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The power of the purse

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AVON HILLS SALON

Thoughts from the Avon Hills

Jim Read on The Power of the Purse

MARCH 28, 2019



The political debate about Donald Trump's proposed border wall has been going on since before the 2016 presidential election. My theme here is how fundamentally the situation changed with Trump's February 15 Declaration of Emergency, where he declared illegal border crossings to be a national emergency, and asserted the right to spend more than 8 billion dollars on the wall that Congress had specifically refused to authorize for that purpose.

The actual costs of building a wall across the entire length of the U.S. – Mexico border are much higher than 8 billion dollars. Some estimates run as high as 70 billion dollars.

Whatever one thinks of a border wall, there is no question that Congress has the unquestioned authority to spend money on that purpose if it so chooses. Instead, Congress has repeatedly chosen not to do so. This has been the case not only recently, with the Democrats winning a majority in the U.S. House in the 2018 elections. From 2017-2018, even when there were

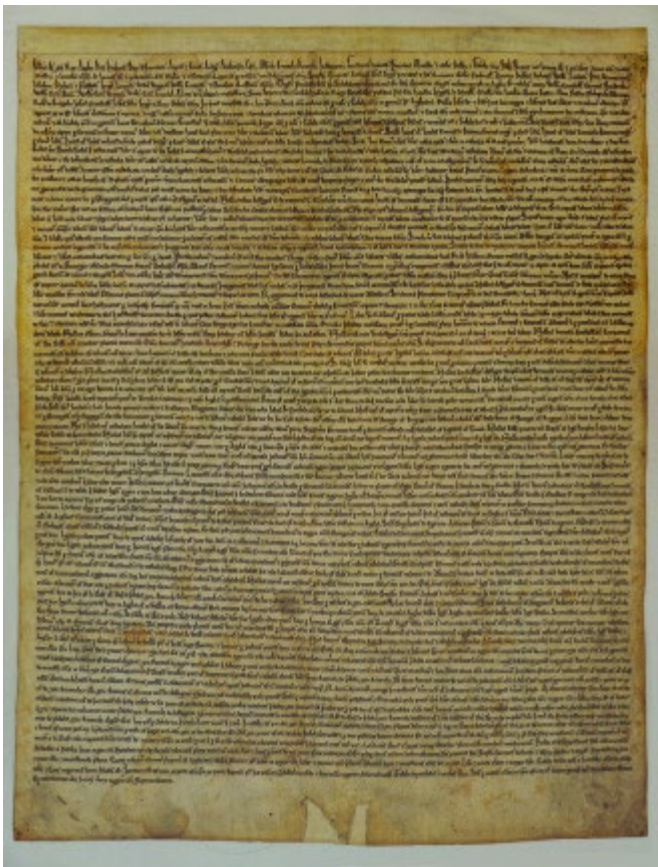
Republican majorities in both U.S. House and U.S. Senate, Congress voted funds for border security, but never for Trump's proposed wall.

So what changed on February 15, 2019 was that President Trump asserted that he had the power, by declaring an emergency, to spend funds that Congress had not appropriated for that purpose, indeed that Congress had specifically refused. Trump issued his emergency declaration at the very moment in time that Congress was voting on a budget that did not include funds for the wall. The message was clear: he was exercising what he claimed was his independent power, as president, to spend public funds, regardless of whether they have been authorized by Congress, when he considers it necessary.

So this is no longer just about a wall. It is about presidential power. If Trump's act of spending public funds, on his own authority, that Congress has specifically refused to authorize goes unchallenged, then any president, of any party, can do the same to push through any item of their political agenda. So I want to say this again: the issue here is not whether or not one favors a border wall. The issue is what restraints on the power of the president, if any, will remain if this act goes unchallenged.

The U.S. Constitution is very clear on the point at issue here. Article I, section 9 says that "No money should be drawn from the treasury but in consequence of appropriations made by law." Article I, section 8 makes clear that Congress – and Congress alone – has power to tax and spend. No such power is granted to the executive branch or to the judiciary. This is not some obscure detail of the Constitution. It is absolutely central to the power, indeed to the very existence of Congress as an institution of government. Without what is called "the power of the purse," Congress's other powers would be null.

The power of the purse is the oldest and most important check against executive tyranny in the Anglo-American constitutional tradition. It dates from medieval England, at least as far back as the Magna Carta in 1215. During the many centuries when English kings claimed to be divinely appointed by God to rule the kingdom, kings still had to ask parliament to grant the money. Some kings, such as Charles I, did claim the right to spend funds regardless of parliament. This was one of the causes of the English Civil War (1642-1651). Indeed, King Charles I so to speak "lost his head" over the issue.



Protecting parliament's power of the purse was once again a central issue in England's "Glorious Revolution" of 1688, when parliament, acting in the name of the English people, bloodlessly pushed out James II, who had claimed absolutist powers over the purse (and in many other domains as well) and replaced him with William III, who acknowledged that his power was limited by

parliament. These events formed the background for John Locke's classic work of political philosophy, *Second Treatise of Civil Government*, which made an extended case for government by consent – including the people's consent, through their representatives, to taxes and public expenditures.

The American Revolutionaries took up and radicalized this idea in setting up a fully republican form of government. The Declaration of Independence proclaimed that governments derived "their just powers from the consent of the governed." Whatever else "consent of the governed" meant to the American revolutionaries, it included the right of the people, through their elected representatives, to consent to all taxes and public expenditures.

The delegates to the Constitutional Convention of 1787 disagreed with one another on a wide range of matters. But on this point there was no disagreement whatsoever: Congress alone could tax and spend. The President had no power to do so, except by signing bills passed by Congress. Article I of the Constitution begins: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Notice that all legislative powers are vested in Congress. If a president had his own pool of funds, and could spend it on whatever he chose, that would be exercising legislative power, contrary to the Constitution's exclusive grant of those powers to Congress.

James Madison, arguably the most influential framer of the U.S. Constitution, in defending and explaining the proposed Constitution wrote in the Federalist Papers, Number 58 (1788) that: “This power of the purse may, in fact, be regarded as the most complete and effectual weapon, with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”

There is no question, then, that constitutionally, only Congress can appropriate money. And it does not appropriate that money in one lump sum, but for specified purposes. A president cannot constitutionally transfer funds from the Medicare budget to the military budget, for example. Or from the U.S. military budget to the U.S. Immigration and Customs Enforcement budget, which is what Donald Trump is doing.

The big, new question that we have faced since February 15 then is: do illegal border crossings (which have been steadily dropping in numbers since their peak in 1972) constitute a public emergency great enough to justify suspending the regular workings of the U.S. Constitution? I would argue that they do not – indeed, they do not come close to the level of emergency that would justify such a step.

For purposes of historical perspective, I want to describe an unquestioned emergency in U.S. history: the outbreak of the American Civil War in April 1861. When the Confederacy fired on Fort Sumter on April 12, 1861, Congress was not in session, and was not scheduled to meet for a long time. Indeed, early in the war, it would have been difficult and dangerous for Congress to meet at all. Washington, D.C. bordered on Virginia, the largest of the slave states, and some major battles were fought very close to the nation’s capital. Moreover, for several months before and after Abraham Lincoln took office as president, it was not clear who the members of Congress were, since several slave states had already seceded from the union, and more followed immediately after the war began.

This was an undisputed emergency – whether the United States would continue to exist as a nation. Under the circumstances, Lincoln exercised a number of powers in the early months of the war that ordinarily would have required congressional pre-approval. He suspended the privilege of the writ of habeas corpus, i.e., the right of a person, under ordinary circumstances, not to be detained for more than 24 hours without being charged with a specific crime. The Constitution itself indicates that there are circumstances when suspension may be justified. Article I, section 9 of the Constitution holds that “The privilege of the writ of **habeas**

corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” The phrase indicates with some specificity the conditions under which it may appropriate to suspend it: “rebellion” and “invasion.” The slave state secession and the seizure and firing



on federal forts would clearly qualify as a massive act of rebellion. However, because this clause occurs in Article I, which covers the legislative branch of government, it implies that whether and when to suspect habeus corpus is a matter subject to congressional authority. Lincoln himself agreed that it was ordinarily a congressional power, but argued that under the circumstances of the early months of the war, when Congress was not in a position to meet, the president was justified in exercising it temporarily. Lincoln called Congress into special session on July 4, 1861, described what he had done, and asked Congress retroactively to approve his action – which Congress did.

Lincoln also made several military expenditures immediately after the outbreak of the war that had not been specifically authorized in the peacetime military budget. Here too Lincoln acknowledged that this was a power belonging to Congress, and asked the body to retroactively authorize the expenditures he had made, which Congress did.

It is not my purpose here to justify every one of Lincoln’s exercises of emergency power during the Civil War. I believe some were justified, and some went too far. But there was no question that the emergency was a real one. Lincoln also made clear that he respected the authority of Congress, and acted to restore the regular balance of constitutional power as soon as it was practically possible.

In both cases, his exercise of emergency powers differed significantly from that of Donald Trump. No one has made a serious case that illegal border crossings constitute an emergency great enough to suspend the ordinary operations of the Constitution. It is simply something that President Trump wanted to do. He was irritated that Congress did not fund it. (Nor did Mexico choose to pay for the wall, as Trump promised repeatedly during the campaign.) Declaring an emergency was simply a way of getting hold of money that Congress had repeatedly declined to

appropriate.

We cannot know at this point whether or how the U.S. Supreme Court will weigh in on Trump's emergency power declaration. Historically, the judiciary has been reluctant to get involved in disputes involving what it calls "political questions" – i.e., disputes between branches of government. In effect, the Court's "political question" doctrine says to Congress: "Stand up for your own power." And it is true that the framers of the Constitution did assume that office holders in each branch of the federal government would stand up for and protect the powers that the Constitution has granted them.

In the case at hand, however, there are two fundamental problems with the Supreme Court telling the Congress, in effect, to stand up for their own power. First: any argument of this kind presumes that Congress does continue exclusively to hold the power of the purse. If presidents can declare an emergency, and spend potentially unlimited funds anytime Congress chooses not to vote the funds a president wants, then Congress is deprived of the only foundation from which they can possibly stand up for their own power. The president would then hold the lion's share of legislative as well as executive power, and Congress would be overnight reduced to the level of a not-very-well-behaved debating society.

The second reason why the U.S. Supreme Court cannot in good conscience dodge its responsibility to defend the powers of Congress, is that the Court itself – unintentionally but nevertheless monumentally – undermined the capacity of Congress to stand up for its own power in the case of a presidential emergency declaration. To understand this peculiar part of the story, we need look at the National Emergency Act of 1976, the piece of legislation President Trump relies on as legal justification for his defiance of Congress.

The National Emergency Act was ironically an attempt by Congress to check potential presidential abuse of emergency power declarations, while at the same time recognizing that emergency declarations are sometimes appropriate. In an attempt to fulfill both of these contrary objectives, Congress designed the National Emergency Act to function as a so-called "legislative veto," whereby Congress authorizes the president to take discretionary action, but at the same time reserves the right to say "No" if it believes the president has used that discretion wrongly. Thus under the National Emergency Act as originally passed by Congress, if Congress judged that a president was wrongly using emergency powers, it could negate those powers – "veto" them, so to speak. The National Emergency Act required that the president report at regular intervals to Congress about what emergency powers have been exercised and why, so that Congress could

decide whether to continue to authorize, or to terminate, the presidentially-declared emergency.

In short, under the National Emergency Act as designed and passed by Congress, the act of an out-of-control president declaring a bogus emergency could be overturned by a majority vote of both houses of Congress. This act of disapproval was framed as a congressional resolution, not as a new and separate act of legislation, so that it was not subject to presidential veto. Congress stands up for its own powers: constitutional crisis resolved. And in fact, that is what Congress did in the case of Trump's emergency power declaration. By a wide margin that included a significant number of Republicans as well as nearly every Democrat, both the House and the Senate voted to terminate president Trump's state of emergency and to nullify his inappropriate appropriation of unappropriated funds.

But this is where the Supreme Court enters the story, and not exactly as the hero of the drama. In a 1983 court decision, *INS v. Chadha* (which had nothing to do with border walls), the Court ruled that the so-called legislative veto, whereby Congress provisionally authorizes the president to do something but then reserves the right to reverse it after the fact, was unconstitutional. Congress, the court held, could not exercise executive power, which it arguably did in presuming to "veto" the actions of a president in administering a law. The court's ruling in effect transformed legislative veto mechanisms, which required only a simple majority of both houses and were not subject to presidential veto, into regular pieces of legislation, which are subject to presidential veto, which in turn requires a two-thirds vote of both houses to overturn it – a nearly impossible bar under our current state of partisanship.

At this point a wise Congress would have thoroughly revised, or if necessary repealed, every single law it passed that relied on a legislative veto mechanism, because in many such cases – and certainly in the case of the National Emergency Act – Congress would not have granted the president so much power in the first place if they did not believe it could be revoked when necessary. But we have not had an especially wise Congress for a long time. One can very well argue that a wise Congress would not have passed the National Emergency Act in the first place.

The upshot of the story, as anyone knows who has been following current events, is that President Trump vetoed Congress's majority vote to end Trump's emergency declaration and his claim to spend funds not authorized by Congress. The effort to overturn Trump's veto failed to get the required two-thirds vote in both houses of Congress.

There is much blame to go around here. One can blame the Supreme Court for unwittingly

expanding presidential power in the Chadha ruling. One can blame Congress for passing an unwise law in 1976, and not fixing it after 1983. One can blame Donald Trump for putting the Constitution through a shredding machine without a second thought.

But ultimately the U.S. Constitution belongs to us, the People of the United States. Even if Congress wanted to hand over its constitutional power of the purse to the president, it cannot legitimately do so, because the Constitution belongs to us, not to Congress or the president. Nor can we rely on the U.S. Supreme Court to resolve fundamental constitutional questions like this one. Courts act very slowly, and often rule on narrow, technical grounds – as they are likely to do in this instance, if they take up the case at all.

To me, as a citizen of the United States, the fundamental constitutional question is this: if a president can spend 8 billion dollars, not only that Congress has not specifically authorized, but that Congress has specifically declined to authorize, then why not 80 billion? 800 billion? What possible checks are there on the power of a president to do anything he or she wants, once that president is given a blank check on the power of the purse?

When I was in college studying political philosophy, I read many philosophers who warned about the danger of a people “losing their love of liberty” and willingly subjecting themselves, whether out of fear or greed or some other motive, to the chains of a despot. I remember being puzzled about this notion of a people losing its love of liberty. Why would people do that? I wondered. I had great difficulty forming any mental picture of what a people renouncing its own freedom looked like.

Today I have a much clearer picture, both of what this means and how it is possible. I just hope it doesn't happen here.

Jim Read

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