

Substantial Disruption



Liberty's Dangerous Companions

By Mike Tully

If the federal courts endorse President Donald Trump's attempt to circumvent the wishes of Congress by declaring a phony national emergency, they will do more than ratify a narcissist's trophy lust. They might permanently change the relationship between the American people and their military – and not for the better.

Trump's declaration has been attacked as a Constitutional-level violation, a usurpation of Congress' exclusive right to control the amount and purpose of federal spending. In the case of his cherished wall, it's clear his determination to build it contravenes the will of Congress. We know because Congress refused to include funding for it, even when Trump stomped his feet, held his breath, and shut down the government for 35 days. They weren't impressed by his theatrical temper tantrum and didn't give him a cent. (As an aside, don't you find it ironic that, when Trump holds his breath, he doesn't turn blue but red states do?)

While Trump's "national emergency" stunt has inspired street protests and angry editorials, not all pundits are aiming a fire extinguisher at their hair. For example, Ross Douthat of the *New York Times*, [concedes](#) that Trump's stunt is a Constitutional issue, but insists it "is not itself a constitutional emergency." He admits the precedent it would set is troubling, but notes, "With Trump, though, the only clear precedent being set is one of deplorable incompetence." In other words, while Trump might seize an unconstitutional power, he's too stupid to use it effectively. That's what passes for consolation in the age of Trump.

But there is a more immediate, profound, unsettling and potentially dangerous consequence of Trump's power move that Douthat – and, frankly, everybody else I've read on the subject – has not addressed: the aforementioned alteration of the relationship between the generals and the people. I'm talking about civilian control of the military, a guiding principal of the American experiment. As the Defense Department [states](#) on its website:

The framers of the U.S. Constitution worked to ensure the military would be under civilian control. They did not want to emulate the European experience. The colonies had just fought a war for freedom from Britain. The king controlled the British military, and the framers had no interest in duplicating that system.

Civilian control of the military is governed by two Constitutional provisions. Article I, Section 8 gives Congress the authority to "raise and support armies" and to "provide and maintain a navy." Article II, Section 2 states, "The President shall be commander in chief of the Army and Navy of the United States." These provisions perpetuate civilian control by giving Congress the power to fund the military and by establishing an elected official, the President, as the Commander-in-Chief – as opposed to a leader from entirely within the military establishment.

These two provisions work in concert. Both are necessary and there is some tension between the two, especially in recent years as Congress has effectively ceded its power to declare war to the Presidency. Article II, Section 2 standing alone would not sufficiently guarantee civilian control and protect the American people from military overreach. The mere fact that the commander of the armed forces is an elected civilian does not ensure that the military will act in accordance with the will of the people and guarantee civilian freedom. Nicolás Maduro of Venezuela is an elected President who has lost his legitimacy because his incompetence has led his country to the brink of starvation. Nevertheless, he retains power because of one factor: the Venezuelan military. As long as the generals support him, Maduro will perpetuate a presidency that has degenerated into a tin-horn dictatorship and devastated his nation.

While Trump's declaration is onerous on general Constitutional principles, the way he wants to enforce it threatens the Constitutional balance. While he will initially use discretionary funds that do not require the national emergency declaration to begin construction of his trophy wall, the bulk of the funding Trump is demanding [will come from military construction funds](#). He cannot use those funds without violating the will of Congress – unless the courts endorse his national emergency and allow it. If they do, they will increase presidential power to the detriment of civilian control of the military because civilian control requires a tight hold on the purse strings. This is a chilling reordering of Constitutional powers under any circumstances, but even more so when the occupant of the Oval Office disdains the law and worships despots like an aged groupie.

In America, civilian control of the military does not only mean that a civilian is the commander-in-chief, but that he and the military are subject to Congress' budgetary authority. It is Congressional power that insures civilian control of the military, not Presidential power. It is Congress that authorizes the creation and location of military bases, the procurement of weapons systems, and the nature and location of military construction projects. That's leverage that constitutes the molten core of Congressional power over the military. Trump's declaration threatens to upset the delicate balance between Article I and Article II and reduce Congress' authority over the military while expanding presidential authority.

James Madison told the Constitutional convention on June 29, 1787, that "A standing military force, with an overgrown Executive will not long be safe companions to liberty." The federal courts, as they determine whether to allow Trump's so-called "national emergency," should be guided by his words.