

Summary

Congress has given the President very broad national security and emergency powers, which have been abused to pursue ordinary policy goals. Justice Gorsuch is right that we should worry about such broad delegations of power, but he's wrong about the remedy. Congress should put time limits on these presidential actions, and courts should scrutinize them to make sure they have some plausible basis.

Justice Gorsuch has made it a personal crusade to revive the nondelegation doctrine, in part because of concerns about the rising tide of presidential power. As I'll explain below, the nondelegation doctrine tries to limit the ability of Congress to delegate authority to the executive branch. Strengthening the doctrine is an unworkable solution, but Gorsuch is right that Congress has put far too much trust in the good faith and sound judgment of the President and his subordinates. That's especially true with respect to national security and emergency powers. Environmental law provides more than enough examples.

The nondelegation doctrine is based on the separation of powers. The idea is that the Constitution gives Congress the power to make laws and the President the power to implement them. If, instead, Congress told the President to make up whatever rules he wants, he would be essentially making law rather than implementing it. The problem is that there's no real way for a court to decide when Congress has given the President "too much" discretion.

Gorsuch is right that executive discretion has become a real problem. The executive branch under Trump has run amok in its use of emergency power, which is not to say his predecessors were completely restrained either. He's been President about 10% of the fifty years since the National Emergencies Act was passed but has issued 25% of all national emergencies. On the first day of his second term, he declared a national energy emergency. He claimed that "the United States' insufficient energy production, transportation, refining, and generation constitutes an unusual and extraordinary threat to our Nation's economy, national security, and foreign policy." The emergency was a fiction. The U.S. had plenty of energy. In response, agencies like the Army Corps of Engineers took hundreds of emergency actions, all at the expense of the environment.

Justice Gorsuch was right on point in a speech last week when he decried "'[t]he rise of the emergency. The perpetual emergency. Everything is an emergency.'" He

added “I just don’t think that’s a recipe for a healthy democracy over the long term.” Absolutely right.

Trump and his subordinates have also been all too willing to find threats to national security. I posted a dozen examples recently. Those dire security threats included restraints on oil drilling to protect whales in the Gulf of Mexico, restrictions on toxics emissions from a half dozen industries, and radar reflections from windmills.

These abuses of power are based on *extremely* broad delegations. The National Emergencies Act doesn’t attempt to define emergencies. The courts refuse to review emergency declarations, so the President has carte blanche to trigger emergency powers. National security calls to mind foreign soldiers or military threats, but today the definition has become very broad and covers just about anything the President decides is bad for the country.

For example, the [Defense Production Act](#) allows the President to run roughshod over the economy to “ensure the vitality of the domestic industrial base.” The theory is that “the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United States.” When the Trump Administration wanted to restart a small oil pipeline near Santa Barbara despite state law (probably as a poke in the eye for Governor Newsom), they reached for the Defense Production Act. And why not, given the vague standard for invoking powerful legal authority?

In the Trump tariff case, the Court pointed out the threat of executive abuse that is posed by emergency statutes: “The Government reads [an economic emergency law] to give the President power to unilaterally impose unbounded tariffs. On this reading, moreover, the President is unconstrained by the significant procedural limitations in other tariff statutes and free to issue a dizzying array of modifications at will. All it takes to unlock that extraordinary power is a Presidential declaration of emergency, which the Government asserts is unreviewable.” Just so.

Justice Gorsuch’s pet solution, the nondelegation doctrine, was called into use for the first and last times in 1935. (The doctrine first surfaced in a 19th Century Supreme Court decision.) It was never used to strike down a federal law in the 146 years before that, nor in the 91 years after. There’s a good reason for that. It’s impossible to draw a principled line for when a delegation “goes too far.” The

question of how tightly to constrain the executive branch's implementation of law is inherently a policy decision. But that doesn't mean that we need to ignore the possibility of abuse, which has become all too real.

Congress tried in the 1976 National Emergencies Act to rein in presidential power, but that part of the law turned out to be unconstitutional, leaving the President a completely free hand. An alternative solution adopted by many states is to put a time limit on emergency powers and require legislative action to extend them. That makes complete sense to me. A six month or one year deadline would give Congress plenty of time to consider a problem and act.

That solution would require legislation. In the meantime, I'd suggest that courts should rethink their kneejerk deference to declarations of emergencies or national security threats. There are good reasons to be deferential to these actions. Crises may demand quick responses, and judges may be ill-positioned to determine the need for action. But deference should not mean complete surrender. Courts should still stand ready to demand *some* plausible explanation for the President's action.