

THE EXECUTIVE’S POWER OF THE PURSE IN NATIONAL EMERGENCY: THE PRESIDENT’S PLAN TO POACH DEFENSE FUNDS TO BUILD THE WALL

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President Donald Trump made the promise to “build a wall” between the United States and Mexico a staple of his 2016 presidential campaign.¹ And since his election, a key part of the Trump Administration’s executive agenda has been to fulfill that promise.² But after failing to receive the desired funding for the wall’s construction, the President now seeks to proceed “with or without Congress.”³ Usurping congressional authority, the President has declared the situation at the southern border a “national emergency” that “requires the use of the Armed Forces,”⁴ triggering statutory emergency powers that allow him to redirect defense funds for “military construction” to use for construction of the wall.⁵ In doing so, Trump has abused his executive authority to further his policy goals and poached Congress’s power of the purse. A citizen coalition has since challenged President Trump’s reprogramming plan, but the Supreme Court will allow it to go into effect, pending appeal.⁶

This Current Development will detail the President’s plan to redirect constitutional appropriations toward the construction of the border wall, discuss

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1. See, e.g., Ron Nixon & Linda Qiu, *Trump’s Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html>.

2. See *The Trump Administration’s Immigration Agenda Protects American Workers, Taxpayers, And Sovereignty*, WHITE HOUSE (Feb. 4, 2020), <https://www.whitehouse.gov/briefings-statements/trump-administrations-immigration-agenda-protects-american-workers-taxpayers-sovereignty/> (stating that “The border wall is being built as promised—with more than 100 miles of wall constructed and much more to come”); see also Fact Sheet: President Donald J. Trump’s Border Security Victory, WHITE HOUSE (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/> (stating that “President Trump was elected partly on his promise to secure the Southern Border with a barrier and, since his first day in office, he has been following through on that promise”).

3. See Andrew O’Reilly, *Mulvaney Says Border Wall Will Get Built, ‘With or Without’ Funding from Congress*, FOXNEWS.COM (Feb. 10, 2019), <https://www.foxnews.com/politics/mulvaney-says-border-wall-will-get-built-with-or-without-funding-from-congress>.

4. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

5. 10 U.S.C. § 2808 (2017).

6. See *Trump v. Sierra Club*, 140 S. Ct. 1 (Mem.), 204 L.Ed.2d 1170 (2019).

one case challenging the President's actions, and analyze the issues animating the courts' decisions and the significance of their pending appeals.

Since his inauguration in 2017, the President has repeatedly requested appropriations from Congress for border wall construction to fulfill one of his central campaign promises.⁷ For the 2019 fiscal year, President Trump requested "\$1.6 billion to construct approximately 65 miles of border wall,"⁸ although he informally "pressed Republicans to give him \$5 billion as a down payment on his wall."⁹ At first, the Senate appropriated the initial requested amount of \$1.6 billion to be "made available" for border fencing.¹⁰ However, in appropriations negotiations between the President and congressional Democratic leaders, the President again pushed Congress to appropriate \$5 billion for a border barrier—and the talks broke down.¹¹ When the President did not receive the \$5 billion, Congress and the President reached an impasse—one that led to the longest government shutdown in history.¹² Breaking the funding freeze, Congress then passed the Consolidated Appropriations Act, 2019, which appropriated \$1.375 billion for construction of fencing in the Rio Grande Valley area of the border.¹³ On February 15, President Trump signed the Act into law,¹⁴ but expressed that he planned to acquire additional funding for the wall by declaring a national emergency.¹⁵

That same day, President Trump issued Proclamation 9844, "Declaring a National Emergency Concerning the Southern Border of the United States."¹⁶ The Proclamation stated that increasing unlawful migration presents a border security and humanitarian crisis that constitutes a national emergency.¹⁷ It reasoned that, not only does the southern border act as a major entry point for illicit activity, but the sharp rise in family unit migration in recent years has also led to an inability of the government to provide

7. See, e.g., OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS: FISCAL YEAR 2018 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf> [hereinafter OFFICE OF MGMT. & BUDGET] (requesting "\$2.6 billion in high-priority tactical infrastructure and border security technology, including funding to plan, design, and construct a physical wall along the southern border").

8. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2019: EFFICIENT, EFFECTIVE, ACCOUNTABLE: AN AMERICAN BUDGET 57 (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf>.

9. Rachel Bade, *Immigration Storm Bears Down on Republicans*, POLITICO (Jul. 2, 2018), <https://www.politico.com/story/2018/07/02/immigration-republicans-border-fallout-687895>.

10. S. 3109, 115th Cong., tit. 2 (as reported by S. Comm. on Appropriations, June 21, 2018).

11. Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, WASH. POST (Dec. 11, 2018), <https://www.washingtonpost.com/politics/2018/12/11/trumps-extraordinary-oval-office-squabble-with-chuck-schumer-nancy-pelosi-annotated/?noredirect=on>.

12. Mihir Zaveri et al., *The Government Shutdown was the Longest Ever. Here's the History*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html>.

13. Consolidated Appropriations Act, 2019, Pub L. No. 116-6, § 229, 133 Stat. 13 (2019).

14. See *Statement by the President*, WHITE HOUSE (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-28/>.

15. Fact Sheet: President Donald J. Trump's Border Security Victory, WHITE HOUSE (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>.

16. Proclamation No. 9844, *supra* note 4.

17. *Id.*

adequate space in detention, ensure individual's appearances at hearings, and enforce removal orders.¹⁸ The Proclamation then declared that it would be necessary for the Armed Forces to provide additional support to traditional immigration enforcement due to the gravity of the crisis.¹⁹

In accordance with the National Emergencies Act,²⁰ which requires the President to specify the provisions of law under which he plans to act upon following the declaration of a national emergency,²¹ the President then invoked section 2808 of title 10 of the U.S. Code as authority for the Department of Defense to support the government's response to the emergency at the southern border.²² Under section 2808, when the President declares a national emergency, the Secretary of Defense may redirect unobligated military construction funds to other projects so long as (1) there is a national emergency "that requires the use of the armed forces," (2) the funding is spent on a "military construction project," and (3) the project is "necessary to support [the] use of the armed forces."²³

The President also stated his intent to divert \$2.5 billion to the Department of Defense's drug interdiction fund, relying on section 284, which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States."²⁴ The President also planned to augment the drug interdiction fund under section 8005, which authorizes the reprogramming of up to \$4 billion.

Under section 8005, the transfer must come from either Department of Defense working capital funds or "funds made available in this Act . . . for military functions (except military construction)." Additionally, they must be determined by the Secretary of Defense as necessary to the national interest, reprogrammed for higher priority items than those originally appropriated and based on "unforeseen military requirements." Finally, they may not be transferred in any case where Congress has denied the item for which funds are requested.²⁵

On February 19, 2019, the Sierra Club and a coalition of other citizen groups filed suit requesting a preliminary injunction in the Northern District of California to prevent the redirection of federal defense funds for the construction of the wall.²⁶ The court granted their motion for a preliminary

18. *Id.*

19. *Id.*

20. *Id.*

21. National Emergencies Act, 50 U.S.C. § 1631 (2018).

22. Proclamation No. 9844, *supra* note 4.

23. 10 U.S.C. § 2808 (2020).

24. See *Fact Sheet: The Funds Available to Address the National Emergency at Our Border*, WHITE HOUSE (Feb. 26, 2019), <https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border/> [hereinafter *Fact Sheet*]; 10 U.S.C. § 284(b)(7) (2018).

25. Dep't of Def. Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).

26. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019).

injunction on the use of the funds under section 8005, but not under section 2808.²⁷ Although the court determined that the plaintiffs were likely to succeed on the merits of both claims, it ruled that the citizen groups failed to prove the section 2808 requirement that they show irreparable harm would occur in the absence of an injunction.²⁸ The court reasoned that the plaintiffs could not demonstrate this requirement because the Administration had not yet determined how section 2808 funds would be used.²⁹ Instead, the court held that it would allow the plaintiffs to make a showing once the Administration reported how the funds would be used.³⁰ The Ninth Circuit denied the Administration's appeal for a stay.³¹

However, in a short memo on July 26, 2019, the Supreme Court granted the government's motion to stay, stating that the plaintiffs had "no cause of action to obtain review."³² Although not explicit, some speculate that the Court believes that the plaintiffs lack standing to bring the case.³³ Justice Breyer concurred in part and dissented in part, stating that he would have allowed the government to take preparatory steps for construction, but not disburse funds or begin construction.³⁴ Now, the Court waits for a final determination in the Ninth Circuit and the government's inevitable petition for certiorari.³⁵

In determining whether the President may redirect federal funds, it is important to note that there is no such thing as "emergency powers."³⁶ For the President to justify the use of federal funds, even in emergency, his power must "stem from an act of Congress or from the Constitution itself."³⁷ However, this use of power is not supported by the constitutional or statutory provisions President Trump invoked when he announced his reprogramming scheme.³⁸ Rather, his reprogramming of federal funds circumscribes essential checks and balances of the American government by claiming emergency authority in the face of congressional refusal. The Appropriations Clause

27. *Id.* at 919.

28. *Id.* at 926.

29. *Id.* On September 3, 2019, the Secretary of Defense notified the court that he would authorize eleven border barrier projects in California, Arizona, New Mexico, and Texas pursuant to Section 2808. Ex. 2, Notice of Decision by the Department of Defense to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. 2019), <https://www.aclu.org/legal-document/sierra-club-v-trump-dod-decision-authorize-border-barrier-projects-pursuant-10-usc-ss>.

30. *Sierra Club*, 379 F. Supp. 3d at 926–27.

31. *Sierra Club v. Trump*, 929 F.3d 670, 707 (9th Cir. 2019).

32. *Trump v. Sierra Club*, 140 S. Ct. 1 (Mem.), 204 L.Ed.2d 1170 (2019).

33. David Savage, *Supreme Court rules for Trump in border wall funding dispute*, L.A. TIMES (Jul. 26, 2019), <https://www.latimes.com/politics/story/2019-07-26/supreme-court-trump-in-border-wall-funding-dispute>.

34. *Sierra Club*, 140 S. Ct. at 2 (Breyer, J., concurring).

35. This article was sent to publication prior to the recent 9th Circuit decision. See *Sierra Club v. Trump*, No. 19-16300, 2020 WL 3478900 (9th Cir. June 26, 2020).

36. See *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579 (1952).

37. *Id.* at 585.

38. See Proclamation No. 9844, *supra* note 4; Peter Baker, *Trump Plans National Emergency to Build Border Wall*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>.

provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”³⁹ This clause grants to the legislature the “exclusive power over the federal purse,” and is “one of the most important authorities allocated to Congress in the Constitution’s ‘necessary partition of power among the several departments.’”⁴⁰ The Constitution makes clear that the appropriation of funds is a legislative, not executive power; nor is this power authorized by statute.⁴¹ Not only does the President’s plan fail the requirements of the provisions under sections 2808 and 8005 of title 10 of the U.S. Code that he claims provide statutory authorization, but it subverts Congress’s explicit intent of these provisions.⁴² The President’s declaration of a national emergency and actions to usurp Congress’s appropriations power pose serious concerns regarding unbounded executive power and the militarization of domestic policy. This violates the fundamental order of a finite government and may result in setting a precedent of an illimitable president who may act as both the executive and legislature.

Congress has attempted to rein in claimed “emergency powers” from the executive through statutes like the “National Emergency Act,” and these types of checks are critical to the preservation of a free republic. As explained below, the President’s reprogramming plans under sections 8005 and 2808 do not meet the requirements of the statutes invoked, and, in fact, contradict one another. Instead, he appears to act in direct opposition to the express will of Congress, outside of his constitutionally delegated powers, and the Supreme Court must recognize its crucial role in reining in these types of *ultra vires* grabs at power.

The President’s claims of statutory emergency powers fail the requirements of sections 8005 and 2808. Section 8005 reprogramming applies to the specified Department of Defense funds determined by the Secretary of Defense as necessary to the national interest, for higher priority items than for those originally appropriated, “based on *unforeseen military requirements*, and *in no case* where the item’s funding *has been denied by Congress*.”⁴³ The construction of a barrier on the border of the United States and Mexico is not an *unforeseen military requirement* and has unequivocally been *denied by Congress*. As previously established, President Trump has insisted upon the construction of a border wall since his presidential campaign and has requested appropriations for it since the beginning of his presidency.⁴⁴ Even within the Emergency Declaration, the President notes that

39. U.S. Const. art. I, § 9, cl. 7.

40. U.S. Dep’t of the Navy v. FLRA, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting The Federalist No. 51 (James Madison)).

41. See U.S. Const. art. I, § 9, cl. 7.

42. See Fact Sheet, *supra* note 24; 10 U.S.C. § 284(b)(7) (2020).

43. Dep’t of Def. Appropriations Act, § 8005.

44. See, e.g., OFFICE OF MGMT. & BUDGET, *supra* note 7; Nixon & Qiu, *supra* note 1.

large-scale migration through the southern border is “long-standing.”⁴⁵ Section 8005 also cannot be invoked to justify reprogramming of funds to the wall because these funds were denied by Congress. It is precisely the rejection of additional funds by Congress for the construction of the wall that led to the government shutdown.⁴⁶

Section 2808 also does not support the President’s reprogramming plan. Section 2808 requires that there (1) be a national emergency that requires the use of armed forces, (2) the funds be used for military construction, and (3) the project be necessary to support the use of the Armed Forces.⁴⁷ Notably, the President’s claim under section 2808 contradicts the requirements of section 8005, which *excludes* the redirection of funds for military construction purposes.⁴⁸ First, despite the emergency declaration’s language, the situation at the southern border does not require the use of the Armed Forces. The enforcement of domestic law at the border by the Armed Forces, as proposed by the President in the Emergency Declaration, is prohibited under the Posse Comitatus Act, which, in short, forbids the military from executing domestic law.⁴⁹ Building a border barrier also does not constitute military construction. “Military construction”⁵⁰ includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation,” as defined by section 2801 of the statute.⁵¹ A “military installation” is “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department.”⁵² Because the southern border does not resemble the statutory definition of a military installation, the construction of a barrier would not constitute “military construction.” The construction of a border wall is also not “necessary to support the use of Armed Forces.”⁵³ Not only does Customs and Border Protection already act as the enforcement agency at the border for domestic law,⁵⁴ but the Armed Forces are restricted to only support roles such as surveillance and search and rescue⁵⁵ under Posse Comitatus—certainly not “necessary” for their support.⁵⁶

45. Proclamation No. 9844, *supra* note 4.

46. See Zaveri et al., *supra* note 12.

47. 10 U.S.C. § 2808 (2020).

48. Compare 10 U.S.C. § 2808, with Dep’t of Def. Appropriations Act, § 8005.

49. 18 U.S.C. § 1385 (1994).

50. 10 U.S.C. § 2808 (2020).

51. 10 U.S.C. § 2801 (2017).

52. 10 U.S.C. § 2801(c)(4) (2017).

53. 10 U.S.C. § 2808 (2020).

54. See U.S. Customs & Border Protection, *About CBP*, <https://www.cbp.gov/about> (last visited Apr. 5, 2020) (stating its mission as “to safeguard America’s borders”).

55. Brief of the U.S. House of Representatives as Amicus Curiae in Support of Plaintiff’s Motion for a Preliminary Injunction at 15, *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019); *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (citing Jim Garamone, *DOD Officials Testify on Military Support to Southwest Border*, DEFENSE.GOV (Jan. 29, 2019), <https://www.defense.gov/Explore/News/Article/Article/1743120/dod-officials-testify-on-military-support-to-southwest-border/>).

56. 18 U.S.C. § 1385 (2020).

Therefore, without statutory authority to construct the wall, the President acts *ultra vires*, and in defiance of the Constitution's delegation of executive and legislative powers. Moreover, the President did not seem to hide the fact that the necessity of his Emergency Declaration was dubious. The day he announced the Declaration, he stated in an interview, "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster . . . And I think that I just want to get it done faster, that's all."⁵⁷ In 1976, Congress enacted the National Emergencies Act (hereinafter "NEA") "to insure that the exercise of national emergency authority is responsible, appropriate, and timely"—seemingly to restrict this type of fraudulent exploitation of executive deference.⁵⁸ The NEA allows the President to exercise emergency powers authorized by Congress after "specifically declar[ing] a national emergency," so long as the President specifies the power or authority under which he will act.⁵⁹ The Act also provided that Congress could pass a joint resolution to dissolve a presidential declaration of a national emergency, subject to presidential veto.⁶⁰ For the first time in history, Congress used this power to terminate President Trump's declaration of a national emergency, but this effort was ultimately vetoed by the President.⁶¹ The President's bad faith emergency declaration attempts to avoid constitutional restrictions in order to defy Congress. In so doing, he subverts the basic purpose of the NEA and this crucial constitutional check of separation of powers.⁶²

Although the Supreme Court's grant of a stay was not a total victory for the President, it does raise a concern that the Court might rule that the plaintiff coalition does not have standing to sue. Notably, other courts have held that the legislature may not sue either.⁶³ So the question is: if not the citizen coalition, and if not Congress itself, then who can challenge the President if he acts outside of his authority? For there to exist some limit to presidential power, the courts must fulfill their duty as a co-equal branch of government to "say what the law is."⁶⁴ They must determine when a branch of government has exercised power beyond its granted authority—reining in tyranny through the cases and controversies before them. It should be of grave concern when the executive may not be challenged by the citizens, the Congress,

57. Steve Benen, *A quote Trump may come to regret: 'I didn't need to do this'*, MSNBC.COM (Feb. 15, 2019), <http://www.msnbc.com/rachel-maddow-show/quote-trump-may-come-regret-i-didnt-need-do>.

58. *Sierra Club*, 379 F. Supp. 3d at 898 (quoting Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies & Delegated Emergency Powers, 94th Cong., 2d Sess., *The National Emergencies Act* (Public Law 94-412) (1976) Source Book: Legislative History, Texts, and Other Documents, at 1 (1976) ("NEA Source Book")).

59. 50 U.S.C. § 1621 (2020).

60. 50 U.S.C. § 1622 (2020).

61. H.R.J. Res. 46, 116th Cong. (2019); *Vetoed by President Donald J. Trump*, U.S. SENATE, <https://www.senate.gov/legislative/vetoed/TrumpDJ.htm> (last visited Apr. 5, 2020).

62. Brief of the Brennan Center for Justice in Support of the Plaintiff's Motion for a Preliminary Injunction at 1, *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019); *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019).

63. *Mnuchin*, 379 F. Supp. 3d 8.

64. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

nor the Court, as “with all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”⁶⁵

65. *Sierra Club v. Trump*, 929 F.3d 670, 707 (9th Cir. 2019) (citing *Youngstown*, 343 U.S., 654-55 (Jackson, J., concurring)).