



# Implications of Today's Senate Vote Against Trump's Border Wall "Emergency" Declaration

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Earlier today, the Senate overwhelmingly voted to reject President Trump's "national emergency" declaration that seeks to use emergency powers to appropriate funds to seize private property to build the president's border wall. Twelve GOP senators joined all 47 Democrats to form a strong 59-41 majority against the declaration. In February, the House of Representatives also voted to terminate the emergency declaration, with 13 Republicans joining the Democrats in opposing the president. On few if any other issues has Trump faced so much resistance within his own party.

The majority against the declaration is not large enough to override a virtually certain presidential veto, which would require a two-thirds super-majority in both the House and the Senate. But the vote might nonetheless have more than just symbolic significance, because it could potentially impact the resolution of the many lawsuits challenging the legality of Trump's declaration.

As a narrowly technical legal matter, the vote should have little or no effect. The cases ultimately come down to the meaning of the relevant statutes and constitutional provisions, which cannot be changed by a congressional vote that (if successfully vetoed by Trump) does not itself change the law. Nonetheless, today's vote could have an indirect impact. That is so for three reasons.

First, the vote reinforces the plaintiffs' argument that Trump's declaration is an attempt to undermine the separation of powers by circumventing Congress' control over the power of the purse. It makes clear that a large majority of members of Congress oppose the president's actions and do not want to allow him to spend additional funds on building the wall. GOP opponents of the declaration also emphasized the risk that it might set a dangerous precedent for presidents of both parties, a factor that might carry some weight with judges, as well:

"Declaring a national emergency to access different funds sets a dangerous new precedent," GOP Sen. Rob Portman of Ohio warned in remarks on the Senate floor ahead of the vote. "It opens the door for future presidents to implement just about any policy they want."

The senator went on to say, "a future President could seize industries ... a future President may well say that climate change is a national emergency and use emergency authorities to implement the Green New Deal," referencing a sweeping progressive policy proposal to tackle global warming.

Second, historically courts are sometimes reluctant to rule against the signature policy of the president and his party, for fear of generating a massive political backlash. The congressional

vote might help allay any such concerns by further underscoring the extent to which both the wall and the emergency declaration are highly unpopular.

Finally, it is significant that the dissenting GOP senators cited constitutional concerns as a reason to oppose the president on this issue. This reinforces the point that the emergency declaration is not one of those issues on which the views of legal and political elites divide along partisan/ideological lines. A large number of conservative and libertarian legal commentators believe that that declaration is illegal, as do the vast majority of liberal ones. This state of affairs makes it far more likely that at least some conservative judges will vote to strike down the declaration. While judicial decisions certainly don't always follow the views of legal scholars and other specialists, judges do often give at least some weight to expert opinion, particularly that of experts whose judicial and political philosophies are aligned with the judges' own.

None of these factors are likely to shift the decisions of judges who already have a strong view on one side or the other of these cases. But they could potentially affect some who might be on the fence.

In my view, the declaration is illegal for reasons that hold true regardless of what the Senate did today. The National Emergency Act does not allow the president to declare an emergency over an issue that is not a sudden crisis. Even if he can declare an emergency, the relevant statutes do not authorize him to reallocate funds and seize private property to build the wall. I also object to the wall on moral and policy grounds, and decry the great harm likely to be caused by using eminent domain to take property from unwilling owners. As GOP Rep. Will Hurd explains using eminent domain to build the wall is an affront to private property rights.

I don't doubt that many of those who support Trump's declaration also have strong views that are unlikely to be shifted by today's events. The Senate's vote against the president is unlikely to have more than a marginal effect on the ultimate resolution of this issue. But if it turns out to be a close case in the minds of the judges who rule on the matter, that marginal impact could be decisive.

UPDATE: On March 25, 12:30-2 PM, I will be speaking at this panel on presidential emergency powers co-sponsored by the Cato Institute and the American Constitution Society. The event is free and open to the public.

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