



A Legal Review of the National Emergencies Act

Executive Summary

The following memorandum addresses several issues pertaining to presidential declarations of national emergencies made in response to national security, humanitarian and/or economic crises present at or, because of, the United States' porous Southern Border. It includes an assessment of the National Emergencies Act, 50 U.S.C. § 1601–1651 (2018), and its implications upon the President of the United States' considerations and decisions in how best to respond to these crises. President Trump has now declared a national emergency allowing military construction of a border wall to ensure that our southern border is secured against the spread of drugs and disease as well as the influx of multiple thousands of persons, including members of criminal gangs like MS-13, seeking to enter the country unlawfully. In short, the President of the United States possesses the authority under the National Emergencies Act to declare a national emergency for the purposes of securing the nation from sundry threats and to halt an ongoing humanitarian crisis, resulting from a lack of funding to deal with the current situation.

Justifications for Proclaiming a National Emergency

The threats facing our borders are steeply rising and without stricter border security, our nation remains vulnerable to the drug and crime violence that proliferate along the U.S./Mexico border. According to the Department of Homeland Security, within the last three years, “DHS has seized 74 percent more currency, 41 percent more drugs, and 159 percent more weapons along the Southwest border as compared to fiscal years 2006-2008.”¹ Across the board, “[t]he Department of Homeland Security (DHS) refuses entry to 7 known or suspected terrorists every day, 50 every week, and 2,500 every year.”² There has been a 300% increase in unaccompanied alien children and a 600% increase in family units for fiscal year (FY) 2017.³ The Border Patrol also saw a 73% increase in assaults on officers along the Southwest border for FY 2017.⁴

¹*Border Security Results*, DEP'T OF HOMELAND SECURITY (Mar. 9, 2018), <https://www.dhs.gov/border-security-results>.

²*We Must Secure The Border And Build The Wall To Make America Safe Again*, DEP'T OF HOMELAND SECURITY (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/we-must-secure-border-and-build-wall-make-america-safe-again>.

³*Id.*

⁴*Id.*

Drug Activity

“Mexican transnational criminal organizations (TCOs) ‘remain the greatest criminal drug threat to the United States; no other group is currently positioned to challenge them.’”⁵ For FY 2017, six drug types accounted for 96.1% of drug trafficking offenses: Meth (36.9%), Powder Cocaine (20.3%), Marijuana (14.1%), Crack Cocaine (8.2%), Heroin (13.8%), and Oxycodone (2.8%).⁶ In 2015, a total of 1,555,552 lbs. of illegal drugs had been seized coming across the Southwest border.⁷ Among these drugs, there has been an increasing concern regarding drugs contributing to the opioid drug abuse epidemic, such as heroin.⁸ According to the Drug Enforcement Administration, “[t]he SWB [Southwest border] remains the primary entry point for heroin into the United States.”⁹ In 2017, 7,979 kg of heroin was seized nationwide, with 3,090 kg (39%) of that figure being seized at the Southwest border.¹⁰ Significantly, the DEA has recognized that “[s]ince 2015 most of the heroin sold in the U.S. is from Mexico.”¹¹

MS-13

Additionally, gangs and gang violence continue to pose dangers to American citizens. MS-13, a gang whose motto is to “kill, steal, rape, and control,”¹² has a reputation for particularly violent criminal activity.¹³ Over 10,000 MS-13 members are in the United States conducting gang activities in at least 40 states and the District of Columbia.¹⁴ In November 2018, Texas reaffirmed that MS-13 is a Tier One threat.¹⁵

⁵ KRISTIN FINKLEA, CONG. RESEARCH SERV., R44599, HEROIN TRAFFICKING IN THE UNITED STATES 2 (Dec. 11, 2018) (citing DRUG ENFORCEMENT ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT, vi (2018)).

⁶ U.S. SENTENCING COMM’N, QUICK FACTS: DRUG TRAFFICKING OFFENSES (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_2017.pdf.

⁷ Drug Trafficking Across Borders, *Examining Drug Seizures by U.S. Border Patrol*, DRUGABUSE.COM, <https://drugabuse.com/featured/drug-trafficking-across-borders/> (using seizure data collected from U.S. Customs Border Patrol for fiscal years 2012 through 2015 and the United Nations’ World Drug Report).

⁸ *Supra* note 5, at 1.

⁹ U.S. Drug. Enforcement Admin., *2018 National Drug Threat Assessment*, DEA.GOV, 18 (Oct. 2018) <https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NTA%20final%20low%20resolution.pdf>.

¹⁰ *Supra* note 5, at 3.

¹¹ *Id.* at 2 (citing DRUG ENFORCEMENT ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT, 13 (2018)).

¹² *Treasury Sanctions Latin American Criminal Organization*, DEP’T OF THE TREASURY (Oct. 11, 2012), <https://www.treasury.gov/press-center/press-releases/pages/tg1733.aspx>.

¹³ KRISTIN FINKLEA, CONG. RESEARCH SERV., R45292, MS-13 IN THE UNITED STATES AND FEDERAL LAW ENFORCEMENT EFFORTS 1 (Aug. 20, 2018) [hereinafter FEDERAL LAW ENFORCEMENT EFFORTS], <https://fas.org/sgp/crs/homsec/R45292.pdf>.

¹⁴ *Department of Justice Fact Sheet on MS-13*, DEP’T OF JUSTICE (Apr. 18, 2017), <https://www.justice.gov/opa/speech/file/958481/download>.

¹⁵ Texas Joint Crime Information Center Intelligence & Counterterrorism Division Texas Department of Public Safety, *Texas Gang Threat Assessment*, TEX. DEP’T OF PUB. SAFETY, 19 (Nov. 2018), http://www.dps.texas.gov/director_staff/media_and_communications/2018/txGangThreatAssessment20181.pdf.

Within the United States, MS-13 gang members are involved in “extortion, drug distribution, prostitution, robbery, and murder, as well as in more transnational illicit activity such as drug trafficking and human smuggling and trafficking.”¹⁶ In a 2018 study, the Center for Immigration Studies reviewed 506 MS-13 members that were arrested or charged with crimes in 22 states.¹⁷ Of these, 207 MS-13 members were charged with murder; over 100 were accused of conspiracy/racketeering, and dozens of others were arrested for “drug trafficking, sex trafficking, attempted murder, sexual assaults, and extortion.”¹⁸ Out of the 506 MS-13 suspects, 126 were illegal immigrants, and 38 of the 207 murder suspects were illegal aliens.¹⁹ 120 out of the 506 MS-13 suspects arrived as UACs (Unaccompanied Alien Children), including 48 of the murder suspects.²⁰

General Crimes

The crime level stemming from the Mexican-U.S. border causes concern for the safety of United States’ citizens. From 2016–2018, United States Customs and Border Protection reported the following convictions: 2,205 for assault, battery, and domestic violence; 1,742 for burglary, robbery, larceny, theft, and fraud; 5,116 for driving under the influence; 14 for homicide and manslaughter; 15,199 for illegal entry and re-entry; 508 for illegal weapons possession, transport, trafficking; 370 for sexual offenses; 5,693 for other.²¹ Additionally, border apprehensions steadily increased through 2018 from a low of 25,905 in January 2018 to 62,456 in November 2018.²²

Sex Trafficking

Sex trafficking is also a major concern with the United States-Mexico border. Currently, a minimum of 47 sex-trafficking rings operate in Mexico.²³ An estimated 45,000 to 50,000 persons are trafficked into the U.S. yearly.²⁴ According to the Department of State, Mexico is the primary country responsible for sex trafficking within the United States.²⁵

These statistics constitute a tangible and incontrovertible manifestation of an increasing threat to our national security. The President’s interest in declaring a national

¹⁶FEDERAL LAW ENFORCEMENT EFFORTS, *supra* note 13, at 3.

¹⁷Jessica M. Vaughan, *MS-13 Resurgence: Immigration Enforcement Needed to Take Back Our Streets*, CTR. FOR IMMIGR. STUD. (Feb. 21, 2018), <https://cis.org/Report/MS13-Resurgence-Immigration-Enforcement-Needed-Take-Back-Our-Streets>.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Total Criminal Conviction by Type FY2016–2017 Totals, and FY2018 YTD (October 1, 2017-August 31, 2018)*, U.S. CUSTOMS & BORDER PROTECTION (Oct. 23, 2018), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-alien-statistics>.

²²*Southwest Border Migration FY 2019*, U.S. CUSTOMS & BORDER PROTECTION (Dec. 10, 2018), <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

²³Alexandra Still, *Solving Human Trafficking Between Mexico and the United States*, 9 PEPP. POL’Y REV. (July 20, 2017), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1144&context=ppr>.

²⁴*Id.*

²⁵*Id.*

emergency is founded upon the legitimate concerns regarding multiple threats infiltrating our southern border.

Presidential Power & the National Emergencies Act

When a national emergency like the one our country is currently facing on the border presents itself, the President may exercise certain constitutionally implied and/or statutorily granted emergency powers. Under the National Emergencies Act, Congress established certain procedural formalities for utilizing some of the statutorily delegated emergency authority, including requirements that the President formally declare the existence of a national emergency and specify upon what statutory authority he intends to act.

The Act also provides Congress a means of terminating the declaration, assuring that political pressure, rather than litigation, would serve as a check against any alleged abuse of executive authority. This provision, in our considered view, is more than a mere procedural formality; indeed, this aspect of the Act undercuts a primary argument advanced by the President's critics on this issue, *i.e.*, the contention that the Act does not authorize the President to utilize emergency declarations or power because Congress has specifically considered and refused to appropriate funds for the wall.²⁶ Since Congress has not placed any serious limits on the President's power to declare an emergency²⁷ and since Congress' decision to, in the statute, vest itself with the power to terminate a presidentially declared emergency at the appropriate time, the solution exists to resolve this ostensible problem, if it actually exists. Importantly, the Act contains no formal definition of what constitutes a national emergency. Instead, the Act appears to recognize the President's constitutional discretion to make such a determination.

Contrary to the above-referenced analysis, some may observe that President Obama issued an Executive Order on immigration that was clearly contestable in court. But distinctions abound. First, President Obama's EO was issued in an arena wherein there was already underlying law in place meaning that his EO essentially changed or attempt to change existing law by executive fiat without the participation of Congress. In his own words, he "change[d] the law" – by creating a program granting "deferred action" and hence, "lawful presence" to over 4 million unlawfully present immigrants. The district court found that he was "not just rewriting the laws, he is creating them from scratch."²⁸ This could not be more different from what President Trump is

²⁶See, e.g., Erwin Chemerinsky, *Why Trump can't Simply Build His Wall. Hint: It's That Pesky Constitution*, L.A. TIMES (Jan. 7, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-trump-constitution-20190108-story.html>; Noah Feldman, *No 'Emergency' Will Allow Trump to Build His Wall*, BLOOMBERG OP. (Jan. 7, 2019), <https://www.bloomberg.com/opinion/articles/2019-01-08/trump-can-t-declare-national-emergency-to-build-border-wall>. But see John Yoo, *The Law will Be on Trump's Side If He Declares an Emergency to Fund His Wall*, THE NATIONAL REVIEW, (February 7, 2019) <https://www.nationalreview.com/2019/02/trump-border-wall-emergency-declaration-legal-likely-upheld/>.

²⁷John Yoo, *The Law will Be on Trump's Side If He Declares an Emergency to Fund His Wall*, THE NATIONAL REVIEW, (February 7, 2019) <https://www.nationalreview.com/2019/02/trump-border-wall-emergency-declaration-legal-likely-upheld/>.

²⁸ *Texas v. United States*, 86 F. Supp. 3d 591, 663 n. 81 (S.D. Tex. 2015).

doing. President Trump has the authority to uphold the laws and protect the Nation. He is upholding them with explicit congressional approval as he is acting under a specific statutory grant, which allows him to do just this: declare a national emergency. If Congress disagrees, it has the right to rescind it. In addition, President Obama's immigration EO was a clear infringement on Congress' Article I authority to determine classes that are granted entry, while this action is both a use of a statutory grant and an exercise of an Article II national security power to prevent entry based on a potential threat. The distinction boils down to this: President Obama was trying to change the law to give illegal immigrants legal status. President Trump is trying to uphold the law, which says that illegal immigrants are just that: illegal. These two situations could not be more different, and the failure to understand such distinctions in presidential action constitutes an unwarranted conflation of the two different situations.

It is our view that widely available statistics and data clearly support the decision by the President to declare a national emergency. Although it can be argued that traditional notions of emergencies encompass aspects of suddenness, and while some commentators will doubtlessly contend that the border-related crises have been anything but sudden, any impartial analysis of the history of congressional and presidential treatment of national emergencies over the years reveal that suddenness has *not* been viewed as a requirement of the Act. The dozens of officially continuing states of emergency in the United States relied upon by previous Presidents substantiates the defensibility of this conclusion.

Additional Statutory Provisions

Regarding statutory provisions that the President may assert as a basis for declaring an emergency for the situation at hand, one key statute permits the Secretary of the Army to halt Army civil works projects during a presidentially declared emergency and instead direct troops and other resources to help construct “authorized civil works, military construction and civil defense projects that are essential to the national defense.”²⁹ The Army Corps of Engineers (COE) has a large capacity and operates pursuant to a separate budget from that of the Army. The COE FY 2019 Budget includes \$4.785 billion in gross discretionary funding for the Civil Works program of the U.S. Army Corps of Engineers.³⁰

²⁹33 U.S.C. § 2293(a) states: “In the event of a declaration of war or a declaration by the President of a national emergency in accordance with the National Emergencies Act [50 U.S.C. 1601 et seq.] that requires or may require use of the Armed Forces, the Secretary, without regard to any other provision of law, may (1) terminate or defer the construction, operation, maintenance, or repair of any Department of the Army civil works project that he deems not essential to the national defense, and (2) apply the resources of the Department of the Army’s civil works program, including funds, personnel, and equipment, to construct or assist in the construction, operation, maintenance, and repair of authorized civil works, military construction, and civil defense projects that are essential to the national defense.” 33 U.S.C. § 2293(a) (1986).

³⁰*President’s Fiscal 2019 Budget for U.S. Army Corps of Engineers Civil Works Program Released*, U.S. ARMY CORPS OF ENGINEERS (Feb. 12, 2018) [hereinafter *President’s Fiscal 2019 Budget*], <https://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1438488/presidents-fiscal-2019-budget-for-us-army-corps-of-engineers-civil-works-progra/>.

Another law permits the Secretary of Defense, in an emergency, to begin military construction projects “not otherwise authorized by law that are necessary to support such use of the armed forces,” using funds that Congress had appropriated for military construction purposes that have not yet been earmarked for specific projects.³¹

Additionally, Congress has effectively pre-approved a wall-like barrier under other laws, including one that authorizes the military to construct border “fences” blocking drug-smuggling corridors,³² and another statute called “The Secure Fence Act of 2006.”³³ This act empowers the Department of Homeland Security to do exactly what the President has indicated he desires to do: build a physical infrastructure enhancement along the border. Despite the existence of such statutory authority, it is plausible that the President could elect to skip the “pre-existing authorization” requirement and argue that the wall actually meets the legal definition of military construction.³⁴

Prior Presidential Action under the National Emergencies Act

The emergency already declared in Executive Order 13224 by President George W. Bush, which authorized the use of economic sanctions to address terrorism and threats of terrorism committed by foreign terrorists against U.S. nationals or the United States, was relied upon to support President Barack Obama’s Directive No. 3025.18: Defense Support of Civil Authorities, under which U.S. Commanders “are provided emergency authority.”³⁵ Some conditions that allow for the use of this directive include military support needed “to prevent significant loss of life or wanton destruction of property” or “to restore governmental function and public order.”³⁶

National Emergencies Act and Judicial Review

On the issue of judicial review that arises in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and its progeny, *see, e.g., Zivotofsky ex rel. Zivotofsky v.*

³¹10 U.S.C. § 2808(a) states, “In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may 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. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing that have not been obligated.” 10 U.S.C. § 2808(a) (1982).

³²10 U.S.C. § 284(b) (7).

³³Secure Fence Act of 2006 (Pub. L. 109-367) (2006).

³⁴The term “military construction” includes any construction, development, conversion, or extension of any kind which is carried out with respect to any military facility or installation (including any Government-owned or Government-leased industrial facility used for the production of defense articles and any facility to which section 2353 of this title applies), any activity to which section 2807 of this title applies, any activity to which chapter 1803 of this title applies, and advances to the Secretary of Transportation for the construction of defense access roads under section 210 of title 23. Such term does not include any activity to which section 2821 or 2854 of this title applies.” 10 U.S.C. § 114(b).

³⁵DEPARTMENT OF DEFENSE, DIRECTIVE NO. 3025.18 § 4(i) (2010), <http://twit-media.washtimes.com/media/misc/2014/05/28/ring-document.pdf>.

³⁶*Id.* § 4(i) (1).

Kerry, 135 S. Ct. 2076, 2085–84 (2015), those cases are distinguishable and, in our view, not inconsistent with a presidential declaration of national emergency under the current circumstances. In sum, application of *Youngstown* should lead a court to recognize the President’s power to act subject to the authority provided by relevant constitutional and statutory provisions. However, a more in depth review of *Youngstown* and its application to the issues at hand is necessary and recommended – with a basic understanding that presidential action in this case may be based on the President’s inherent constitutional power under Article II of the Constitution as well as statutorily granted power via the legislative branch, or pursuant to a combination of both, which appears to be the strongest and most ideal basis in support of the President’s ability to act in the face of the current crisis. In addition, it is important to note that the Supreme Court’s reversal of President Truman’s seizure of the Nation’s steel mills in *Youngstown Sheet & Tube* is a situation that is inapplicable here because the issue in that case involves taking possession of private property rather than securing the nation’s borders.³⁷

Although the National Emergencies Act does not contain a specific provision allowing judicial review, concerning justiciability, it seems the Supreme Court would likely allow review of presidential action under the National Emergencies Act. It could do so without deciding such review is appropriate as a matter of law while affording great deference to the President.

³⁷ See John Yoo, *The Law will Be on Trump’s Side If He Declares an Emergency to Fund His Wall*, THE NATIONAL REVIEW, (February 7, 2019) <https://www.nationalreview.com/2019/02/trump-border-wall-emergency-declaration-legal-likely-upheld/>.