

## Trump's Emergency Powers Threat Could End Shutdown Crisis, but at What Cost?

By Charlie Savage

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### News Analysis

If President Trump invokes emergency powers to build a wall along the southern border, it could be a mutually face-saving way to reopen the government, but also an extraordinary violation of constitutional norms. *Guillermo Arias/Agence France-Presse — Getty Images*



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WASHINGTON — President Trump's repeated threat to declare a national emergency so he can build his border wall without congressional approval has been denounced by Democrats as extreme and an overreach. But it could be the only politically realistic way out of the shutdown crisis in the nation's capital.

"I think we might work a deal, and if we don't, I may go that route. I have the absolute right to do national emergency if I want," Mr. Trump told reporters on Wednesday. "My threshold will be if I can't make a deal with people that are unreasonable."

If the president does invoke emergency powers to circumvent Congress, it would be an extraordinary violation of constitutional norms — and establish a precedent for presidents who fail to win approval for funding a policy goal.

But Mr. Trump's threatened move offers both sides a face-saving solution in the budget standoff between the president and congressional Democrats that has prompted a partial government shutdown, which, if it lasts to Saturday, will be at 22 days the longest in American history.

Both sides have taken absolutist positions that leave no room for the kind of split-the-difference compromise that usually ends budget impasses. Mr. Trump [refuses to accept anything less than his demand for about \\$5 billion in wall spending](#), and House Speaker Nancy Pelosi has said [his wall along the southern border would be immoral](#).

But Mr. Trump's claim that he can and may attempt to build his wall another way opens the door for him to sign a spending bill with no wall funding, reopening the government without capitulation by either side.

While any such move by Mr. Trump is certain to prompt outrage from his critics and wild approval from his supporters, there is good reason to believe that it is unlikely to result in much immediate change. His push for a wall would be channeled into a lengthy court fight, keeping lawyers far busier than construction workers, at least initially, as his term ticks away.

"We're going to be in 2020 before this gets resolved," said Walter E. Dellinger III, a former solicitor general in the Clinton administration, adding: "If they are just planning where to build slats, judges are unlikely to decide that requires expedition in the Supreme Court. I think they would recognize the wisdom of going slow."

If, in the end, the Supreme Court were to rule that emergency-power laws give Mr. Trump authority to proceed, he would probably face still more litigation with property owners over whether the government may use eminent domain to force them to sell their border lands. There may be little time left in his term after all that to add more than a few miles, if any, of barriers to the 1,954-mile border, which already has [654 miles of fencing](#).

And if the court instead eventually ruled against him, Mr. Trump could honestly tell his supporters that he tried, and then vow to renew the push if he is re-elected. Indeed, he has suggested that he would relish still having the issue of wall to once again rev up supporters in the campaign. He wrote on Twitter [late last month](#) that Democrats may have enough votes to stop his wall, "but we have the issue, Border Security. 2020!"



### Government Shutdown Timeline: See How the Effects Are Piling Up

The longer the federal government remains closed for business, more services are affected.

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In the meantime, the shutdown that is threatening to last for months could end. Hundreds of thousands of federal workers and contractors could once again receive their wages and pay household bills. National parks could reopen and be cleaned. Needy families could keep receiving food assistance. Across the economy, farmers and businesses that depend on government actions could proceed with work they need to be handled.

“It’s a way to get past an ugly fight in a way that allows the dust to settle and passions to cool while moving on,” said Bruce Buchanan, an emeritus professor of political science at the University of Texas at Austin.

If Mr. Trump does invoke emergency powers, fierce criticism would follow. Of the [58 times presidents have declared emergencies](#) since Congress reformed emergency-powers laws in 1976, none involved funding a policy goal after failing to win congressional approval. Chris Edelson, an American University government professor and author of a 2013 book, [“Emergency Presidential Power: From the](#)

[Drafting of the Constitution to the War on Terror](#),” said he could recall no such instance in the first two centuries of American history, either.

The precedent Mr. Trump would establish raises the risk of longer-term damage to the American constitutional system, undermining people’s confidence in the country’s democracy, said Elizabeth Goitein, who oversaw a recent study of presidential emergency powers for the Brennan Center for Justice at New York University School of Law.

“It is a crisis when the president of the United States flouts the role of Congress and abuses his powers in order to get around the will of Congress and to undermine the democratic process for lawmaking set forth in the Constitution,” she said.

Ms. Goitein and other experts who have studied emergency-powers laws have said [there are serious — if not dispositive — arguments that Mr. Trump’s legal team can make](#) that at least two such statutes could be used to erect border barriers by redirecting military construction funds that can be freed up, in a presidentially declared emergency, to build something Congress has not approved.

But she and others maintain that it would be an abuse of power for Mr. Trump to proclaim that there is a national emergency along the southern border that justifies a wall. The number of people illegally crossing the border is far lower than it was a generation ago. The recent phenomenon of caravans of Central American migrants largely consists of people who present themselves to border officials and request asylum.

And despite repeated [false claims by Trump officials](#) that terrorists are infiltrating the country across the border, including by the thousands, no one in the modern era who committed a terrorist attack on domestic soil has turned out to have sneaked in via Mexico.

Many legal experts nevertheless expect that in the inevitable litigation, the Justice Department would pressure judges not to even consider the facts, arguing that courts must defer to the president’s judgment about whether an emergency exists rather than substituting their own thinking.

But even though courts have traditionally given substantial deference to the president’s determinations in security matters, Mr. Dellinger said that should not be true within the executive branch. He said it was the obligation of senior Justice Department officials who review the legality of proposed government actions — the head of the Office of Legal Counsel, [Steven A. Engel](#), and the acting attorney general, Matthew G. Whitaker — to independently assess whether there really is a justifiable basis to declare an emergency, and if there is not, to tell Mr. Trump no, or resign.

“If there is not, in fact, a persuasive basis for this being the kind of national emergency that was contemplated by Congress, and it is nevertheless approved by

the Department of Justice, what is the rule-of-law cost? What kind of slope does that start us down?" Mr. Dellinger said. "One question is whether there is some other way out of this current mess that doesn't involve such a cost to the rule of law."

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