according to experts.

'The Congress cannot let the President shred the Constitution'

In addition to the the power granted to the president to declare a "national emergency" under the National Emergencies Act, some legal experts have also made the case the Constitution gives the president emergency powers due to the broad, ill-defined "executive power" it grants to his office.

But Democrats accused the president of bypassing the constitutionally-mandated authority of Congress to determine how the government spends its money. Trump was not able to convince

Democrats to agree to allocate money for his wall in recent funding negotiations, which led to his decision to declare the national emergency.

'This is the first time we've seen such a national emergency declared, but it won't be the last'

Trevor Burrus, a research fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies, told INSIDER that Trump's national declaration will "face legal challenges very quickly."

But anyone challenging the declaration will still have their work cut out for them, according to Burrus.

"The hardest argument the challengers have to make is to contend that this is not really an emergency. Many judges— even many liberal judges — will find it difficult to find a judicial standard for deciding when something is or is not an emergency," Burrus said. "Therefore, they will determine that an emergency is a 'political question' that lacks justiciability."

Burrus said some of Trump's statements, including that he didn't "need to" declare an emergency "will be used against him, but probably to no effect."

"The National Emergencies Act is a broad grant of legislative discretion to the executive that could be considered an over-delegation of legislative power to the executive, thus violating separation of powers," Burrus added. "Challenges along those lines are more likely to succeed."

There are over 100 statutes a president can invoke during times of emergency. [An analysis](#) from the Brennan Center for Justice at New York University School of Law identified two statutes Trump could point to as justification for his ban.

Burrus also said Trump is setting a dangerous precedent by attempting to supersede Congress and its constitutional authority on the power of the purse, and it could come back to bite Republicans later on under a future Democratic administration.

"There is an immense danger in a president declaring a national emergency because his policy preferences are not shared by Congress," Burrus said. "We have divided government for a reason, to encourage compromise and to prevent unilateral power grabs. This is the first time we've seen such a national emergency declared, but it won't be the last. The next time, it will be the Republicans who are complaining."

Bradley P. Moss, a Washington-based lawyer specializing in national security, expressed similar views.

"If Trump can pull this off, I fully expect his successors to start using the political precedent, to say nothing of the legal precedent, to declare national emergencies and circumvent the legislative appropriations process whenever they fail to get congressional funding for a pet domestic project," Moss told INSIDER.

Moss said the "biggest" legal challenges Trump will face are "the fact-based determinations the government will have to provide to outline exactly how the reallocated funds fall within the specific and narrow scope of the statutory provisions whose emergency provisions are opened up due to the separate declaration of a national emergency."

"This isn't like just shifting money from one bank account to another," Moss added. "There are concrete limitations on how even emergency uses of funds are to be handled."

'There is no border crisis and there certainly isn't an invasion'

Though Trump acknowledged he didn't have to declare a national emergency, he's also contended there's a crisis at the border in an effort to substantiate his plan.

But experts disagree with the president on the situation at the border and his claim the US is facing an "invasion."

"There is no border crisis and there certainly isn't an invasion," Alex Nowrasteh, a senior immigration policy analyst at the Cato Institute's Center for Global Liberty and Prosperity, told INSIDER.

"Homicide rates along the border are below those in the interior of the United States and no American has ever been murdered by a terrorist who crossed the border with Mexico illegally—facts that would not be true if there was a crisis or invasion," Nowrasteh added.

Matthew Kolken, an immigration attorney based in Buffalo, New York, told INSIDER, "During a 'national emergency' the Commander in Chief may reallocate defense funds to 'undertake military construction projects that are necessary to support such use of the armed forces.'"

"It is a stretch at best to claim that undocumented immigration is a 'national emergency' that poses a military threat to the United States such that it would require the employment of armed forces," Kolken added.

Kolken also said that though the law allows the military to "condemn property to employ 'fortifications' Congress must first appropriate funds for their construction."

The law also doesn't permit the use of eminent domain via the emergency declaration provisions, Kolken said, and any attempts to "seize private property" as part of the wall construction process "will likely be frustrated by lengthy court proceedings."