

“The Dangers and Limits of Government by Emergency Rule”

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Government by emergency rule is a hallmark of authoritarian regimes. It is not hard to see why. Under the constitutions of many countries, a declaration of emergency allows the head of state to accrue vast powers, including the power to suspend some or all of the rights that the constitution gives to the people. The temptation to exploit crises—or to invent them—can be irresistible for leaders who wish to rule by fiat.

On paper, the United States is different. The primary source of the president’s emergency powers is Congress, not the Constitution. While some of the powers Congress has afforded presidents are sweeping and vulnerable to abuse, they do not override constitutional rights; moreover, previous presidents have shown restraint in their use. In times of war, presidents have occasionally relied on dubious claims of inherent constitutional powers, taking actions that violated the people’s rights in misguided efforts to keep the nation safe. But no American president has manufactured emergencies in an effort to consolidate power and subvert democracy.

In his use of emergency powers as in so many other areas, President Trump has already broken with historical patterns. In 2019, he became the first U.S. president since the enactment of the National Emergencies Act to declare a national emergency for the express purpose of getting around Congress over a policy dispute (whether to spend billions of dollars to build a wall on the southern border). In his second term, he has declared a record nine national emergencies in his first eight months in office, almost all to sideline Congress on policy matters such as energy production, tariffs, and immigration. He has also misused wartime and domestic military deployment authorities to facilitate mass deportations without due process and to suppress protests against unpopular immigration policies.

Perhaps most concerning, though, is the fact that he has claimed emergency powers that simply do not exist. In some cases, he has claimed that these powers may be inferred from statutes that don’t actually provide them. In other cases, he has ascribed them (wrongly) to the Constitution, or to nothing at all. As some of his allies begin to float legally baseless notions of using emergency powers to “protect” elections, the health of our democracy may turn on whether Congress and the Supreme Court will draw the line on Trump’s abuses of emergency powers—and whether Americans will begin to accept these abuses as normal.

The U.S. Emergency Powers Framework

Emergency powers play a distinct role in our constitutional system. Emergencies, [by definition](#), are sudden, unexpected crises that require immediate action. Because they are unexpected, the powers conferred on the president by existing laws might not be sufficient to address them. And as a bicameral, deliberative body, Congress cannot always respond with the necessary speed and

flexibility. Emergency powers thus give the president extraordinary legal leeway, to be used on a temporary basis until the emergency passes or Congress has time to act.

The farthest-reaching emergency powers are those governed by the [National Emergencies Act](#). Under this 1976 law, the president has broad discretion to declare a national emergency. That declaration then unlocks standby powers contained in [137 statutory provisions](#) scattered across the U.S. Code. The subjects of these powers run the gamut from military deployment to communications to agriculture. Some of them carry alarming potential for abuse—including powers to [shut down or take over](#) communications facilities, [freeze Americans' assets](#) without judicial approval, and [control domestic transportation](#).

Congress has also passed standalone laws to address particular types of emergencies. The [Insurrection Act](#), for instance—an amalgamation of laws passed between 1792 and 1874—authorizes the president to deploy federal armed forces domestically to quell civil unrest and execute the law in a crisis. Similarly, the 1798 [Alien Enemies Act](#) allows the president, during wartime, to summarily detain and deport people born in enemy nations. Although neither law requires an emergency declaration, both are clearly emergency powers, insofar as they confer extraordinary powers to address extraordinary circumstances.

The plethora of emergency authorities passed by Congress reflects the fact that the Constitution itself gives the president no express emergency powers. Nonetheless, modern presidents have increasingly laid claim to *inherent* constitutional powers to take action during emergencies. The Supreme Court has provided little guidance on the existence and scope of inherent constitutional emergency powers. It has [made clear](#), however, that Congress may constrain any of the president's constitutional authorities as long as Congress is acting within its own enumerated powers.

President Trump's Unprecedented Use of Emergency Powers

Despite the potency of the statutory powers available to presidents during national emergencies, there was surprisingly little abuse of these powers until recent years. Before 2019, with the notable exception of International Emergency Economic Powers Act (IEEPA) invocations (discussed below), national emergency declarations under the National Emergencies Act were [few and far between](#). All of the five non-IEEPA declarations issued during this period responded to sudden, unexpected events, such as the terrorist attacks of 9/11 and Hurricane Katrina, and all at least arguably required immediate action.

In 2019, President Trump broke with this tradition of self-restraint when he [declared a national emergency](#) to secure funding for the southern border wall. At the time, there was no sudden, unexpected crisis at the border—to the contrary, unlawful border crossings were [hovering near a 40-year low](#). And by Trump's own admission, there was no need for immediate action; in [his words](#), "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." Instead, Trump invoked emergency powers for the [stated purpose](#) of getting around Congress, which had repeatedly refused to allocate the funds he requested.

With the seal broken, President Joe Biden tried a similar move in 2022. He attempted to use emergency powers to [forgive student loan debt](#) after Congress failed to enact legislative solutions to the longstanding problem. The Supreme Court [blocked](#) his plan, holding that the emergency power he had invoked authorized only smaller modifications to loan repayment terms, not outright loan forgiveness.

In his second term, Trump has taken the use of emergency powers to an entirely new and unprecedented level. His declaration of [nine national emergencies in eight months](#) far outpaces any previous president (including Trump himself, in his first term) in the five decades since the National Emergencies Act was passed. As a point of reference, over a four-year span that saw a historic pandemic, and three of the [costliest hurricane seasons](#) on record, President Biden declared a total of 11 national emergencies.

Most of Trump's declarations involve sidestepping Congress, and none constitutes a necessary response to a true "emergency," as the term is commonly defined. For instance, Trump [declared](#) a national emergency based on alleged energy shortages to bolster the production of fossil fuels, notwithstanding the fact that the U.S. is the world's largest exporter of [oil](#) and [natural gas](#). He [declared](#) a border emergency based on a supposed "invasion" by undocumented migrants at a time when unlawful border crossings had been [steadily declining](#) for a year. Weeks after Trump himself [pronounced](#) the "invasion" over due to a dramatic drop in border traffic, he relied on the declaration to [transfer hundreds of miles of federal land](#) at the border to the Department of Defense—a move that would otherwise be [illegal](#) without congressional approval.

The list goes on. Trump has imposed emergency sanctions on foreign persons and nations that seek to uphold the rule of law, including [International Criminal Court employees](#) (for investigating allegations that U.S. and allied personnel committed war crimes) and [Brazil](#) (for prosecuting former president Jair Bolsonaro after he attempted to overthrow Brazil's democratically elected government). Perhaps most infamously, Trump declared that longstanding trade imbalances constituted an emergency justifying the [imposition of tariffs](#) on nearly every nation in the world, usurping a power the Constitution expressly gives to Congress.

Outside the National Emergencies Act framework, Trump [invoked the Alien Enemies Act](#) to deport [137 Venezuelans](#) to a notorious El Salvadoran prison based on unsubstantiated allegations that they were members of the Venezuelan gang Tren de Aragua. (It has since emerged that the majority of the deported individuals, who remain imprisoned in El Salvador, had [no criminal record whatsoever](#). Moreover, many—if not most—[were here lawfully](#).) As a matter of law, the Alien Enemies Act is available only during declared [war or when there](#) is an invasion or "predatory incursion" by a foreign nation or government. Despite a wealth of contradictory evidence, Trump claimed that Tren de Aragua had "invaded" the United States at the direction of Venezuela's Maduro regime. The law had [previously been used](#) only three times: during the War of 1812, during World War I, and after the bombing of Pearl Harbor.

Trump misused another statutory emergency authority to deploy the military in American cities. In [Los Angeles](#) and [outside Chicago](#), protests against Immigration and Customs Enforcement (ICE) operations involved some acts of violence. In [Portland](#), there was no violence in the weeks

leading up to the deployment, but protesters displayed a makeshift guillotine, twice shone lights into the eyes of ICE officers, and posted a photograph of an unmarked ICE vehicle. Trump responded by federalizing National Guard forces and ordering their deployment in these cities over the objections of the respective governors and mayors. (At time of writing, a federal judge in Oregon has [blocked](#) the Portland deployment.) He invoked a [little-known law](#) that authorizes federalization of the Guard when the president is “unable with the regular forces to execute the laws of the United States”—even though ICE continued its enforcement actions throughout the protests. Although previous presidents have deployed federal forces to address civil unrest or enforce the law, they have [generally done so](#) only when a state’s governor requested assistance or when state and local authorities themselves were obstructing the law (as occurred during the Civil Rights era).

Finally, Trump has claimed that unlawful migration constitutes an “invasion,” and that the existence of an invasion confers sweeping powers on the president under the Constitution. Among other things, he has claimed that he is constitutionally empowered to [use military force](#) to repel migrants and that he may [set aside laws](#) governing asylum. These claims once again seek to bypass Congress, which has the constitutional authority to provide for calling forth military forces to repel invasions and to pass laws governing immigration.

Like Trump’s other uses of emergency powers, his reliance on claimed constitutional powers to address the migrant “invasion” is unprecedented. To be sure, previous presidents have asserted sweeping powers during wartime, and they have occasionally used those powers to commit massive rights violations. Examples include President Franklin Delano Roosevelt’s internment of more than 100,000 Japanese Americans during World War II and President George W. Bush’s authorization of torture and warrantless wiretapping after 9/11. These actions were wrong and illegal. At the same time, there was no question that they were undertaken in response to actual attacks on the United States. Here, Trump is exploiting the perennial phenomenon of unlawful migration to circumvent Congress and assert vast claims of power.

The Emergency Powers that Don’t Exist

Compounding the concerns over Trump’s declarations of fake emergencies is his exaggerated view of the powers such declarations unlock. His use of IEEPA to impose worldwide tariffs is a case in point. From the time of IEEPA’s enactment in 1977, presidents have treated it as a general delegation of foreign sanctions authority rather than an emergency power. Congress has largely acquiesced as IEEPA has become a routine tool of foreign policy. Even so, no president has used IEEPA for tariffs. That’s because the law, which sets forth a [long list of economic actions](#) the president can take to address foreign threats, conspicuously omits any mention of tariffs, taxes, or duties.

Trump similarly overreached in his memorandum authorizing the secretary of defense to federalize National Guard forces in response to protests in Los Angeles. The law permits federalization as a last resort; it can be used only when civilian law enforcement officers are overwhelmed. Yet in his [memorandum](#), Trump authorized deployment, not only in Los Angeles, but anywhere in the country where a protest against any federal function was occurring or was likely to occur—regardless of whether it involved any violence or obstruction of federal law.

There is no law that gives the president the power to order nationwide, preemptive military deployments to police protests.

Trump also overreads his constitutional powers to act during an invasion. In one [executive order](#), he claimed the constitutional authority to override laws that afford undocumented migrants relief from deportation, including asylum laws. He has no such authority. As the Supreme Court made clear in the landmark 1952 case [Youngstown Sheet & Tube Company v. Sawyer](#), the president may disregard statutes only if Congress exceeded its own constitutional authority in passing them. Congress not only has authority to enact laws governing immigration; it has “plenary” authority in that area, [according to the Supreme Court](#).

At times, Trump’s statements suggest a belief that a declaration of national emergency gives him the power to do whatever he thinks necessary. For instance, the law Trump invoked to commandeer the District of Columbia’s Metropolitan Police Department (MPD) includes a 30-day limit on the president’s authority unless Congress extends it. As the deadline approached, Trump [said](#) that he would declare a national emergency to continue his control over the MPD if Congress did not pass the extension. He [reprised this threat](#) recently, after D.C. Mayor Muriel Bowser announced that the MPD would no longer cooperate with Immigration and Customs Enforcement operations. Yet none of the 137 powers available to the president when he declares a national emergency grants him any authority over the MPD whatsoever.

Trump’s inflated view of his emergency powers is particularly worrisome in the realm of elections. After he lost the 2020 presidential election, his aides and allies urged him to invoke a range of emergency powers to hold on to the White House. They advised him to [declare](#) a national emergency; [invoke](#) the Insurrection Act; [impose](#) martial law (something the president likely has [no authority to do](#) under current law); and “temporarily [suspend](#) the Constitution” (a power no U.S. president has ever had). One of Trump’s attorneys [urged](#) him to seize voting machines under IEEPA, a proposal he seriously [considered](#).

The president has no legal authority to overturn the results of an election by *any* means, let alone the far-fetched ones posited by some in Trump’s orbit. IEEPA, for instance, allows the president to block financial transactions and to freeze assets, but it [permits](#) the *seizure* of property only “when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals,” and the seized property belongs to a foreign enemy. Even more fundamentally, the seizure of voting machines—or any other action designed to overturn the election results—would violate a host of laws that [prohibit election interference](#).

Trump did not follow these suggestions, instead urging a [weapons-wielding crowd](#) to march to the U.S. Capitol building and “[fight like hell](#)” against the democratic transition of power. But his attacks on the rule of law have been far more aggressive in his second term. In a recent Cabinet meeting, when asked about possibly deploying National Guard forces in Chicago, he [stated](#) that he has “the right to do anything I want to do. I’m the president of the United States. If I think our country is in danger . . . I can do it.”

In early September, attorney and Trump associate Cleta Mitchell [issued this prediction](#): “I think maybe the president is thinking that he will exercise some emergency powers to protect the

federal elections going forward.” (The “protection” would be against alleged fraudulent voting by undocumented migrants—a phenomenon that is [vanishingly rare](#).) Although the Constitution vests responsibility for federal elections solely in the states and Congress, Mitchell asserted that there was an exception “where there is a threat to the national sovereignty of the United States.” No such exception appears in the Constitution, U.S. Code, or case law.

Drawing the Line on Abuse of Emergency Powers

When a president uses emergency powers to sideline Congress in the absence of an emergency, it threatens the constitutional separation of powers. When he lays claim to emergency powers beyond those conferred by the Constitution or Congress, it threatens the rule of law. And if he is willing to use these claimed powers to influence the results of an election, it threatens democracy.

Lawmakers could stand up for the separation of powers in multiple ways. The National Emergencies Act establishes special rules under which any member can force a vote on a joint resolution to terminate a national emergency declaration. But those rules are subject to change in committee, and majority leaders in the House have [blocked all efforts](#) to shut down Trump’s emergency declarations. Congress could also withhold funding for Trump’s Alien Enemies Act deportations and domestic military deployments, and it could condition Department of Homeland Security funding on the administration’s adherence to asylum law. Sadly, there is little sign that the current majority will allow Congress to play its constitutional role as a check on presidential overreach.

The courts, for their part, are empowered to enforce the rule of law. Historically, though, courts have been reluctant to second-guess a president’s determination that emergency conditions exist. In several of the current Alien Enemies Act challenges, courts have [concluded](#) that they may interpret the language of the statute, but that they [must accept the facts](#) as Trump presents them—despite all evidence to the contrary. And in various cases challenging emergency declarations under Trump and previous presidents, [courts](#) have [held](#) or [suggested](#) that they cannot review a president’s decision to declare a national emergency.

Despite this deferential approach, Trump, at time of writing, is losing in the courts. The U.S. Court of Appeals for the Federal Circuit [held](#) that IEEPA does not authorize Trump’s worldwide tariffs. The famously conservative Fifth Circuit [held](#) that there has been no “invasion” or “predatory incursion” justifying the invocation of the Alien Enemies Act. Although a Ninth Circuit panel [deferred](#) to Trump’s assessment that federalizing the National Guard was necessary to execute federal law in Los Angeles, the district court judge subsequently [held](#) that many of the specific actions taken by Guard members violated the [Posse Comitatus Act](#)—the law that generally prohibits federal armed forces from engaging in core law enforcement duties. A Trump appointee in Oregon, also applying a deferential standard of review, blocked the president from deploying federalized Guard troops in Portland, [noting](#) that “‘a great level of deference’ is not equivalent to ignoring the facts on the ground.” A judge in Illinois [blocked](#) the deployment of federalized Guard troops in Chicago, concluding that the administration’s portrayal of the facts was less credible than that of the state. And while the Supreme Court has often stayed rulings

against the Trump administration in this term, it issued two extraordinary orders in the Alien Enemies Act litigation limiting deportations under the law.

Ultimately, preserving democracy against the abuse of emergency powers will take more than Congress or the courts. It will take the people of the United States recognizing and refusing to normalize the president's abuses. If people accept that emergency rule is a permissible status quo, they may come to accept the deprivation of freedoms that comes along with it. And if they believe that Trump can use emergency powers to control election results, many might see no point in voting. But government by emergency rule is neither normal nor valid in a democracy, and any attempt by Trump to interfere with an election, whether through emergency powers or otherwise, would be flatly illegal. As dangerous as emergency powers may be, nothing would be more dangerous than buying into the mistaken notion that they give the president a blank check.