

authorities Congress has given him, this is not a constitutional crisis, in my view, as some people are painting it to be, but I am concerned about the process for a few reasons.

One, as a number of our colleagues have pointed out over the last few weeks, it does set a precedent. A use of these powers in circumstances under which a conference committee has already come up with a dollar amount for border security that was ultimately signed by the President and he declared a national emergency on top of that in order to gain access to additional money—I do worry that this sets a precedent whereby a future President could abuse this authority.

These 123 congressional grants of authority to Presidents—any President—are broad, and they cover everything from the military, to public health, to Federal pay schedules. Some are pretty unremarkable, such as the one that allows the Secretary of Transportation to waive vehicle weight limits on a stretch of Interstate 95 in Maine. That is one of the congressional delegations of authority. Others are more alarming, such as the one that would authorize the President to suspend a law prohibiting the testing of chemical and biological weapons on human subjects.

What I find most concerning is that the definition of an “emergency” is very vague and subjective, which means it is going to end up being the subject of litigation. Yes, lawsuits have already been filed in the Federal district court challenging this declaration of an emergency under these circumstances. This gets to my basic problem, which is that this is not a very productive way to actually accomplish the goal if you know that what you are going to do is going to be tied up in litigation for the next 6 months or a year.

But I have to ask the question: Under these broad grants of authority that Congress has previously given to a President or any President, what would stop a future President from declaring a national emergency over climate change or global warming? I am concerned that we are going to see these emergency powers used as a failsafe for policies favored by the Executive—one who takes it further for a purely ideological goal that in no way comes close to a crisis or emergency.

Yes, I also worry that some of the money that will be accessed under this declaration of national emergency is for military construction projects, many of which are located at military bases in Texas. This is not a case of, do we need border security, or do we need to provide the housing and infrastructure for our military—we need both. So the President and Congress should not try to rob from Peter to pay Paul.

I, along with my colleagues, have fought for these appropriations for military construction because they are important to the ability to recruit and retain men and women who volunteer for the military, and their families.

They are important for our national security. I have and I will continue to push the administration to not let these critical projects get caught in the crosshairs in this dispute over adequate border security funds.

Third and finally, I suggest that Congress needs to look in the mirror when it comes to the situation in which we find ourselves. The only reason President Trump had the authority to do what he did is because Congress delegated it to him, just like it is delegated to future Presidents and has been to past Presidents under these 123 separate grants of authority. I worry that Congress has delegated too much of its power to the executive branch.

In the 1944 case *Korematsu v. United States*, the Supreme Court upheld the internment of Japanese Americans—something unimaginable today, but in 1944, during the throes of the Second World War, it was something that was the official policy of the government. It went all the way to the Supreme Court of the United States. Justice Robert Jackson—one of the three dissenters—said that each emergency power “lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” I agree with Justice Jackson’s warning.

If our Democratic colleagues are concerned about how this President or any other President will utilize the powers this body has given him, perhaps we should reexamine those powers rather than fault the President for using authorities Congress has already given to him.

Despite these concerns, I believe the President is operating within the authority Congress has delegated to him. It is strictly because of the dysfunction in the Congress and our inability to work together to come up with solutions when it comes to border security or immigration that the President is desperate to find access to the funds he believes are necessary for the national security of our country.

As I said, I think this situation reflects more on the dysfunction in Washington these days and the inability of Congress to work with the President to find bipartisan, commonsense solutions. I think we ought to return to those bipartisan, commonsense solutions rather than engage in some of the drama associated with this particular declaration under these sets of circumstances.

Madam President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Ms. ERNST). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ALEXANDER. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

DECLARATION OF NATIONAL EMERGENCY

Mr. ALEXANDER. Madam President, on Thursday, I suggested that Presi-

dent Trump has sufficient congressional authority to spend the \$5.7 billion he asked for in his January 6 letter to the Senate Appropriations Committee chairman to build 234 miles of border wall without resort to a dangerous national emergency precedent that could upset the constitutional separation of powers that goes to the heart of our freedom.

I believe the President has clear authority to transfer up to \$4 billion among accounts within the over \$600 billion defense budget in order to counter drug activities and to block drug smuggling corridors across international borders.

On February 15, the President said that he plans to use \$2.5 billion of this same transfer authority to build the 234 miles of wall along the southern border that he asked for in his January 6 letter. If he increases the transfer from \$2.5 billion to \$3.7 billion, along with the other existing funding authority that he has, he will have the full \$5.7 billion that he said he needed.

William E. Nelson, of New York University School of Law—one of America’s foremost scholars of legal history—wrote an excellent op-ed last week that explained why it is so important that the President and the Congress should not, in Professor Nelson’s words, “invert the entire constitutional order where Congress appropriates and the President spends.”

I ask unanimous consent that Professor Nelson’s article be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE CONVERSATION: TRUMP VS. CONGRESS:
THE EMERGENCY DECLARATION SHOULD NOT
BE RESOLVED IN COURT

(Opened by: William E. Nelson, New York
University February 28, 2019)

President Donald Trump’s emergency declaration to build a border wall has provoked a constitutional confrontation with Congress.

Here is the background for understanding what’s at stake—beginning more than two centuries ago.

A major problem for the framers at the Constitutional Convention in 1787 was how to create a presidency powerful enough to protect the nation, yet constrained enough to prevent a president from becoming a dictator.

Ultimately, the president was given power to enforce the law, conduct foreign relations and command the armed forces. Congress retained most other key powers, including the power of the purse and the power to declare war.

The framers knew they could not predict all that the future would bring. So they left the precise boundaries between presidential and congressional power unclear. This imprecision in our checks and balances has served the nation well for 230 years because it provides the flexibility to govern while preventing tyranny.

As scholars of constitutional law and history, we believe that President Trump’s assertion of a national emergency to build a wall along the Mexican border and the lawsuits filed in response together threaten the very imprecision that has helped maintain constitutional checks and balances for more than two centuries.

To best maintain that balance, this confrontation should be resolved in the political realm, not in the courts.

THE NATIONAL EMERGENCY

But the lawsuits over the emergency declaration will probably reach the Supreme Court, and the court might well hold Trump's emergency declaration unconstitutional.

That would set a precedent that would unduly limit national emergency power that some future president may need.

Alternatively, the court could decide the lawsuits in Trump's favor. That would invert the entire constitutional order, where Congress appropriates and the president spends. It would undercut the checks and balances provided by the framers and lead to an incredibly powerful presidency.

Either result the court reaches would set a bad precedent.

Congress can avert this problem.

The 1976 National Emergencies Act gives Congress power to invalidate a president's declaration of emergency by a resolution passed by simple majorities of both houses.

The House voted 245–182 on Tuesday to overturn President Trump's national emergency declaration. Democrats were joined by more than a dozen Republicans in the vote. The Senate will now take up the measure, though a vote has not been scheduled.

White House adviser Stephen Miller has already suggested that Trump would veto any such resolution.

"He's going to protect his national emergency declaration. Guaranteed," Miller said on Fox News. Both the House and the Senate would then need two-thirds majorities to override his veto.

We believe that for Congress to protect the constitutional order, its members must muster the necessary two-thirds majority.

TO THE COURT

If Congress does not override the president's veto, the lawsuits will probably go to the Supreme Court. The court's decision has strong potential to do harm to the historic constitutional balance.

That balance was upheld by the Supreme Court in a crucial decision more than 50 years ago.

On April 9, 1952, President Truman declared a national emergency. In the midst of the Korean War, he seized the country's steel mills on the eve of a nationwide strike because steel was necessary to make weapons. The steel companies immediately brought a lawsuit against the seizure in federal court.

Recognizing the importance of the issue, the Supreme Court heard arguments on May 12, and handed down its decision on June 2.

The court, in *Youngstown Company v. Sawyer*, rejected the president's claim by a 6–3 majority.

Justice Robert Jackson wrote an opinion proclaiming a general approach to the balance of powers between Congress and the president, rather than a fixed rule.

Jackson declared that "when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."

The president's power, Jackson wrote, is in a "zone of twilight" when Congress has not spoken. When "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

PRESIDENT AGAINST CONGRESS

President Trump is acting contrary to Congress's will by appropriating money Congress has refused to appropriate. He signed a carefully constructed compromise budget bill passed by more than veto-proof two-

thirds majorities in both houses. He accepted the U.S. \$1.375 billion that the bill gave him for a border wall.

He then broke the deal by declaring a national emergency to allocate an additional \$6.7 billion to pay for border wall construction.

In two important cases, the Supreme Court has broadly prohibited Congress from giving any of its appropriations authority or responsibility to the president—even voluntarily.

Congress's adoption of a joint resolution seeking to invalidate Trump's emergency declaration—an explicit statement of congressional will—would provide conclusive evidence that would only strengthen the argument that the president is acting contrary to Congress's will.

PRESERVING THE CONSTITUTIONAL BALANCE

If the case gets to the Supreme Court, the president's lawyers might argue that for Congress to decisively oppose an emergency declaration of the president, lawmakers must override his veto by a two-thirds vote.

Imposing such a veto override requirement, however, would eliminate the court's role. That's because a presidential declaration of emergency is immediately invalid if Congress overrides a presidential veto.

Two-thirds overrides are historically unlikely by Congress. And requiring a two-thirds vote would give a president who declares a national emergency virtually unlimited power to appropriate money to his or her heart's content—perhaps hundreds of billions of dollars to address, for example, climate change by subsidizing construction of wind farms.

Requiring Congress to override a presidential veto that protects a presidential appropriation would turn the appropriations power and the Constitution's checks and balances inside out.

Congress has already spoken through passing the spending bill and will be considering a resolution to invalidate the president's declaration of emergency.

Such a resolution, even if vetoed by the president, places President Trump's declaration in Justice Jackson's category where presidential power "is at its lowest ebb."

It also preserves the historic flexibility by allowing the court's decision to give deference to the votes of Congress in cases of claimed emergencies.

This story has been updated to reflect the House vote on Feb. 26, 2019, on the resolution to overturn President Trump's national emergency declaration.

Mr. ALEXANDER. I yield the floor.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. WICKER. Madam President, what is the pending business?

The PRESIDING OFFICER. The pending business is the Rushing nomination.

Mr. WICKER. Madam President, I ask unanimous consent to speak as in morning business for no more than 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

REMEMBERING BORIS NEMTSOV

Mr. WICKER. Madam President, on Sunday, February 24, thousands of people marched in Moscow and in cities across Russia to remember Boris Nemtsov, a Russian statesman and friend of freedom who was gunned down in sight of the Kremlin walls 4 years ago.

These people were honoring a Russian patriot who stood for a better fu-

ture—a man who, after leaving the pinnacle of government, chose a courageous path of service to his country and his fellow Russians. Boris Nemtsov was a man who walked the walk. When others were silent out of fear or complicity, he stood up for a future in which the Russian people need not risk jail or worse for simply wanting a say in how their country is run.

Sadly, since Mr. Nemtsov's assassination, the risks of standing up for what is right have grown in Russia. With every passing month, ordinary citizens there become political prisoners for doing what we take for granted here in the United States—associating with a political cause or worshipping God according to the dictates of one's conscience.

Last month alone, in a high-profile case, a mother was jailed for the crime of being a political activist in Russia. She was kept from caring for her critically ill daughter until just hours before her daughter died. Jehovah's Witnesses have been sentenced to years behind bars for practicing their faith. Also, a leader of a small anti-corruption organization was beaten to death with metal rods on the outskirts of Moscow. This was all just in February, and it is not even a comprehensive account of the Russian state's using its powers not against real enemies but against its own people—peaceful citizens doing what peaceful citizens do.

As for the Nemtsov assassination, 4 years later, justice has yet to be served. It appears that President Putin and his cronies have little interest in uncovering and punishing the masterminds behind Russia's highest profile killing in recent memory. While a few perpetrators who had been linked to the Kremlin-appointed leader of Chechnya, Ramzan Kadyrov, were convicted and sent to prison, Mr. Nemtsov's family, friends, and legal team believe the organizers of his murder remain unidentified and at large.

I understand that Russia's top investigative official has prevented his subordinates from indicting a close Kadyrov associate, Major Ruslan Geremeyev, as an organizer in the assassination, and the information linking Geremeyev to Mr. Nemtsov's murder was credible enough for a NATO ally to place Geremeyev on its sanctions list. Yet there has still been no indictment. Russian security services continue to forbid the release of footage from cameras at the site of the assassination. Russian legal authorities refuse to classify the assassination of a prominent opposition leader and former First Deputy Prime Minister as a political crime. Despite all of this, they have declared the case solved.

Given this pattern of deliberate inaction on the part of Russian authorities, the need for some accountability outside of Russia has grown more urgent. Russia and the United States are participating states in the Organization for Security and Cooperation in Europe, or the OSCE, and have agreed