There is a National Emergency at the Southern Border. True or False?

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Government shutdown over border funding (winter 18/19)

- The Constitution grants Congress the exclusive power to decide how the government spends money. (Appropriations Clause; Spending Clause)
- The President asked Congress to authorize and appropriate certain funding for barriers at the southern border.
- The fight over whether to fund the President’s request prompted the longest government shutdown in U.S. history.
Shutdown Speculation: Will Trump declare a national emergency?

• In January, Trump said that if Congress didn’t give him the border wall funding he wanted, he’d invoke the National Emergencies Act (NEA), 50 U.S.C. § 1601 et seq.

• The NEA states that “during the period of a national emergency,” the President is delegated the authority to declare a national emergency and invoke specific statutory powers that are only available once a national emergency has been declared. 50 U.S.C. § 1621.

• The NEA does not define the term “emergency.”

• The NEA was designed to curtail a President’s power to declare an emergency, limiting it to those situations where the emergency was unforeseen, so Congress would not be able to act in time.

"We can call a national emergency because of the security of our country, absolutely. No, we can do it. I haven’t done it. I may do it. I may do it, but we could call a national emergency and build [the wall] very quickly, and it’s another way of doing it. But if we can do it through a negotiated process, we’re giving that a shot. -- President Trump
Deal reached to end the shutdown (February 2019)

• A deal was reached, and Congress enacted the 2019 Consolidated Appropriations Act.
• The Appropriations Act includes $1.375 billion in funding for fencing in specific locations along the southern border, limiting the fencing to a previously deployed design.
• President Trump signed the Appropriations Act into law on February 15, 2019.
• The same day that President Trump signed the Appropriations Act, he issued his proclamation declaring a national emergency + associated White House statement laying claim to more money that had been appropriated for other purposes.
What the proclamation said: how the President (and his lawyers) justified declaring a national emergency

• “The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency.”
  • A humanitarian crisis of whose making?

• “The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and . . . the situation has worsened in certain respects in recent years.”
  • Is this a real emergency?

• “Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.”

• “NOW, THEREFORE, I, DONALD J. TRUMP . . . hereby declare that a national emergency exists at the southern border of the United States . . . .”
What Trump said

• While announcing the Proclamation in the White House Rose Garden, the President acknowledged that the “emergency” was his inability to persuade Congress to authorize the construction of a border wall or to appropriate funds to do so in the manner and amount he wants.

“I could do the wall over a longer period of time. I didn’t need to do this. But I’d rather do it much faster.”
What the Proclamation did

• The President’s Proclamation and accompanying White House Statement used the declaration of national emergency as a way to lay claim to $6.7 billion that Congress did not appropriate, for the purpose of building a border wall that Congress did not authorize.
The Proclamation and WH statement direct activities that are not authorized by the statutes they invoke

- 10 U.S.C. § 2808 – When the President declares a national emergency that “requires use of the armed forces,” SecDef “may undertake military construction projects . . . Necessary to support such use of the armed forces.”
  - “Military construction” is defined as a project “carried out with respect to a military installation,” which must be “under the jurisdiction of the Secretary of a military department.”
  - Invoked in the past wrt barracks and runways in Afghanistan and courthouse security at the U.S. Naval Base at Guantanamo Bay.

- 10 U.S.C. § 284 – DoD drug interdiction activities (invoked in WH statement)
  - Permits “small-scale construction projects” (< $750,000) along “drug smuggling corridors.”
  - Relied on section 8005 of the 2019 Department of Defense Appropriations Act, Pub. L. No. 115-245. That section allows for transfers of funds only “based on unforeseen military requirements,” and “in no case where the item for which funds are requested has been denied by the Congress.” And it further states that transfers may be made only “for military functions (except military construction).”

- Treasury Department’s Asset Forfeiture Fund

“I didn’t need to do this”
Looking at two of the lawsuits challenging the declaration

- ACLU filed a lawsuit on behalf of the Sierra Club and the Southern Borders Communities Coalition (N.D. Cal.)
  - ND Cal: Government’s use of military construction funds under Section 2808 is unlawful.
  - “[T]he Court cannot blind itself to the plain reality presented in this case: the border barrier projects Defendants now assert are ‘necessary to support the use of the armed forces’ are the very same projects Defendants sought—and failed—to build under DHS’s civilian authority, because Congress would not appropriate the requested funds.”
  - Issued permanent injunction, which was stayed pending appeal.
  - Appeal is ongoing; ACLU has sought review of additional re-programming requests.

- Protect Democracy, joined by right- and left-leaning lawyers, filed a lawsuit in W.D. TX on behalf of the County of El Paso & the Border Network for Human Rights . . . .
El Paso v. Trump

- Information about the lawsuit: https://protectdemocracy.org/project/el-paso-county-v-trump/

- Information about the harms to border communities: https://endtheemergency.org/. The emergency there is the one the proclamation created.
El Paso v. Trump: Claims

• Proclamation **violates the NEA**
• NEA, as construed by the proclamation (such that the phrase “national emergency” is devoid of meaning), **violates the nondelegation doctrine**
• Use of unappropriated funds to construct the border wall under 10 U.S.C. § 2808 (military construction funds) **violates the Appropriations Clause and the Spending Clause**
• Use of funds under § 2808 (military construction funds), 10 U.S.C. § 284 (drug interdiction funds), and 31 U.S.C. § 9705 (Asset Forfeiture Funds) **violate the APA because their use is “not in accordance with law.”**
  • Funding plan violates the aforementioned statutes.
  • Funding plan violates Section 739 of the Consolidated Appropriations Act of 2019, which prohibits transfer/reprogramming of all funds appropriated; limited statutory exceptions are inapplicable here
• Transfer of funds under 10 U.S.C. § 284 (drug interdiction funds) **violates the APA (see above)**
• Proclamation **violates the President’s duty to faithfully execute the law under the Take Care Clause** (“I didn’t need to do this”)
El Paso v. Trump: Outcome

- **October 2019:** W.D. TX (Judge Briones) held that the Proclamation is unlawful because the funding plan the Consolidated Appropriations Act of 2019, which prohibits the transfer/reprogramming funds.
  - **Specific controls the general.** Specific appropriations in the Consolidated Appropriations Act for border security, which tight constraints as to how they may be used, precludes transfer, for border security, of $6.1 billion of funds appropriated for more general purposes.
  - Section 739 “expressly forbids” the Government’s funding plan.
  - Court did not reach other claims

- **December 2019.** Court issues nationwide injunction; Fifth Circuit grants government’s motion to stay the injunction, pending appeal.
• The National Emergency Act of 1976 included two innovations to keep Congress involved in the President’s decision to declare an emergency.
  • Originally empowered Congress to override a declaration of a national emergency with a concurrent resolution to terminate (no presidential signature necessary).
    • Idea was to allow Congress to delegate authority without needing to overcome a veto to claw it back/stop abuse.
    • *INS v. Chadha* declared such resolutions unconstitutional; bicameralism and presentment are necessary.
    • Congress now needs veto-proof majority to terminate an emergency.
  • Expedited procedures to ensure that termination votes make it to the floor, whether majority leader likes it or not.
    • Expedited termination votes are in order every six months for the duration of the emergency. (Emergency must be renewed annually)
Meanwhile, on the Hill . . .

- Expedited procedures mean that the termination resolutions actually come to the floor!
- Vote is (relatively) bipartisan! Support for termination breaks down as follows:

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- All of Trump’s vetoes have come in response to votes on statutes that, pre-Chadha, would have allowed one or both houses of Congress to rescind a delegation of authority to the President: Yemen war powers resolution, arms sales disapprovals (x3), national emergency termination (x2)
Proposal for reform

• In July 2019, the ARTICLE ONE Act, S. 784, reported out of committee with an overwhelming bipartisan majority: 11-2.

• Would amend the NEA to include a ”sunset and approve” mechanism.
  • Any new national emergency would sunset 30 days after being declared by the President unless Congress voted to approve the declaration.
  • Any national emergency that Congress did approve would require annual re-approval.
  • Once Congress chose not to approve a national emergency, the President would be prohibited from redeclaring a national emergency concerning the same subject matter.
  • Expedited procedures will ensure that a resolution to approve a national emergency would get to the chamber floor for a vote. This would guarantee that the floor schedule would not prevent Congress from asserting its constitutional prerogatives.

• Bill has 18 Republican co-sponsors; Republicans who aren’t cosponsors voted for the bill in committee. Expect possible movement on Senate floor soon.

• “Sunset and approve” would work for other laws gutted by Chadha (War Powers Act, Armed Export Control Act)
  • Same mechanism in other proposals: the bipartisan Trade Certainty Act (Toomey-Carper) and the Bipartisan Bicameral Congressional Trade Authority Act
National emergency: one year later

• Emergency Renewed

• Unlawful fund raids continue
  • Most recently, Administration sought to divert $3.8 billion from weapons programs → drug-interdiction funds → border wall funding.

• Appropriations
  • First half of Trump Administration, lots of talk about the Administration undermining rule of law by undermining judicial orders.
  • Instead, the Administration is destroying rule of law by ignoring Congress (statutes, oversight requests, subpoenas), and courts aren’t stepping in and/or aren’t doing so quickly enough. Appropriations is a key site for this effort. E.g. . . .
    • Impoundment of funds for Ukraine
    • Impoundment of money intended for clean energy
    • Border wall

• Legislative reform efforts continue