



Donald Trump can call a 'national emergency,' but that doesn't mean he can build the wall

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President Donald Trump recently said that he will “almost... definitely” resort to emergency powers to build a wall on the Mexican border if Congress does not give in to his demands. That may be his way out of this government shutdown if Democrats, unmoved so far by his televised address Saturday, continue to hold the line. But it should not get him that wall.

In order to build it, he would need not only funds, but also the power to seize property from unwilling owners through the use of eminent domain. Allowing him to do so would set a dangerous precedent and threaten the property rights of thousands of Americans.

Poorly drafted laws give the president a wide range of easily abused emergency powers. Even if he can declare a “national emergency,” however, that does not mean he can use it to pay for and build a wall.

Some point to 10 U.S.C. 2808 and 33 U.S.C. 2293 as possible justifications. But Section 2808 states that, during a “national emergency” that “requires the use of the armed forces,” the president can reallocate defense funds to “undertake military construction projects... that are necessary to support such use of the armed forces.” No threat posed by undocumented immigration “requires the use of the armed forces” and it is hard to see why a wall is “necessary to support such use.” In fact, as Yale Law School Prof. Bruce Ackerman explains, longstanding laws bar the use of troops for domestic law enforcement (including enforcing immigration law).

Section 2293 also only applies to a war or emergency that “requires or may require use of the Armed Forces.” Another federal law allows the military to condemn property for various purposes, such as “fortifications.” But that only extends to projects for which funding has been appropriated by Congress. Arguments that Trump can use disaster relief funds to build the wall are even more implausible.

The outcome of a legal battle over emergency powers is hard to predict. Clever administration lawyers may come up with creative new legal arguments. Too often, courts give presidents undue deference on security and immigration issues. But judges should keep in mind the importance of rigorously enforcing legal constraints on dangerous exercises of emergency powers.

Eminent domain on massive scale to build wall

Even if the president can use emergency powers to get funds, that does not mean he can seize property by eminent domain. The Supreme Court has long held 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.

Building Trump's wall requires using eminent domain on a massive scale. Less than one-third of the needed land is currently owned by the federal government. The rest would have to be taken from private owners, Native American tribes, and state governments, many of whom are unlikely to sell voluntarily.

The result would be one of the largest federal condemnations in modern American history. In Texas alone, there are almost 5,000 privately owned lots in the likely path of the wall. Securing the land and building on it is likely to be costly and time-consuming. Construction and legal battles over compensation can drag on for years.

This reality underscores the absurdity of claiming that a wall is needed to combat an "emergency." Emergency powers are intended to address immediate threats that cannot be dealt with by slow-moving legislative processes. If the supposed emergency can be fixed by a wall that takes years to build, that means it was not an emergency in the first place. In reality, there is no genuine crisis that a wall could fix. It would not even meaningfully reduce undocumented immigration.

Democrats could declare their own emergencies

Far from alleviating a crisis, building the wall through eminent domain would actually create one by imperiling the property rights of thousands of landowners along the border. The Department of Homeland Security has a terrible record of violating procedural rights and under-compensating property owners in earlier takings for smaller border barriers. Such abuses would likely be repeated on a much larger scale if we try to build Trump's wall.

If Trump succeeds in using emergency powers to build the wall and seize property through eminent domain, future presidents could exploit this dangerous precedent. They too could declare a "national emergency," and then divert military funds and take private property without congressional authorization.

Republicans who cheer Trump now will regret it if the next Democratic president uses the same powers to declare that climate change is a "national emergency" and then allocate funds and take land for the gigantic "Green New Deal" program many progressives advocate. Climate change is a more plausible menace to national security than undocumented immigration.

If Trump succeeds, presidents could use the same ploy almost any time they want funds or seek to condemn private property for purposes Congress has not authorized, so long as there is some vague security pretext. To their credit, conservative commentators Philip Klein and David French have highlighted the risks of going down this very slippery slope. No one person, whether Democrat or Republican, can be trusted with such sweeping power.

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