

Using emergency powers to seize property and build the wall would set a horrible precedent

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Last night, President Trump restated his desire to build a border wall, despite Congress' refusal to appropriate funding for it. Fortunately, he did not declare a "national emergency," as he had previously threatened to do. But administration officials indicate that option remains on the table if Congress refuses to give in to Trump, as is highly likely. The claim that emergency authority can be used to build the wall and seize property through the power of eminent domain is highly dubious. If the President succeeds, it would set a dangerous precedent.

One of the fundamental principles of the Constitution is that Congress is the only branch of the federal government that has the power of the purse. The President cannot spend money for purposes not authorized by the legislature. That rule prevents any one person from controlling the nation's public funds.

Trump cannot use "emergency" powers to get around the requirement of congressional authorization. if doing so involves using the military to build the wall, he would run afoul of longstanding laws barring the use of troops for domestic law enforcement purposes (which includes enforcing immigration law).

Congress has unwisely granted the President a wide range of easily abused emergency powers. But, so far, it does not seem any of them cover this situation.

Some point to 10 U.S.C. 2808 and 33 U.S.C. 2293 as possible sources of authority. Yet neither actually grants it. Section 2808 states that, if the President declares a "national emergency" that "requires the use of the armed forces," he can use certain military funds to "undertake military construction projects... that are necessary to support such use of the armed forces."

It is far from clear whether any supposed emergency caused by undocumented immigration really "requires the use of the armed forces" or that a wall would be "necessary to support such use." Indeed, the law forbids the use of the armed forces for domestic law enforcement. Section 2293 likewise only applies to a declared war or emergency that "requires or may require use of the Armed Forces."

Another federal law allows the military to condemn property for "fortifications." But that only extends to projects for which funding has been appropriated by Congress. And a wall intended to keep out migrants hardly qualifies as a "fortification" preventing armed attack.

It is difficult to predict the outcome of a legal battle over emergency powers. Courts often give Presidents undue deference on national security and immigration issues. But, hopefully, judges will see the importance of strictly enforcing constraints on the exercise of dangerous emergency powers.

Even if Trump can use an emergency declaration to secure funding, that does not mean he can seize property by eminent domain. Supreme Court precedent states that the use of eminent domain must be “expressly authorized” by law. No emergency laws “expressly” permit the use of eminent domain for border walls not otherwise authorized by Congress.

Trump cannot build his wall without using eminent domain. Less than one-third of the needed land is now owned by the federal government. The rest would have to be obtained from private owners, Native American tribes and state governments.

If Trump succeeds in using emergency powers to build the wall and seize private property, it would set a dangerous precedent for future Presidents. They too could declare a “national emergency,” and then spend funds to take private property, even without clear congressional authorization.

Conservatives who cheer Trump now may regret it if the next Democratic president uses the same powers to appropriate funds and take property for liberal policies. No president of either party can be trusted with such dangerous unilateral authority over public funds and Americans’ property rights.

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