

State of Emergency: Presidential Power Run Amok

In February, President Trump proclaimed the existence of a national emergency on the southern border after Congress refused to provide funding for his desired border wall. Invoking the National Emergencies Act, the president aims to bypass Congress and reallocate funds from a variety of sources to build the wall. In March, Cato hosted a forum on presidential emergency powers cosponsored by the American Constitution Society. Among the participants were DEBORAH PEARLSTEIN of the Benjamin N. Cardozo School of Law and ILYA SOMIN, Cato Institute adjunct scholar and professor at the Antonin Scalia Law School at George Mason University.

DEBORAH PEARLSTEIN: Let me begin by saying I think this particular invocation of the National Emergencies Act [NEA] by the president in February is a pretextual invocation of the act. I do not believe there's an emergency, I do not believe the national security establishment believes there is an emergency, and I do not believe the current Department of Defense believes there is an emergency. So, I find it a deeply problematic use of the power. But I think there are a lot of misconceptions about why and what's problematic about it as a matter of law, so in these brief remarks, I want to make three points.

First, the primary legal problem is statutory, not constitutional. Second, the primary problem with the NEA is not a presidential usurpation problem, it's a congressional delegation problem. It's not a problem of the president seizing power, but of Congress giving it away. And third, because I am really determined to end on a note of hope, I think it's entirely possible that Congress might take steps to fix this problem. That's an exciting prospect and something I can't always say.

So, let me start by delving into the legal weeds of what the president did in February and whether one can make a plausible, or indeed successful, legal claim that what he did violates the Constitution and laws of the United States. Notwithstanding the

rhetoric on both sides of the aisle on Capitol Hill and the raft of lawsuits challenging Trump's invocation of the emergency power as a violation of the Constitution, the most apparent legal problem here is compliance with the relevant statutes, not the Constitution. The NEA gives the president an enormous amount of power. Congress did this quite deliberately. It's still on the books and, in my judgment, there is no slam-dunk legal argument against its application here. There are a bunch of very good arguments that apply here, but none of these arguments are a surefire winner.

The president issued a declaration and an accompanying fact sheet saying, "This is what I am doing." The fact sheet tells us that he is going to access something on the order of six or seven billion dollars for constructing a wall on the southern border. A little less than half of that money comes from existing statutory authorizations that have nothing to do with the National Emergencies Act at all. That requires no emergency declaration at all. Depending on what he does, various statutory questions of legality may be presented, but we can't answer the legality question until we know more specifically about what the president proposes to do. The remaining three billion or so does require the invocation of the NEA. The NEA, in relevant part, just unlocks other statutory powers. Under all the

other acts of Congress authorizing the exercise of powers during a national emergency, the president is authorized to declare such an emergency by the NEA. So, why is this legally complicated?

Number one, the fact sheet issued along with the proclamation says that the president won't touch the NEA-relevant funds until he's first expended the other funds that have yet to be identified. If you're suing, this raises an enormous problem of what lawyers would call "ripeness" under Article III. Also, the NEA grants the president total discretion to identify an emergency.

There are a variety of canons of statutory interpretation that courts use if they determine the meaning of a statute is unclear. There are some rules that the courts employ to try to help inform their judgment, such as the nondelegation doctrine. This is the idea that Congress, because of separation of powers, can't simply give away all its powers to the executive branch. The Supreme Court has long said if there's any question about the meaning of a statute, we'd prefer the meaning that does not create an excessive delegation problem. That canon is available to the courts here, but in fact the Supreme Court hasn't held that a law violates the nondelegation doctrine since 1935. And more problematically, the Court in the national security context defers to executive judgment of what counts as a national emergency. We saw this in the travel ban case, *Trump v. Hawaii*.

The best legal challenge to the current invocation of the NEA is not constitutional, but rather on the underlying statutory authority that the president is trying to invoke. He declared an emergency, and the statute he is trying to use to build the wall is 10 USC § 2808. That law says, "In the event of a declaration of emergency that requires the use of the armed forces, the Sec-

retary of Defense may authorize the secretaries of the military departments to undertake military construction projects that are necessary to support such use of the armed forces.” There’s a lot of language in there that lawyers can and should use to argue that this is not a permissible use of this statute. The words “require” and “necessary” imply some objective determination that the courts could conclude has not been made. And the statute includes a definition of military construction within it, and it’s not at all clear that covers the construction of a border wall, and certainly not a wall on private land. There are plenty of rich statutory arguments to be made there. The best argument here is a statutory argument, but we’re not going to get there for some time, depending on how quickly the president wants to move to actually use that claimed authority.

So, given where I started—that this is a manifestly pretextual use of the emergency authority, and that the president is trying to exercise it contrary to Congress’s disinterest in funding the wall—why is that argument not a slam dunk? Why is this a complicated, long story on how it may or may not be lawful? That leads me to a couple of the problems with the existing National Emergencies Act. Now, some might call the first one an excessive delegation issue; some might call it all three branches shirking their responsibilities. The problem is this: when you have multiple actors involved in decisionmaking, each one knows the other one is involved and so has an incentive for the other to hold the burden of accountability. Congress says, “We’re going to authorize this power, but we don’t have to take special care in how we craft this statute because the president, in good faith, is going to exercise the determination about how it’s going to be exercised. He’ll take care of it.” Equally, the president can say, “Well, Congress gave me this authority, they must have assumed I’m going to use it in good faith, and therefore I won’t worry about it too much and I can blame Con-

gress for giving me the authority in the first place.” Both political branches say, “If we really went too far off the deep end here, the courts would step in and check us.” And yet for reasons I just mentioned, the courts have developed a variety of doctrines in this area that suggest they tend to defer to the judgment of the political



DEBORAH PEARLSTEIN

“This is a manifestly pretextual use of the emergency authority.”

branches. The present problem is that no one branch can really be held accountable for what happens when the president invokes emergency authority.

The other problem is that in 1983, the Supreme Court decided that when Congress engages in lawmaking, it needs to do so as the Constitution says: pass it by both chambers and get the president to sign it or override a veto. The NEA bill was originally drafted in 1976 and said Congress could override the president’s veto with a concurrent resolution, that is, without the president getting to sign or veto it. That bypassed the presidential veto that we’ve just seen invoked. Since *INS v. Chadha* in

1983, Congress amended the NEA to make it consistent with that decision. Now the override of a presidential proclamation does have to pass through the normal legislative process, as we have seen. That means, in effect, the act now, in the post-*Chadha* universe, flips the separation of powers on its head. It takes a supermajority of Congress to disapprove of any presidential invocation of emergency.

Last point: do I have hope? Well, I think it’s possible we are living in an era, in part with the current president to thank for it, in which Congress is concluding that it might actually have some important role as a coequal branch in our government, particularly on questions of national security. Not only did it just vote, very significantly, to overturn the president’s declaration of emergency for the first time in history, it also voted for the first time under the War Powers Resolution to end U.S. military assistance for Saudi operations in Yemen. Congress has also taken action to override the president on sanctions for certain Russian individuals. The point is this: we have an interesting president, and he’s made for interesting times in these longstanding debates on issues of separation of powers.

ILYA SOMIN: I’m going to start by talking a little bit about the current national emergency declaration by the president. I think this goes beyond what exists in the current, fairly broad, jurisprudential and legal framework. I also think there are significant problems with the framework itself, and I’ll end by discussing a few possible reforms.

In February, the president declared a national emergency for the purpose of getting money allocated for his border wall that Congress had refused to give him. The statute says that during a period of national emergency, the president may declare that emergency and then adopt these emergency powers. Here’s the question that should be raised: is an emergency anything that the president says it is? Does his de-

claring it make it so? Or is he only allowed to declare it in a situation that counts as a sudden crisis or emergency in ordinary language?

I think the second interpretation is better, for a couple of reasons. One is that in general, the Supreme Court has said, quite rightly, that most of the time we should interpret laws in accordance with their ordinary meaning. And the ordinary meaning of an emergency is not anything that I say it is, or any problem that might arise, or a disagreement the president has with Congress over funding. It is, rather, a sudden crisis that requires measures that cannot go through the ordinary legislative process. So just under ordinary meaning, that's the better interpretation. In addition, if you go the other way and you just say the president can declare an emergency anytime he wants for any reason, then you raise a serious constitutional problem.

Although the Supreme Court has been very permissive in letting Congress delegate powers to the executive, they did say there was a limit. And that limit was that there had to be an intelligible principle for when the power might be used. What counts as an intelligible principle is not always easy to say, but at the very least it's not "whenever the president wants to." That's not an intelligible principle even under the Court's permissive approach. The Court has said that, where possible, we should interpret federal laws to avoid constitutional problems, and the best way to avoid one here is to require it to be a sudden crisis, and not just any perceived problem.

What's going on at the border is not a sudden crisis. Undocumented immigration, if you consider that to be a problem, is at low levels in historical terms. The other issue the president has raised is drug smuggling. Most drug smuggling, some 80 percent, actually goes through ports of entry and therefore would not be affected by a wall. So, even if there is a crisis, it has no relationship to the proposed remedy. Finally, if there really were

a crisis, it's hard to understand how a wall could possibly be a remedy for it, given that a wall will take several years to build even aside from the legal challenges to it. Therefore, it's a little like saying we have a fire going and we need to stop it quickly, so the remedy is to build a new fire station.

Clearly, even if it's a beautiful and won-



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derful fire station, it won't put out this particular fire. There's a very obvious mismatch in the claim that there is an emergency and the claim that the wall is a solution for the problem. Secondly, even if you assume that the president can declare an emergency, as Deborah pointed out, it is unlikely that Section 2808 could actually be used to transfer money to the wall, because Section 2808 can only be invoked in situations—in emergencies—that require the use of the military, and there's a longstanding federal law barring the use of the military for domestic law enforcement purposes. That includes immigration enforcement, and it also includes drug enforcement. The thing about this is that, unlike the National Emergen-

cies Act, the Posse Comitatus Act is relatively clear, and it seems to exclude the sort of thing that Trump is trying to do.

Finally, there's an additional issue, which is that in order to get much of the property he would need to build the wall, Trump would need to use eminent domain to condemn private property, maybe even thousands of different properties. Eminent domain requires specific statutory authorization, and I do not think that authorization is present. That said, it isn't a slam dunk, because the law is unclear, so I think broader reforms are desirable.

One important reform is that a declared emergency should no longer be indefinite. Instead it should automatically terminate within a relatively short period of time unless Congress affirmatively endorses it. The Brennan Center for Justice recommends that change, and a bill to do this was recently introduced by Republican Sen. Mike Lee. He and his cosponsors have said that an emergency declaration should end in 30 days. You could argue about the particular time frame, but I think something like that is desirable.

Second, some of the powers on the list of those that could be triggered by an emergency are ones that should just be abolished entirely. I can't go through a full list, but one example is the power to test chemical and biological weapons on unwilling subjects. That seems like a power that the government shouldn't have at all. The other example is the kill switch for shutting down electronic media, including the internet. That's also a dangerous power that we shouldn't leave lying around.

Finally, the statute should make clear that a national emergency is a sudden crisis. In reviewing whether there is an emergency or not, the judiciary should not be deferential to the president. When you're invoking extraordinary powers, as opposed to ordinary ones, there's a good case for the judges to hold the president's feet to the fire instead of just taking his word for it. ■