

What happens if Donald Trump declares a national emergency at the border?

Recently there was a five-week partial government shutdown that saw Donald Trump and Democrat leaders faceoff over funding for a wall on the southern border. Trump refused to sign any spending bill that didn't include more than \$5 billion for the wall. Politicians recently agreed to open the government for 3 weeks (through Feb. 15th) without money for the wall while they negotiated a long-term spending bill with money for the wall. President Trump has continuously threatened to declare a national emergency to fund the wall which wouldn't rely on a congressional spending bill.

- If Congress doesn't come up with an appropriations bill funding a border wall, can President Trump declare a national emergency and build the wall anyway?
  - The Constitution says that the government, including the president, can't spend money unless Congress passes a law authorizing the spending.
  - However, the [National Emergencies Act](#) (1976) says that a presidential declaration of an emergency triggers a bunch of provisions that allows a president to tap funds from a number of emergency funds. Under this act, the president has complete discretion to issue an emergency declaration, but he must specify in the declaration which powers he intends to use, issue public updates if he decides to invoke additional powers, and report to Congress on the government's emergency-related expenditures every six months. The state of emergency expires after a year unless the president renews it, and the Senate and the House must meet every six months while the emergency is in effect "to consider a vote" on termination. It should be noted that the National Emergencies Act offers no definition for what constitutes an emergency.

- (Side note: this Act is useless and means nothing. 30 states of emergency are in effect today - several times more than when the act was passed. Most have been renewed for years on end and during the 40 years the law has been in place, Congress had not met once to vote on whether to end them)
  - One provision allows a president to spend already appropriated money for “military construction projects”. There is a pot of about \$10 billion available under this provision. However, the statute seems to connect this to building barracks, landing strips, and other things relating to deploying troops to new locations in an emergency.
  - Another provision allows a president to divert emergency money already appropriated for disaster relief but most people see these as natural disasters and it would be up to a judge to see if it fits.
  - He could also declare a “state of immigration emergency” which would pull funds from an immigration emergency fund that is usually used to help stated feed, house, and process migrants. (this fund currently only has about \$20 million)
  - The White House has also reportedly directed the Army Corps of Engineers to look at its budget for potential funds to divert to the wall, including \$13.9 billion from a disaster spending bill passed by Congress last year.
- Congress can vote to overturn a declaration of national emergency using a fast-track procedure to pass a joint resolution. An initial congressional override simply requires a majority vote. The president can then veto it, in which case Congress would need two-thirds vote in both chambers to override it.
  - If Congress were to override a declaration, there is a good chance it would be taken to the courts where things like, “what constitutes and

emergency” or “can a president declare something an emergency simply because he wasn’t able to persuade Congress to appropriate money?” would be debated.

Elizabeth Goitein, a co-director of the Liberty and National Security Program at the Brennan Center for Justice (a progressive law and public policy institute and New York University Law School) wrote an in-depth piece on presidential emergency powers [in the Atlantic](#).

- In it she writes, “a parallel legal regime allows the president to sidestep many of the constraints that normally apply. The moment the president declares a “national emergency” - a decision that is entirely within his discretion - more than 100 special provisions become available to him. While many of these tee up reasonable responses to genuine emergencies, some appear dangerously suited to a leader bent on amassing or retaining power. For instance, the president can, with the flick of his pen, activate laws allowing him to shut down many kinds of electronic communications inside the US or freeze Americans’ bank accounts. Other powers available even without a declaration of emergency, including laws that allow the president to deploy troops inside the country to subdue domestic unrest.”
- The premise underlying emergency powers is that the government’s ordinary powers might be insufficient in a crisis, and amending the law might be too slow in an emergency. It is meant for temporary expansion of power until the emergency passes or laws are changed.
  - Some legal scholars believe the Constitution gives the president inherent emergency powers by making him commander in chief or by vesting him a broad, undefined “executive power.”
  - In the past presidents have cited inherent constitutional powers when taking drastic actions that were not authorized or prohibited by Congress.

- Examples include: FDR's internment of US citizens and residents of Japanese descent during WWII, George W. Bush's programs of warrantless wiretapping and torture after 9/11, and Abraham Lincoln's suspension of habeas corpus during the Civil War.
- The president has access to emergency powers contained in 123 statutory provisions.
  - For instance, George W. Bush leveraged the state of emergency after 9/11 to call hundreds of thousands of reservists and members of the National Guard into active duty in Iraq.
  - During a national emergency, the president can unilaterally suspend the law that bars government testing of biological chemical agents on human subjects.
  - In 1942, Congress amended Section 706 of the Communications Act of 1934 to allow the president to shut down or take control of "any facility or station for wire communication" upon his proclamation "that there exists a state or threat of war involving the United States." In today's age this could be seen as extending to the internet, effectively giving the president complete control over the internet and could function as a "kill switch".
  - Under the International Emergency Economic Powers Act (IEEPA)(1977) the president can declare a national emergency "to deal with any unusual and extraordinary threat" to national security, foreign policy, or the economy. This allows the president to order a range of economic actions essentially transferring export and tariff control from Congress to the Executive Branch.
    - Bill Clinton expanded IEEPA's usage by targeting both foreign governments and foreign political parties, terrorist organizations, and suspected narcotics traffickers.
    - George W. Bush expanded this even further after 9/11 through Executive Order 13224 which prohibited

transactions not just with any suspected foreign terrorist, but also with any US citizen suspected of providing support to foreign terrorists.

- Once a person is designated under the order, no American can legally give him a job, rent him an apartment, provide him with medical services, or sell him groceries without the government's permission. The Patriot Act allowed the government to trigger these consequences just by opening an investigation into whether a person should be designated. The government only needs a “reasonable basis” for believing someone is involved with or supports terrorism in order to designate him. The person is generally given no advance notice and no hearing.
- The Insurrection Act of 1807, which has been amended over the years, allows the president to deploy troops unilaterally, either because he determined that rebellious activity has made it “impracticable” to enforce federal law through regular means, or because he deems it necessary to suppress “insurrection, domestic violence, unlawful combination, or conspiracy” (terms not defined in the statute) that “impedes the course of justice.”
  - Eisenhower used the Insurrection Act in 1957 when he sent troops into Little Rock to enforce school desegregation.
  - George H. W. Bush used it in 1992 during the LA riots.
  - Trump tweeted that he would “send in the Feds” to Chicago after a spike in homicides in 2017
  - It wouldn't be that hard for a president to find a reason to send the military into an American city.
- Presidential Emergency Action Documents (PEADS) originated as part of the Eisenhower administration's plans to ensure continuity of government in the wake of a Soviet nuclear attack.

These are orders to Congress that are prepared in advance of anticipated emergencies.

- PEADS are closely guarded within the government; none have ever been publicly released or leaked.
  - However, according to FBI memos, certain sources, and court records, PEADS drafted from the 1950s through the 1970s would authorize martial law and the suspension of habeas corpus by the executive branch, revoke Americans' passports, and detain "subversives" identified in an FBI "Security Index" that contained more than 10,000 names.
  - In 1987, the Miami Herald reported Oliver North had worked with FEMA to create a secret contingency plan authorizing "suspension of the Constitution, turning control of the United States over to FEMA, appointment of military commanders to run state and local governments and declaration of martial law during a national crisis."
  - Since 2012, the Department of Justice has been requesting and receiving funds from Congress to update several PEADS first developed in 1989 and in 2008 government sources told a reporter for Radar magazine that a version of the Security Index still existed under the code name Main Core, allowing for the apprehension and detention of Americans tagged as security threats.
- Late Monday night, negotiators charged with hammering out a deal to avert another partial government shutdown announced they had reached an agreement in principle.
    - Details of the agreement have not been released, but Congressional sources told ABC News that it includes \$1.375 billion for physical barriers at the southern border.
    - It is unclear at this point if Trump will accept this new deal

## UPDATES:

- On February 15th Donald Trump declared a national emergency in an effort to circumvent Congress and fund a wall on the southern border. This came a day after Congress cleared a bill for his signature that prevented another government shutdown and provided \$1.375 billion for 55 miles of new fencing.
  - “We’re talking about an invasion of our country with drugs, with human traffickers with all types of criminals and gangs.” he said from the White House Rose Garden.
  - When he took questions later he remarked, “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. I just want to get it done faster, that’s all.”
- “The President’s actions clearly violate the Congress’s exclusive power of the purse, which our Founders enshrined in the Constitution,” Speaker Nancy Pelosi and Senate Minority Leader Chuck Schumer said in a joint statement. “The Congress will defend our constitutional authorities in the Congress, in the Courts, and in the public, using every remedy available.”
- Senior administration officials said that with the declaration, Trump will have access to a total of \$8 billion for the wall. That figure includes \$1.375 billion offered by Congress, \$600 million from the Treasury Department’s drug forfeiture fund, \$2.5 billion from a Defense Department drug interdiction program, and \$3.5 billion from a military construction budget.
- The House Judiciary Committee announced Friday that it would investigate the president’s emergency claim, while House Democrats plan to introduce legislation to block it. That measure could pass both houses of Congress forcing Trump to issue the first veto of his presidency.

- Keith Whittington a politics professor at Princeton said, “Trump has a more credible claim than he should to the necessary legal authority to bypass Congress and fund some wall construction, because both Congress and the courts have been very generous to past presidents. Congress has delegated substantial statutory authority to the president to declare emergencies and move already appropriated funds to new military construction projects.”
- On Monday, February 18th, a coalition of 16 states filed a federal lawsuit to block Trump’s plan to build the border wall without Congressional approval, declaring that the national emergency is unconstitutional.
  - The states participating in the suit are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, and Virginia. With the exception of Maryland Governor Larry Hogan, the governors of the states are Democrats. The suit names as defendants the president, the departments of Defense, Treasury, Interior, and Homeland Security; and senior officials of those departments.
  - The lawsuit seeks a preliminary injunction that would prevent the president from acting on his emergency declaration while the case plays out in the courts.
  - The complaint was filed in the U.S. District Court for the Northern District of California, a San Francisco-based court whose judges have ruled against an array of other Trump administration policies, including on immigration and the environment. According to a count by the Washington Post, the court’s judges have ruled against the Trump administration in at least nine important cases.
  - The complaint argues that diverting money that Congress designated for other purposes violates the separation of powers defined in the Constitution. The complaint says that once Congress passes laws and a president signs them, the



Constitution requires that the president take care that the laws be faithfully executed. Another clause of the Constitution, the lawsuit notes, prevents money from being paid from the U.S. Treasury unless Congress had appropriated it.

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