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What Are the President's Emergency Immigration Powers?

By Dan Cadman

Background

With one fully formed "caravan" of several thousand primarily Central Americans headed our way, and apparently more following behind, the president has resolved to do all that is necessary and within his authority to frustrate any efforts to enter the United States.

Despite the not-unexpected ridicule from some on the left, the president, rightly in my opinion, considers such caravans a direct challenge to U.S. sovereignty — over our borders, our laws, our right to choose who may enter — as well as a public safety and national security threat.

Opponents of the type of action the president contemplates (including a couple of not-so-neutral reporters I heard addressing the issue on National Public Radio the other day) suggest that these are just poor people fleeing violence and seeking a better way of life, and that they band together simply so that they don't get assaulted or robbed or raped or murdered along the perilous path. I don't think it's quite that simple for various reasons, including the opportunists who inevitably attach themselves to such crowds for "protective coloration": people who are criminals; people who were previously deported (sometimes for crimes); people who are themselves members of violent gangs; and even to a small degree people who hail from nowhere near Latin America and whose intentions, identities, and backgrounds are entirely unknown.

But for those who do fit the "only want a better life" profile, it's worth noting that the path *is* perilous, and has been made more so because of ineffectual actions by multiple administrations to curb irregular arrivals, leading in turn to de facto acceptance and resettlement of hundreds of thousands of such people. It should be no surprise, then, that the process has itself lured more people to attempt the journey and the crossing, including especially vulnerable women and minors. Our government has in effect become complicit in the horrific human smuggling trade, with its multiple accompanying abuses, along our southern border.[1]

Smuggling — and its spin-off enterprises of theft, extortion, abuse, and impressment into becoming sex chattel or unwilling drug mules — has become a high-profit criminal endeavor, thanks to an unwillingness on our side of "the line" to see what the long-term price is for a lack of will to deter future would-be trekkers by halting those who jump the line or queue up at ports of entry asking for "asilo politico".

This *Backgrounder* briefly examines the powers available to the president to change the dynamic and significantly alter the status quo.

Use of the Military

President Trump, in his capacity as commander in chief, has dispatched active duty military troops to the southern border in advance of anticipated caravan arrivals. This was a smart decision: By using active duty armed forces, he sidesteps the necessity of asking state governors for their okay to activate national guard troops.

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Can active duty military be useful? They can. Troops have the expertise, equipment, and supplies to quickly put up sophisticated tent facilities; they can reinforce areas of border barrier that consist of nothing but a few strands of wire; they can implant state-of-the-art sensor and listening devices to aid in detecting border intrusions; and they can provide air and logistical support to Border Patrol agents expected to confront the surge (which, in fact, already goes on, on a daily basis, like the constant drip of a leaky faucet that overflows the basin and floods the room).

Use of the military (or, for that matter, activated national guard) on the border does, however, raise corollary questions having to do with law enforcement activities and the use of force:

Law Enforcement Powers

With the presence of active duty military troops on the border, the inevitable question arises as to whether they are proscribed from engaging in law enforcement functions as suggested by the Posse Comitatus Act, as well as the use of force.[2] The president has so far assigned to the military support roles that do not anticipate engaging in enforcement or arrest functions, but posse comitatus prohibitions are not so clear as one may suppose regarding whether or not the military could engage in additional, more active functions. The reason is that the military's primary duty is to protect and defend America.

In the modern age, we have come to accept that, in efforts to protect us from harm at home, the armed forces have extended their outer perimeter of operations all over the globe, but there is some reason to question a position that asserts that, as a nation, we've reached the point that our military may act everywhere *except* in direct protection of our borders. If one accepts the ineluctable logic that the end goal of the Defense Department is to defend our borders, then use of the military even in an active role would not be a violation of posse comitatus, because in this role it is not engaging in civil law enforcement, per se.

Conceived in this context, then, the argument becomes one of exactly when and under what circumstances should the military be activated to protect and defend the nation. In other words, at what point is a caravan, or several caravans, or a mass migration incident of sufficient gravity as to require direct and active intervention?

But this is a hypothetical argument that need not be reached at this juncture. And perhaps it will never need to be reached, if the federal government shows the resolve needed to halt the flows of migrants who use systemic structures like these caravans, which have clearly been organized in a determined effort to undermine the nation's immigration control and border security infrastructure.

Use of Force

The use of force by military members serving on the southern border, while serious, is a less complex question than that raised by posse comitatus. The issue is, quite simply, whether active duty military members should be permitted to protect themselves with the level of force needed to safeguard lives and property. The border is a precarious, easily penetrated area in which spontaneous violence occurs, often as a corollary to the serious crimes that take place in its vicinity: crimes such as drug, alien, weapons, and currency smuggling going in both directions depending on the illicit commodity. It seems self-evident that, even in a supporting and logistical role, military members are entitled to engage in self-defense or the defense of other innocent parties, and of vital or sensitive military technology and equipment.

Border Agent Force Multipliers

Deployment of Other Federal Officers

The president can assign as many federal law enforcement personnel as he chooses, en masse, to be temporarily assigned to border security duties. These could vary from Deputy U.S. Marshals and Drug Enforcement Administration agents, to the Federal Protective Service, or Fish & Wildlife and Bureau of Land Management agents, or virtually any other federal police organization. There, they would reinforce available Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) agents. It can be done through the simple expedient of "deputizing" these agents and officers to act as U.S. Marshals for the duration of their service.[3]

Special deputation for emergency purposes has been used before — for instance, when federal agents and officers from a variety of agencies (including the Border Patrol and the now-defunct Immigration and Naturalization Service) were assigned by President Eisenhower to join the Marshals Service in enforcing school desegregation orders in Little Rock, Ark. The advantage of special deputation is that, by statute, U.S. Marshals enjoy expansive power to enforce all federal laws — and, surprisingly, state statutes as well.[4]

Cross-Designation and Deployment of State Officers to Enforce Immigration Laws

Those who study immigration matters may be aware that, on a limited basis, select state and local officers may be permitted to enforce certain provisions of federal immigration law. This is authorized by INA Section 287(g).[5]

It may surprise many readers to know that this is not the only provision in the INA that permits use of state or local officers to enforce the INA. With consent of the affected governors, the president also has the authority to temporarily designate state and local law enforcement officers to act as immigration officers in prohibiting illegal entry, among other things. Take at look at Section 103(a)(10) of the Immigration and Nationality Act (INA):

> *(10) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.*[6]

While some governors, such as California's Jerry Brown, might balk at providing the requisite consent, it seems likely that at minimum Texas and Arizona would agree to the request, given the significant adverse impact that illegal mass migration has on their communities. Thus, thousands of Arizona and Texas (and possibly New Mexico) county sheriffs' deputies, highway patrol officers, rangers, and a host of others (many of whom are already involved in dealing with the seamy side of illegal immigration by mere proximity to the border) would immediately be available to act as force multipliers in doing law enforcement work to interdict and detain illegal border-crossers.

Other Executive Powers of the President

The president has additionally said that, if needed, he will close the border and suspend acceptance of applications for asylum.[7] The American Civil Liberties Union (ACLU) says it will sue no matter what he does. And chances are that when they file, using a fig leaf of "standing" to justify going to court on behalf of aliens who are not even within the United States, they will cherry pick a sympathetic federal district court in which to file, somewhere in the jurisdiction of the liberal Ninth Circuit Court of Appeals.[8]

But as to these other presidential authorities being asserted, and questioned by opponents:

1) Can the president "close" the border?
2) Can he suspend applications for asylum?

Closing the Border

When one speaks of "closing the border", it potentially means not only the land borders north and south, but also the sea and air ports of entry. However, in the context of the migrant caravans, we are discussing the southern land border. There is ample reason to believe that the president can, in his authority, close the border or any portion of it that he deems necessary. It's been done before. To name just two examples:

1) After the assassination of John Kennedy;[9] and
2) When DEA agent Enrique "Kiki" Camarena was murdered in Mexico.[10]

In the immediate aftermath of 9/11, inbound international flights were temporarily diverted to other nations and not permitted to land — they were, in fact, escorted away by U.S. military aircraft scrambled as the government reacted to the attacks — and although the border was not per se closed, virtually all individuals arriving at ports of entry found their documents, and their possessions, baggage, and vehicles, subject to intense scrutiny and themselves often subjected to lengthy and detailed secondary inspections.

The legal justification for these actions can be found at Section 215 of the INA.[11] It is an interesting section of law in that it applies to both aliens and citizens of the United States. The language of the statute is deliberately broad, and provides to the president in immigration and international travel control matters the same kind of plenary powers that he enjoys as commander-in-chief and as chief executor of the foreign policy of the United States. It was clearly enacted into law with an understanding that in his unique position as leader of the country, there will be times when his authorities must be nearly unfettered in order to safeguard the nation and its citizenry.

Whether, or where, the president might choose to close the border — which in practical effect means shutting down ports of entry (POEs), since illegal entry between ports is always proscribed — remains to be seen. It's entirely possible that he might do so at California POEs since caravaners and their organizers have expressed a preference for attempting entry there, quite probably in full awareness that, as a "sanctuary state", California has done virtually everything in its power to frustrate immigration enforcement and control measures.[12] He might also order POEs closed at any area adjacent to where intelligence reports suggest a surge of migrants has occurred.

But to return to the question of litigation: As a matter of informed speculation, one can imagine that in any contest of wills between the president and the lower courts, in the end the Supreme Court would likely underscore the proposition that no sitting judge is reasonably poised to substitute his or her judgment for that of the chief executive in matters paramount to the safety and security of our country.

The more interesting question is what would happen between any injunction issued or sustained at the district or circuit court level and a ruling by the Supreme Court. How far will the president go to challenge activist jurists when he believes they have exceeding the boundaries established by the Constitution in its separation of powers?

Suspending Asylum Applications

Perhaps the most contentious and vigorously contested presidential action would be one that suspends or otherwise abridges the filing of requests for asylum in the United States. In fact, he has just issued rules to this effect.[13] Can the president do it? Many alien advocates say he cannot:

> *"The law is clear and unambiguous," Beth Werlin, executive director of the American Immigration Council, said in a statement Thursday. "Any person inside the United States, regardless of how he or she entered, may apply for asylum."*[14]

Notwithstanding Werlin's assertion, there may indeed be legally defensible reasons in both international and domestic law for the president to do so. Here's a quick examination:

International law, as Embedded in the UN Convention and Protocol Relating to the Status of Refugees

Contrary to popular belief, there is ample basis within the United Nations (UN) Convention and Protocol Relating to the Status of Refugees (CPRSR)[15] to find that rejecting, denying, or suspending requests for asylum is lawful for signatory nations when they deem it necessary on the grounds of public safety and national security.[16] Such a view begins with the right of a nation to self-defense and preservation, which is a core principle of the UN charter.

This key principle resonates throughout the CPRSR and its accompanying documents, known as the Travaux Preparatoires.[17]

Consider that, although Article 33 of the CPRSR provides that "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where their life or freedom may be threatened on account of his race,

religion, nationality, membership in a particular social group or political opinion," the Ad Hoc Committee responsible for drafting the article is noted in the Travaux Preparatoires as having made clear: "This Article does not imply that a refugee must in all cases be admitted to the country where he seeks entry."

In fact, several delegate representatives to the convention additionally expressed concerns over whether Article 33 encompassed mass migration. The Travaux Preparatoires tell us:

> *The Netherlands representative recalled that at the first reading the Swiss representative had expressed the opinion that the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' ('refoulement') related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 [in the draft Convention, which later became the basis for Article 33] would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.*
>
> *He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.*
>
> *At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.*
>
> *In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.*
>
> *There being no objection, the President ruled that the interpretation given by the Netherlands representative should be placed on record.*[18]

It seems self-evident from these deliberations that it was always understood and accepted that nations reserve to themselves the right to reject refugees who arrive as a part of a mass migration that threatens to undermine the public safety or national security of a state.

Domestic Law as Embedded in the INA

The question of whether asylum requests may be suspended by domestic law is a bit more nuanced than it is in international law. This is because the CPRSR is not a "self-executing treaty"; that is, it must be supported by legislation enacted in each nation to have effect. In the U.S. context, that means the INA. The relevant sections of the INA are Section 101(a)(42), which defines "refugee"; Section 207, which outlines the refugee admission process for the United States; and Section 208, which outlines the asylum process.[19]

With regard to Section 208, a momentary digression is in order. When asking whether any individual is entitled to either refuge or asylum, it's worth considering the fundamental purpose of these provisions of law: They are, simply, to provide a safe haven to individuals who are fleeing for their lives and safety. This is in stark contrast to aliens who seek economic betterment or dislike the lack of opportunities that exist in home countries because of government dysfunction. For this reason, both international and domestic law recognize that aliens who have the opportunity to seek refuge or asylum in a safe third country — and refuse to do so prior to arriving at our border — leave open to question the bona fides of their claim to fear of persecution. Individuals truly seeking protection shouldn't, and don't have the right to, pick and choose their country of safe haven.

This is directly relevant to the Central American caravaners transiting through Mexico en route to the United States. Although it's clear that Mexico has failed to enforce its own border laws as is evidenced by the presence of so many thousands who crossed illegally, it did in good faith offer these individuals the right to seek asylum (Mexico also being a CPRSR signatory

nation). And, with the exception of approximately 1,700 who took advantage of the offer, along with other inducements such as education, jobs, and resettlement aid, by and large they rejected the opportunity.[20] Thus there are cogent reasons to doubt whether many, perhaps most, of those in the caravan actually have meritorious claims.

On the macro level, whether individuals are a part of an illegal mass migration or not, their right to make claims of any kind must be balanced against the public order and national security, and it is here where the emergency powers of the president come into play — particularly those contained in other sections of the INA, including Section 215, which was discussed previously, and Section 212(f).[21]

Section 212(f) says in pertinent part:

> ***(f) Suspension of entry or imposition of restrictions by President.***
> *Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*

This is the provision of law that was used in crafting the executive order misnamed the "travel ban", which was ultimately upheld by the Supreme Court. It has also been suggested as a legal basis for suspending applications for refuge or asylum during a time of immigration emergency.

As mentioned earlier, many legal scholars, most especially those who align themselves with the rights of migrants, say that suspending asylum applications cannot be done. Notwithstanding this argument, in a case brought by the Clinton administration, *Sale v. Haitian Centers Council, Inc.*, the Supreme Court addressed a substantially similar issue, and concluded that a president may do precisely that.[22]

In that case, after prior presidential policies spanning a decade proved ineffective at curbing mass illegal migration of Haitians putting to sea in the Caribbean to reach U.S. shores, on May 24, 1992, President George H.W. Bush issued Executive Order 12807,[23] ordering at-sea interdiction by the U.S. Coast Guard, with immediate repatriation to Haiti and no attempt to "screen" those interdicted to determine their eligibility for any protection as refugees or asylees. The provisions of INA Sections 212(f) and 215 weighed heavily in the legal justification used by the two White Houses, both in crafting EO 12807 and in defending it before the Court.

In ruling in favor of the government, and in words prescient to the instant case of reiterative "caravans" headed to the United States, the Court said, in pertinent part:

> *With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders and offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisers, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft. The second choice would have advanced those policies but deprived the fleeing Haitians of any screening process at a time when a significant minority of them were being screened in.*
>
> *On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today.* ***The wisdom of the policy choices made by Presidents Reagan, Bush and Clinton is not a matter for our consideration.*** *We must decide only whether Executive Order No. 12807, 57 Fed. Reg. 23133 (1992), which reflects and implements those choices, is consistent with § 243(h) of the INA.*[24] [Emphasis added.]

In its decision, the Court also conducted an exhaustive analysis of the requirements of both international law as incorporated in the CPRSR, as well as the INA. It rejected the argument that either international or domestic law prohibited the government from acting to prevent a mass immigration emergency and, in the process, suspending applications for refuge or asylum. The opinion finished this way:

> *We therefore find ourselves in agreement with the conclusion expressed in Judge Edwards' concurring opinion in Gracey, 257 U. S. App. D. C., at 414, 809 F. 2d, at 841:*
>
> > *"This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy."*

Conclusion

As suggested earlier in this document, there is the strong possibility that any injunction issued or sustained by lower courts will set up a test of wills — particularly if a presiding judge issues an injunction of some kind preventing the government from taking effective action along the lines of closing down ports of entry, or refusing to entertain asylum applications, that is upheld at the appellate level, for instance at the Ninth Circuit. It could result in a kind of dramatic showdown between executive and judiciary that we have not seen for many decades, and that is not in the country's best long-term interest.

For so long now we have been going down this path of judicial activism as a surrogate for lawmaking, in which jurists act as armchair quarterbacks consistently second-guessing executive decision-making instead of engaging in strict constitutional or statutory analysis, that a constitutional crisis may perhaps be an inevitability.

What if the president were to say to the courts, "You have made your decision, now enforce it"? Remember that U.S. Marshals and their deputies, who protect the judiciary and might otherwise be expected to enforce orders of the court, are members of the U.S. Department of Justice (DOJ) and servants of the executive branch. The president might make them unavailable to enforce the orders of the court; for instance, he could, with perfect legitimacy, order them en masse, along with other federal law enforcement officers, to the border to reinforce available CBP and ICE agents, as described above.

Only time will tell how all of this plays out, although the clock is ticking: As of this writing, the first caravan is preparing to depart Mexico City and resume its path northward.

End Notes

[1] See, e.g., Dan Cadman, "Uncle Sam, Coyote Extraordinaire", Center for Immigration Studies blog, December 19, 2013; and "The Reality of Childhood Arrivals: Seamy, not Dreamy", Center for Immigration Studies blog, December 15, 2013.

[2] The Posse Comitatus Act can be found at 18 U.S.C. Section 1385.

[3] See 28 CFR 0.112.

[4] See 8 U.S.C. Section 564 and Section 566.

[5] Codified at 8 U.S.C. Section 1357(g).

[6] Codified at 8 U.S.C. Section 1103(a)(10).

[7] See, e.g., Julie Hirschfield Davis and Thomas Givens-Neff, "Trump Considers Closing Southern Border to Migrants", *The New York Times*, October 25, 2018.

[8] During the writing of this document, a suit was, in fact, filed by six Hondurans claiming that the president's plans would undermine their "constitutional rights", presumably to enter the United States illegally and then be sheltered for years through exploitation of a claim for asylum. They are being represented pro bono by a migrant advocacy group, whose efforts, interestingly, are being underwritten by a company in the business of providing immigration bonds to aliens in removal proceedings. See Suzanne Monyak, "Trump Denying Caravan Asylum Bid, Hondurans' Suit Says", Law360, November 2, 2018.

[9] "1963: Border Closed After JFK Death", *El Paso Times* archives, November 23, 1963.

[10] Richard J. Meislin, "9 U.S.-Mexico Crossings Are Closed After Threats", *The New York Times*, March 4, 1985.

[11] Codified at 8 U.S.C. Section 1185.

[12] See, e.g., Jon Feere, "California Sheriffs Protest Anti-Secure Communities Bill", Center for Immigration Studies blog, August 28, 2012; Andrew Arthur, "The Chilling Effect of California's 'Immigrant Worker Protection Act' (But an Opportunity for ICE)", Center for Immigration Studies blog, February 10, 2018; and Dan Cadman, "Xavier Becerra, California Attorney General, Strikes Again", Center for Immigration Studies blog, October 8, 2018.

[13] Michael D. Shear, "Trump Claims New Power to Bar Asylum for Immigrants Who Arrive Illegally", *The New York Times*, November 8, 2018.

[14] Nicole Narea, "Advocates Say Trump Can't Block And Detain Asylum Seekers", Law360, November 2, 2018.

[15] Both refugees and asylees are covered by the CPRSR. Refugees are generally people outside of their own country who are unable or unwilling to return home because they fear serious harm, and seek protection elsewhere. By contrast, an individual seeking asylum is either already physically within the borders of the United States or at its threshold, for instance at an air, land, or sea port of entry. However, the grounds for granting either refuge or asylum are precisely the same: a well-founded fear of persecution on account of race, religion, national origin, political opinion, or "membership in a particular social group" — an undefined phrase subject to misuse due to creative and elastic interpretations as to exactly what constitutes such a group and such membership.

[16] The language of the Convention and Protocol can be found here.

[17] The Travaux Preparatoires (French for "preparatory work") are the equivalent of the legislative history of this international treaty and protocol. They lay out the intent and understandings of the signatory members, one of which was the United States. Those works can be found here.

[18] *Ibid.*

[19] These are respectively codified at 8 U.S.C. Sections 1101(a)(42), 1157, and 1158. See, also, the U.S. Citizenship & Immigration Services website, which provides an overview of refuge and asylum.

[20] See, for example, "Migrant caravan members reject offer to stay in Mexico", Associated Press, October 27, 2018; and "Mexican President Makes Desperate Offer to Migrant Caravan", *The Western Journal*, October 26, 2018.

[21] Section 212(f) is codified at 8 U.S.C. § 1182(f).

[22] *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, Supreme Court, 1993.

[23] Executive Order No. 12807, "Interdiction of Illegal Aliens", *57 Fed. Reg.* 23133 (1992).

[24] Section 243(h) of the INA, as it existed at the time of the Court's ruling, provided that "The Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." However, Section 243 was revised and rewritten in its entirety by Section 307(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, thus eliminating subsection (h).