

## **Reading: The Wall, the Shutdown & the State of Emergency**

### **The Wall**

Donald Trump's pledge to crack down on illegal immigration was a centerpiece of his campaign for president and remains a focus during his presidency. In speeches before and after his election, Trump stoked up crowds by portraying immigrants as being gang members, drug dealers, rapists, murderers, slave traffickers, and job-stealers.

Scholars and advocates for immigrants have pointed out the many falsehoods and misrepresentations in Trump's claims. For example, multiple studies have found that immigrants have lower crime rates than native-born Americans. And contrary to Trump's claims, the number of undocumented immigrants trying to cross the border has been decreasing for years. But these facts have not altered Trump's repeated assertions.

Trump's greatest emotional appeal has been directed against people crossing the southern border without documentation – and his repeated declarations that he would build a wall to keep these immigrants out.

Trump received especially enthusiastic responses from his crowds when he pledged to have Mexico pay for the wall. When Mexico made it clear that the country had no intention of paying for a wall, that aspect of Trump's anti-immigration program faded into the background. Indeed, in the first two years of the Trump presidency, when Republicans controlled both houses of Congress, there was little action on building the wall.

Instead, President Trump managed to focus the nation's attention on his efforts to limit legal immigration. He attempted to ban immigration from several majority Muslim countries, end the Deferred Action for Childhood Arrivals program (DACA), end the temporary protection of immigrants fleeing wars and disaster, and separate thousands of immigrant children from their parents at the border. These efforts were not wildly popular beyond his base supporters, and were slowed or halted by court decisions.

### **The Shutdown**

In December 2018, Congress passed a bill to continue funding the federal government. But Trump refused to sign the bill because it did not contain the \$5.7 billion that he had wanted for the wall. Though Republicans in Congress had received assurances that Trump would approve the measure, Trump received a barrage of criticism from right-wing commentators and Fox News personalities and apparently changed his mind.

Trump's decision led to a partial shutdown of the federal government. Large segments of the federal government were unable to pay their employees. Some of the 800,000 federal employees affected were required to work without pay; other "non-essential" workers were told not to report to work. (All were eventually paid, though contract employees were not.)

The shutdown led to increasing problems felt across the nation, including a growing strain on the nation's air traffic control system, which is staffed by federal employees. When several air traffic

controllers did not come in to work on January 24, New York's LaGuardia airport was forced to temporarily shut down, and flights were delayed across the country.

On January 25, 2019, Trump agreed to end the shutdown, at least temporarily. He gave Congress three weeks to hammer out a new funding package. A 17-member committee negotiated a deal which provided \$1.4 billion to extend a barrier at the border – falling far short of Trump's requested \$5.7 billion.

On February 15, President Trump did sign the bill, which keeps the federal government funded until September 30, 2019. But at the same time, he announced that he was declaring a national emergency and that he would build the wall with the emergency powers this would give him as President. Three days later, a coalition of 16 states, including California and New York, challenged Trump's move in court, arguing that the president does not have the power to divert funds for constructing a wall along the Mexican border because it is Congress that controls spending.

### **The 'National Emergency'**

Though the U.S. Constitution does not define national emergencies, there is a history of presidents acting unilaterally when a crisis arises and they believe urgent action is needed, even without Congressional authorization. Scholars disagree about exactly which actions fall into this category, but the following actions are frequently cited:

- President Lincoln's suspension of constitutional rights (habeas corpus) during the Civil War
- President Roosevelt's "bank holiday" during the Great Depression
- President Roosevelt's internment of Japanese-Americans during World War II
- President Truman's (attempted) seizure of steel mills during the Korean War
- President Nixon use of the National Guard to deliver mail during a postal strike

In the century following the Civil War, Congress passed numerous laws adding to the President's powers to act in military and other crises. In 1976, Congress enacted the "National Emergencies Act," which attempted to codify and define (and thereby limit) the powers of the President in times of emergencies. Importantly, it requires the President to specify which existing laws justify the declaration of an emergency and to estimate the costs involved. The National Emergencies Act also gives Congress the power to rescind the emergency. And it requires the President to renew the emergencies annually, and Congress to review the emergencies regularly.

Unfortunately, the National Emergencies Act did nothing to define what exactly a national emergency is (and is not), and no criteria were established to make the presidential decree legal. And, in fact, Congress has never reviewed the existing national emergencies.

Since 1976, presidents have declared 58 national emergencies, and many of them remain in effect today. Almost all of them have involved economic sanctions against foreign countries, individuals, or groups. For example:

- President Carter imposed sanctions against Iran after Americans were taken hostage in 1979
- President Clinton imposed sanctions against Haiti in 1994 after a military coup
- President George W. Bush prohibited transactions with terrorists or anyone supporting terrorists after 9/11

Other countries sanctioned by the United States through national emergency powers include Nicaragua, Cuba, Iraq, Yemen, Libya, Panama, Serbia, and Sudan.

The actual powers that presidents may exercise after identifying the laws they think apply, are vast. The Brennan Center for Justice has identified 123 laws that grant the President emergency powers. These powers range from taking control of communications facilities to deploying troops in domestic crises, to seizing property and bank accounts of American citizens. The President may institute martial law and even test chemical weapons on innocent civilians.

Trump asserted that the flow of drugs, criminals, and illegal immigrants from Mexico constituted a threat to national security that justified his declaration of an emergency. “It’s an invasion,” he said. “We have an invasion of drugs and criminals coming into our country.” Trump said that he would use his emergency authority to tap three additional pots of money: \$600 million from a Treasury Department law enforcement fund; about \$2.5 billion from a military antidrug account; and \$3.6 billion in military construction funds.

### **The Opposition**

While the laws governing emergency powers are vague, it is possible that courts may not uphold Trump’s border “emergency” and that many Republicans will not support the use of a national emergency to build his wall. The arguments against Trump’s declaration include:

- Allocating government funds is Congress’ job; not the President’s. Congress considered and rejected President Trump’s wall. There is no precedent for a President declaring a national emergency in order to thwart a Congressional decision on funding. Under the U.S. Constitution, Congress serves as “keeper of the purse” – that is, it is the branch of government that drafts and passes federal budgets, which must then be signed by the President in order to be enacted. This is the argument that a coalition of 16 states is using in its court challenge of Trump’s plan.
- There is no evidence of an “emergency” related to undocumented immigrants at the border. In fact, according to research by the Center for Migration Studies, the number of immigrants from Mexico entering the U.S. without documents has dropped steeply since 2010. There were fewer undocumented immigrants from Mexico living in the U.S. in 2017 than in 2016.
- Landowners whose property will have to be seized in order to build the wall have threatened to sue. Many Republicans are skeptical of government seizure of property.
- In order to build the wall, the President will have to take funds from other agencies’ budgets. Defenders of those agencies will likely be opposed to these unplanned cuts.
- Republicans may also be wary of allowing a president to use emergency powers for a dubious emergency, fearing that future Democratic presidents will be empowered to declare a national emergency to address challenges such as climate change or gun violence.

The prospects for building the wall that President Trump has promised are uncertain. The House of Representatives, now in Democratic hands, is almost certain to vote to rescind the emergency. With only a few Republican votes, the Senate too may vote to cancel Trump’s declaration. But if, as is likely,

President Trump vetoes such a resolution, it is doubtful that Congress will have the necessary two-thirds majority in the House and Senate to override it.

Meanwhile, lawsuits against Trump's state of emergency, including the one by states, are likely to proceed to the Supreme Court. Although the court now includes two Trump appointees, it is unclear how the court would rule on the issue.

## **For Discussion**

1. Do you think the border wall President Trump has called for will make the U.S. safer? Why or why not?
2. Do you think the United States should allow people who are fleeing war or other life-threatening conditions in their home country to find refuge in the U.S.? (Under international law, countries are required to provide such refuge.)
3. Whether or not you agree with the idea of a border wall, do you think the President should be able to build a wall if he thinks it is important – even if it means overriding Congress's constitutional role as “keeper of the purse”?
4. Do you think there is a national emergency at the Mexican border? If so, what is the emergency?
5. Should national emergencies be limited to those situations which require immediate action to address urgent needs that would take too long for Congress to act on? If so, provide some examples.
6. Do you agree with those who argue that Trump's declaration of a national emergency in this case sets a dangerous precedent? Why or why not?