

Eminent Domain ~ Emergency Powers & Trump's Wall



Can Trump really exploit emergency powers to use eminent domain to build his wall without additional congressional authorization?

When Congress didn't allocate the funds for the border wall, Donald Trump, on February 15, declared a national emergency. It was an end run around Congress so he could build the fortified 1,954 mile wall between the United States and Mexico that will end up costing much more than the billions Trump touted.

So just who will be making these billions off this wall? The two main beneficiaries of this enormous budget will be the infrastructure companies and the security and arms industry. The Trump administration, as others before it, is letting infrastructure in the United States crumble. We need regular infrastructure maintenance for our bridges, railways, underground pipes, and the electric grid. This is how our infrastructure companies survive, and we survive as a society. So while our infrastructure needs go unmet, Trump brings us the border wall that will pour billions into those companies' coffers.

A quick look at the return on stocks for five of the U.S.'s largest infrastructure companies shows that the mere expectation for the construction of a border wall has already sparked profits in the billions for those companies and their stockholders. What goes unseen and rarely talked about is that the security and arms companies will benefit the most from Trump's plans to build the border wall.

Among those companies is Magala, a former Israeli security company traded on NASDAQ that specializes in wall-mounted guns, cameras, and what they call sterile security zones. Magal's robo-guard system is an automated robot used to scare people away from approaching the wall as it simultaneously sounds its ominous alarm.

Elbit Systems is the largest Israeli arms company. If the wall is built, Elbit will bring with it its experience from working on the Israeli separation wall that separates the occupied West Bank from Israel proper. It is no coincidence that Israeli companies are the first in line to get contracts for Trump's wall. They are leveraging their experience in segregation technology, which was perfected as part of the Israeli apartheid system.

Israeli Prime Minister Netanyahu recently tweeted his support for Trump's wall, highlighting its similarity to Israel's separation wall. In 2004, the International Court of Justice in the Hague gave its advisory opinion that the separation wall between Israel and the occupied West Bank constitutes a war crime. Ironically, the International Court of Justice's ruling actually contributed further to the profits of those Israeli companies that were engaged in wall building, because sections of the wall had to be torn down and rebuilt again, and again, and again, because of the contradictory rulings of the Israeli Supreme Court.

Israel's separation wall ended up costing four times the estimated original budget. If these same companies build the U.S.-Mexico border wall, the cost could be astronomical. At this point, impossible to estimate.

It is far from clear that emergency powers can be used to build the wall. Even if they can, it is questionable whether that would authorize the use of eminent domain to seize private property. And if the president succeeds in using an emergency declaration for such dubious purposes, it would set a precedent that conservative Republicans are likely to have reason to regret the next time a liberal Democrat occupies the White House.

Begin with the basics. From the founding onward, the American constitutional tradition has profoundly opposed the president's use of the military to enforce domestic law. A key provision, rooted in an 1878 statute

and added to the law in 1956, declares that whoever "willfully uses any part of the Army or the Air Force" to execute a law domestically "shall be fined under this title or imprisoned not more than two years" — except when "expressly authorized by the Constitution or Act of Congress...."

In response to the Hurricane Katrina disaster in New Orleans, Congress created an express exception to the rules, and authorized the military to play a backup role in "major public emergencies." But in 2008 Congress and President Bush repealed this sweeping exception.

The statute books do contain a series of carefully crafted exceptions to the general rule. Most relevantly, Congress has granted the Coast Guard broad powers to enforce the law within the domestic waters of the United States. But there is no similar provision granting the other military services a comparable power to "search, seize and arrest" along the Mexican border.

The truth is that the White House's emergency gambit reveals the full extent of Congress's dangerous delegation of emergency powers to the executive branch of the federal government.

Elizabeth Goitein of the Brennan Center has collected a daunting list of statutes authorizing emergency powers—The upshot? Declaring a national emergency to build the wall is a national embarrassment. It ought to be unlawful, too. But whether it is lawful to declare a national emergency to build a wall actually is a much closer question than it should be. The key statutory provisions are 10 U.S.C. 2808 (authorizing emergency reallocation of certain military construction funds) and 33 U.S.C. 2293 (authorizing emergency reallocation of certain civil works project funds.) Section 2808 states that, The president declaring a "national emergency" that "requires the use of the armed forces," military construction funds can be used to "undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law 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" of them. Indeed, federal law actually forbids the use of the armed forces for domestic law enforcement within the United States (and immigration enforcement qualifies as such). Section 2293 also only applies to a declared war or emergency that "requires or may require use of the Armed Forces." Even then, it only allows diversion of funds to build "authorized civil works, military construction, and civil defense projects that are essential to the national defense" In this context, "authorized" likely means "authorized" by Congress, not just by the executive branch.

Nothing remotely resembling a national security "emergency" is actually occurring at the southern border, and that a border wall would do virtually nothing to protect the US against any kind of terrorism or security risk. It may well not even do much to reduce undocumented immigration.

Thus, I would tentatively conclude that Trump cannot use these provisions to appropriate funds for the construction of a border wall - even during this "national emergency." However, courts often give presidents undue deference on national security and immigration issues, and that problem could recur here. Confidently predicting the outcome of a legal battle over this issue is difficult.

The federal government owns less than one third of the land needed to build the wall. The rest would have to be seized from numerous private owners, Native American tribes, and state governments. That is likely to be both costly and time-consuming. It would also open the door to serious abuses of the kind we have seen in many previous eminent domain cases, including those undertaken for past, much smaller border barriers, in which the Department of Homeland Security compiled an awful record of violating procedural rules and under-compensating owners.

Even if Trump does use his emergency declaration to transfer funds to build a border wall, it does not follow that he can seize property through the use of eminent domain. As the Supreme Court has long held, the power to use eminent domain has to be "expressly authorized" under the law. Such authorization cannot simply be assumed or inferred. None of the emergency delegations of power for construction projects discussed above "expressly" authorize the use of eminent domain for purposes that are not otherwise authorized by Congress. If it is not clear whether eminent domain is authorized or not, courts are

generally required to conclude that it isn't. Congress could, of course, solve that problem by giving Trump the authorization he needs. But the whole reason why Trump has declared an emergency is because Congress refuses to do that.

If Trump is able to overcome legal obstacles and secure funds for the wall without congressional authorization and use eminent domain to seize the land he needs, conservatives are likely to have good reason to regret the precedent it would set. The same powers could easily be used by the next Democratic president for purposes that the right would hate.

A legal precedent disallowing eminent domain to be exercised by the executive exists in *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)* which found, much to the embarrassment of President Truman that: **Unless based on specific authority from the Constitution or Congress, seizures of private property by the executive branch are invalid.** This case is notable for the fact that every Justice in the majority wrote a separate opinion, using several different rationales to reach the same conclusion.

Congress has denied Trump funding for his wall, weathering the longest partial "government shutdown" in US history rather than give it to him in December and denying it a second time with the funding bill he signed in February.

Congress saying "NO" when the president asks for money is not an "emergency." He only gets to spend the money they give him, and he only gets to spend that money on the things they've told him he can spend it on.

As Article I, Section 9 of the US Constitution puts it, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Trump's declaration of a fake "national emergency" was actually a declaration that he is now an absolute monarch, a dictator, no longer accountable to Congress for his actions.

The House passed a resolution to terminate the national emergency in February- That vote was 245-182, with 13 Republicans joining Democrats in support of termination.

The Senate was forced to take up the resolution because of its privileged status, and it passed, 59-41, with 12 Republicans joining Democrats in support. The Senate vote was considered a more significant rebuke of the president, because nearly a quarter of the Republican Conference supported the termination resolution.

House Democrats had hoped the strong showing of GOP support in the Senate might prompt more Republicans to support a veto override than had initially voted for the resolution. Ultimately, the majority earned only one more minority vote, New York Rep. John Katko, who was absent for the initial vote.

Trump's veto of a resolution that would have terminated his declaration of a national emergency at the southern U.S. border, has left the matter to federal courts where several lawsuits challenging the decision have been filed. The vote was never expected to be successful, but Democrats still wanted to take the vote to continue hammering home their point that it is Congress, not the president, controlling the power of the purse.

"Whether we can succeed with the number of votes is not the point," Speaker Nancy Pelosi told reporters in New York last week. "We are establishing the intent of Congress. ... We are Article I, the first branch of government — the legislative branch. The president has decided to be in defiance of the Constitution, to deface it with his actions."

If that's not covered by the Constitution's "high Crimes and Misdemeanors" clause outlining grounds for impeachment, what is?

And if Congress isn't prepared to respond accordingly, why should they — or we — bother with the continuing charade that they, or the law, matter at all?

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"There is a cult of ignorance in the United States, and there always has been. The strain of anti-intellectualism has been a constant thread winding its way through our political and cultural life, nurtured by the false notion that democracy means that 'my ignorance is just as good as your knowledge.'"
—Isaac Asimov