

2019

## Up Against the Wall: Congressional Retention of the Spending Power in Times of “Emergency”

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### Recommended Citation

Linda Sheryl Greene, *Up Against the Wall: Congressional Retention of the Spending Power in Times of “Emergency”*, 51 Loy. U. Chi. L. J. 431 (2020).

Available at: <https://lawcommons.luc.edu/lucj/vol51/iss2/6>

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## Up Against the Wall: Congressional Retention of the Spending Power in Times of “Emergency”

Linda Sheryl Greene\*

*President Trump’s border wall has evolved from an ambitious campaign promise into a real opportunity to explore presidential versus Congressional authority to determine how the president spends Congressionally appropriated funds. The president’s arguments that he has the power to build the wall under either the National Emergencies Act or the funding provisions of 10 U.S.C. § 9705 or 10 U.S.C. § 284 lack merit—the cited non-emergency-tied statutes do not provide funding for the wall. The former authorizes the utilization of Treasury Forfeiture funds tied to specific law enforcement activities but excludes the ambitious and broad construction project the president proposed; the latter authorizes support only for counterdrug activities. The wall constitutes an unprecedented appropriation for a project without mooring in statutory language permitting only unspecified minor military construction projects.*

*Nor does The National Emergencies Act authorize the president to use Congressionally appropriated funds to build a wall that congress has expressly declined to fund. Congress enacted the National Emergencies Act after Executive abuses during the Vietnam War and to curb—not encourage—presidential usurpation of Congressional spending power based on emergency rationales. Although the National Emergencies Act imposes scant substantive and procedural limitations on a president’s ability to declare a national emergency and divert funds to address such an emergency, the Act does not allow the president to manufacture a basis for such a declaration where none exists. Even so, the chronology of events leading up to the emergency declaration demonstrates that the president’s invocation of an emergency is a ruse.*

*Additionally, the president’s Executive Order cites 10 U.S.C. § 2808, which requires the declaration of a national emergency under the National Emergencies Act. That Act authorizes a president to undertake “military construction projects” when he declares a national emergency in accordance with that Act. But Section 2808 only applies where a national*

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*emergency “requires the use of the armed forces” and only authorizes military construction projects “necessary to support such use of the armed forces.” The statutory language of 10 U.S.C. § 2808 makes it clear that effectuating immigration policy does not qualify as a military construction.*

*It has been long settled that presidential power must stem from an act of Congress or from the president’s own Article II powers. That dictum need not deprive a president of flexibility in the execution of powers delegated to her by Congress or in the execution of power delegated to her by the Constitution. Neither the foreign affairs power to recognize nations nor Commander in Chief authority to repel sudden attacks authorize the president to spend funds appropriated by Congress for other purposes. The Constitution did delegate to Congress the power to “provide for the common defense and general welfare” of the United States with the proviso that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.” That provision does not deprive Congress of the flexibility to delegate power to the president, but here Congress did not authorize these expenditures and expressly declined to provide funding for “the Wall” on two occasions. Thus, the president’s use of Congressionally appropriated funds to build “his Wall” is in conflict with Congress’s will and unlawful. So far, though lower courts have agreed with this result, a Supreme Court stay of the decision that enjoined the use of Defense Department funds in effect permits the president to finalize contracts and begin wall construction pending the resolution of the dispute on the merits in the Ninth Circuit and the Supreme Court. In its short decision that granted the stay, the Supreme Court signaled that if the case arrives via certiorari and the Court grants review, a majority will conclude that the Sierra Club plaintiffs have “no cause of action.” If that transpires, the favorable outcome for the president will turn on the nature of the litigants not the legality of the Wall construction project. For those concerned with the preservation of constitutional limitations on the Executive, “better half a loaf than none at all.”<sup>1</sup>*

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#### INTRODUCTION: FUNDING THE PRESIDENT’S PREROGATIVES

The idea that Congress must fund the executive’s prerogatives is, as Zachary Price puts it, “off the table.”<sup>2</sup> Although debated early in America’s history,<sup>3</sup> and suggested occasionally since,<sup>4</sup> “the great weight

2. Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 382 (2018).

3. The issue arose as early as 1774. At the same time, however, Congress did not take Washington’s invitation to promote “science and literature” either “by affording aids to seminaries of learning already established” or “by the institution of a national university.” David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–91*, 61 U. CHI. L. REV. 775, 799 (1994) (quoting 1 ANNALS OF CONG. 970 (1789) (Joseph Gales ed., 1834) (statement of Representatives Madison and Page)).

4. See, e.g., Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1350–51 (1988).

of historical practice contradicts it.”<sup>5</sup> In fact, in the earliest years of the Republic, many members of Congress quickly adopted the view that “the general power of granting money, also vested in Congress, would at all events be used, if necessary, as a check upon, and as controlling the exercise of the powers claimed by the President and the Senate.”<sup>6</sup> This check is generally accepted today as an essential component of the separation of powers. How, then, may a president fulfill campaign promises in situations where Congress has expressly refused to appropriate the funds that he has asked for?

President Trump found an answer to this question in the form of a highly publicized and sensationalized declaration of a national emergency. The president campaigned on constructing a “great, great wall” on the United States-Mexico border<sup>7</sup> and took steps to prepare for that construction early in his presidency,<sup>8</sup> but had trouble securing congressional funding to build it—even when his party controlled both chambers of congress. In the third year of his presidency, the longest government shutdown in United States history ended with congressional authorization of about one-quarter of the funding that the president had requested.<sup>9</sup>

Although many considered this turn of events a major loss for the administration, the president countered by declaring a national

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5. Price, *supra* note 2, at 382.

6. 4 ANNALS OF CONG. 466 (1796) (statement of Albert Gallatin). This view is widely adopted today. See Price, *supra* note 2, at 382 (discussing whether Congress’s power of the purse comes with strings attached); Stith, *supra* note 4, at 1344 (describing Congress’s power of the purse).

7. Donald J. Trump, 2016 Presidential Announcement Speech (June 16, 2015) [hereinafter Trump Presidential Announcement Speech] (transcript available at <http://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/AJ3T-JSEN>]).

8. In Executive Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 27, 2017), “Border Security and Immigration Enforcement Improvements,” the president cited the powers vested in him by the Constitution as well as three statutes to undertake numerous policies “to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation’s immigration laws are faithfully executed,” including “the immediate construction of a physical wall on the southern border . . . .” Environmental groups unsuccessfully challenged the Department of Homeland Security (DHS) decision to waive applicable environmental laws in the course of the installation of “additional physical barriers and road . . . in the vicinity of the United States border” that DHS contended were authorized by Section 102a of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *In re Border Infrastructure Evtl. Litig.*, 284 F. Supp. 3d 1092, 1104, 1119–20 (S.D. Cal. 2018), *aff’d*, *Border Infrastructure Evtl. Litig. v. Dep’t of Homeland Sec.*, 915 F.3d 1213 (9th Cir. 2019). The Ninth Circuit concluded that both the projects and the environmental law waivers were specifically authorized by the IIRIRA. 915 F.3d. at 1226.

9. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230, 133 Stat. 13, 28 (providing \$1.375 billion, less than one quarter of the \$5.7 billion sought); Mihir Zaveri, Guilbert Gates & Karen Zraick, *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> [<https://perma.cc/952N-VLYC>].

emergency at the southern border.<sup>10</sup> Invoking his authority under the National Emergency Act (NEA), which authorizes the president to “declare [a] national emergency,”<sup>11</sup> the proclamation detailed:

The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch’s exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.<sup>12</sup>

At the same time, the White House issued additional information regarding the declaration in a “fact sheet,” which stated that “the Administration [had] so far identified up to \$8.1 billion that will be available to build the border wall once a national emergency is declared.”<sup>13</sup> Specifically, the White House laid out three funding sources to be used sequentially: (1) “[a]bout \$601 million from the Treasury Forfeiture Fund”; (2) “[u]p to \$2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities”; and (3) “[u]p to \$3.6 billion reallocated from Department of Defense military construction projects under the president’s declaration of a national emergency.”<sup>14</sup>

Many legal scholars were quick to criticize the declaration. Yale Law Professor Bruce Ackerman wrote that diverting military funds to pay for

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10. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019).

11. National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255 (1976).

12. Proclamation No. 9844, 84 Fed. Reg. at 4949.

13. *President Donald J. Trump’s Border Security Victory*, NAT’L SEC. & DEF. FACT SHEETS (Feb. 15, 2019) [hereinafter *Border Security Fact Sheet*], <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory> [<https://perma.cc/NW4D-Y5VH>].

14. *Id.*

a wall and the use of the military would not only be illegal, but that “members of the armed forces [who] obeyed [President Trump’s] command” to build such a wall “would be committing a federal crime.”<sup>15</sup> Susan Hennessey, a Senior Fellow in National Security in Governance Studies at the Brookings Institution, wrote that “for the president to transparently abuse the emergency discretion granted by statute and for Congress to accede to that abuse is an exceptionally grave signal of serious structural breakdown.”<sup>16</sup> Moreover, Boston University International Law Scholar Robert Sloane characterized the declaration as “an effort to get one’s way outside the ordinary political and legal processes . . . [that] gradually erodes the shared norms that sustain our constitutional democracy.”<sup>17</sup>

Democratic members of Congress also pushed back. For example, House Democratic Caucus Chairman Hakeem Jeffries claimed that Congress’s “power of the purse . . . has been invaded by Donald Trump.”<sup>18</sup> Speaker of the House Nancy Pelosi released a statement finding that “[t]he President’s sham emergency declaration and unlawful transfers of funds have undermined our democracy, contravening the vote of the bipartisan Congress, the will of the American people and the letter of the Constitution.”<sup>19</sup> Senate Minority Leader Chuck Schumer characterized a potential declaration as “a lawless act, a gross abuse of the power of the presidency, and a desperate attempt to distract from the fact that President Trump broke his core promise to have Mexico pay for the wall.”<sup>20</sup> He continued, “[i]t will be another demonstration of President Trump’s naked contempt for the rule of law and congressional authority.”<sup>21</sup>

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15. Bruce Ackerman, *No, Trump Cannot Declare an ‘Emergency’ to Build His Wall*, N.Y. TIMES (Jan. 5, 2019), <https://www.nytimes.com/2019/01/05/opinion/no-trump-cannot-declare-an-emergency-to-build-his-wall.html> [<https://perma.cc/9AQP-97CX>].

16. Andrew Rudalevige, *Does Trump Really Have ‘Absolute Power’ to Declare a National Emergency? Let’s Examine the Statute.*, WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/10/does-trump-really-have-absolute-power-to-declare-a-national-emergency-lets-examine-the-statute/> [<https://perma.cc/KX2H-5RVJ>].

17. Rich Barlow, *Is Trump’s Declaration of a National Emergency Constitutional?*, BU TODAY (Feb. 20, 2019), <http://www.bu.edu/articles/2019/is-trumps-declaration-of-a-national-emergency-constitutional> [<https://perma.cc/7CGK-KDH3>].

18. Deirdre Walsh, *Trump’s National Emergency Stands as House Fails to Override Veto*, NPR (Mar. 26, 2019), <https://www.npr.org/2019/03/26/706843365/trumps-national-emergency-stands-as-house-fails-to-override-veto> [<https://perma.cc/C4FE-R7Y8>].

19. Press Release, Nancy Pelosi, Speaker, House of Reps., *Pelosi Statement on House’s Intention to File Lawsuit to Block the President’s Transfer of Funds for His Ineffective, Wasteful Wall* (Apr. 4, 2019), <https://www.speaker.gov/newsroom/4419-2/> [<https://perma.cc/B54Q-GN3N>].

20. 165 CONG. REC. S1365 (daily ed. Feb. 14, 2019) (statement of Sen. Schumer).

21. *Id.*

Congressional condemnation was not limited to Democrats. Thirteen House Republicans and twelve Senate Republicans voted for a joint resolution to overturn the national emergency.<sup>22</sup> Many of these members of Congress cited political reasons, primarily refusing to give Trump a power that they would not want to see a future democratic president hold.<sup>23</sup> But others voted for the resolution because they did not believe the president had the authority to make such an emergency declaration:

For the Executive Branch to override a law passed by Congress would make it the ultimate power rather than a balancing power . . . We experienced a similar erosion of congressional authority with President Obama’s unilateral immigration orders—which I strenuously opposed. In the case before us now, where Congress has enacted specific policy, to consent to an emergency declaration would be both inconsistent with my beliefs and contrary to my oath to defend the Constitution.<sup>24</sup>

Of course, not all House and Senate Republicans voted to overturn the national emergency, either believing it was constitutional or placing what they believe to be an important policy move over their beliefs of what the Constitution and federal statutes allow.

Despite its current salience, no scholarship focuses directly on the NEA’s applicability where Congress has expressly said no first and its relation to a domestic policy. This is unsurprising, as it appears as though no president in history has cited the NEA to sidestep the congressional appropriations process after Congress has expressly declined to fund a proposed presidential domestic program. This article explores the NEA’s applicability, through a separation of powers lens, in just these situations

22. H.R.J. Res. 46, 116th Cong. (2019). House Representatives Amash (MI), Fitzpatrick (PA), Gallagher (WI), Massie (KY), Johnson (SD), Hurd (TX), Herrera Beutler (CA), Rodgers (WA), Rooney (FL), Sensenbrenner (WI), Stefanik (NY), Upton (MI), and Walden (OR) joined the joint resolution. 165 CONG. REC. H2217–18 (daily ed. Feb. 26, 2019) (relating, through Roll Vote no. 94, to a national emergency declared by the president on February 15, 2019). Overall, the measure passed 245-182 in the House, with 5 not voting. *Id.* In the Senate, Senators Alexander (TN), Portman (OH), Romney (UT), Blunt (MO), Rubio (FL), Collins (ME), Lee (UT), Toomey (PA), Moran (KS), Murkowski (AK), Wicker (MS), and Paul (KY) all voted to overturn the national emergency. 165 CONG. REC. S1882 (daily ed. Mar. 14, 2019) (relating, through Roll Vote no. 49, to a national emergency declared by the president on February 15, 2019). In the Senate, the measure passed 59-41. *Id.*; see also H.R.J. Res. 46 (terminating the national emergency declared on Feb. 15, 2019).

23. Tennessee Senator Lamar Alexander said he supported the border wall, but voted on a resolution to overturn the president’s emergency declaration, claiming “this declaration is a dangerous precedent.” Sen. Lamar Alexander, *Why I Am Voting Against Donald Trump’s State of Emergency Declaration*, TENNESSEAN (Mar. 14, 2019), <https://www.tennessean.com/story/opinion/2019/03/14/lamar-alexander-emergency-declaration-vote-donald-trump/3161542002/> [https://perma.cc/RZJ3-H7GV].

24. Veronica Stracqualursi & Dana Bash, *Romney Says He’ll Vote to Block Trump’s National Emergency Declaration*, CNN (Mar. 14, 2019), <https://www.cnn.com/2019/03/14/politics/mitt-romney-resolution-trump-national-emergency/index.html> [https://perma.cc/MPM6-ZPUP].



and concludes that President Trump has exceeded any express or implied authority he may have.

Part II describes the metamorphosis of candidate Trump's "moonshot" campaign promise to have Mexico pay for the construction of a "great, great wall" into a constitutional controversy over presidential usurpation of Congressional appropriation authority.

In Part III, I explore the president's assertions of statutory authority to fund the Wall based on the NEA, the Treasury Forfeiture Fund,<sup>25</sup> and the counterdrug activities provision of 10 U.S.C. § 284.<sup>26</sup> Neither the Treasury Forfeiture Fund nor § 284 require a presidential declaration for their utilization of the NEA. I conclude that neither the Treasury Forfeiture Fund nor § 284 provide a basis for President Trump's southern border wall because of their textual limitations. Next, I conclude that the scope of the congressional delegation to the president under the NEA must be read against its intent and prior presidential utilization. I conclude that the NEA's broadly-worded text grants the president wide discretion in declaring an emergency, but President Trump's declaration extends far beyond what the statute allows. The NEA's substantive limits require at least an emergency. Although "emergency" is not defined in the statute, historical and common understandings of the term invoke notions of foreseeability and urgency. The national emergency that President Trump declared was neither unforeseen nor urgent, considering his own comments that he "did not need" to declare it. Moreover, prior presidential utilizations of the NEA provide no precedent for the wall. Instead, President Trump's invocation of the NEA is inconsistent with Congress's intent to forbid presidents from using national emergency declarations to usurp congressional appropriations power.

Part IV addresses the constitutional considerations. This discussion necessarily requires an examination of *Youngstown Sheet & Tube Company v. Sawyer*, in which the Supreme Court invalidated President Truman's attempt to nationalize steel mills to prevent labor strikes. *Youngstown* dictates that the executive's power is at its lowest when Congress has expressly said no.<sup>27</sup> Part IV also discusses the unique political history surrounding President Trump's declaration of a national emergency—including the long back-and-forth between the president and Congress, which demonstrates Congress's disapproval of the border wall. President Trump's attempt to sidestep congressional authority over appropriations is an attempt to "aggrandize" the executive's power at the expense of Congress's constitutional power to control appropriations.

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25. 31 U.S.C. § 9705(a) (2019).

26. 10 U.S.C. § 284(a), (a)(1)(A) (2019).

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

Although the emergency powers Congress conferred under the NEA are broad, the statute was conceived as a limitation on the president's authority to redirect funds Congress has appropriated for other purposes. Thus, the NEA is not "congressional approval" under *Youngstown* where Congress has addressed the specific appropriation request and withheld authority. The president's actions are unconstitutional.

In an Epilogue, this Article notes that although so far the lower federal courts agree with the above view, the Supreme Court has already stayed an important ruling that enjoined the wall construction and has signaled that it will side with the president. It will reach that result not because the president acted lawfully but because a set of plaintiffs who prevailed below had no right to sue.

#### I. BREAKING DOWN THE HISTORY OF A "GREAT, GREAT WALL"<sup>28</sup>

A wall spanning the southern border has evolved from an ambitious campaign goal into a politically divisive feature of President Trump's domestic policy agenda. The wall was integral to President Trump's announcement of his candidacy on June 16, 2015,<sup>29</sup> throughout the 2016 campaign,<sup>30</sup> and to his victory speech.<sup>31</sup> In the third presidential debate, he infamously explained, "[w]e have to keep the drugs out of our country. Right now, we're getting the drugs, they're getting the cash. . . . Now, I want to build the wall. We need the wall. The border patrol, I.C.E., they all want the wall."<sup>32</sup> He justified the need for the wall by discussing drugs that come through the border: "We stop the drugs; we shore up the border . . . we have some bad hombres here and we're going to get them out."<sup>33</sup> At his inauguration he said, "[w]e must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength."<sup>34</sup> Once president, Trump immediately scaled

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28. Trump Presidential Announcement Speech, *supra* note 7.

29. *Id.* ("I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.")

30. See generally *The Third Presidential Debate: Hillary Clinton and Donald Trump* (NBC television broadcast Oct. 19, 2016) [hereinafter *The Third Presidential Debate*], <https://www.youtube.com/watch?v=smkyorC5qwc> [<https://perma.cc/2VFF-C7ZP>] (transcript available at <https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063> [<https://perma.cc/Q6JR-N6SF>]).

31. Donald J. Trump, Election Night Victory Speech (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/donald-trump-victory-speech/index.html> [<https://perma.cc/PBK5-69NF>] ("[W]e will always put America's interests first[.]").

32. *The Third Presidential Debate*, *supra* note 30.

33. *Id.*

34. Donald J. Trump, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/> [<https://perma.cc/F59L-GXLL>].

back his broad promise to make the Mexican government pay for the wall, but did not back down on building the wall.

*A. During the 2016 Campaign*

The wall was a focal point from the inception of Donald Trump's campaign. When Donald Trump announced his candidacy on June 16, 2015, he first announced his plans regarding immigration:

When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. . . . I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I'll have Mexico pay for that wall.<sup>35</sup>

On Super Tuesday, Candidate Trump cited the Great Wall of China to support the wall: "The Great Wall of China, built 2,000 years ago, is 13,000 miles, folks, and they didn't have Caterpillar tractors, . . . [t]hey didn't have cranes. They didn't have excavation equipment," he said.<sup>36</sup> "We can do that so beautifully."<sup>37</sup>

Many—including the Mexican government—were quick to condemn Trump's broad comments and specifically the border wall as racist and hateful rhetoric.<sup>38</sup> Mexican President Enrique Peña Nieto said that he was "saddened" by the wall and stated that "Mexico does not believe in walls. . . . Mexico will not pay for any wall."<sup>39</sup> In the United States, Senator Jeff Merkley went as far as to call the wall a "racist symbol."<sup>40</sup>

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35. Trump Presidential Announcement Speech, *supra* note 7.

36. Donald J. Trump, Super Tuesday News Conference (Mar. 2, 2016), <https://time.com/4245134/super-tuesday-donald-trump-victory-speech-transcript-full-text/> [<https://perma.cc/J7EA-HRUL>].

37. *Id.*

38. Dave Graham, *Mexico Blasts Trump Stance on Immigrants as Absurd, Racist*, REUTERS (Aug. 19, 2015), <https://www.reuters.com/article/us-usa-election-trump-mexico/mexico-blasts-trump-stance-on-immigrants-as-absurd-racist-idUSKCN0QO1SZ20150819> [<https://perma.cc/PRF2-2SSM>].

39. Enrique Peña Nieto (@EPN), TWITTER (Jan. 25, 2017, 6:41 PM), <https://twitter.com/EPN/status/824447050066468865> [<https://perma.cc/Q4NY-4CCN>]; see also *Mexico: We Will Not Pay for Trump Border Wall*, BBC NEWS (Jan. 26, 2017), <https://www.bbc.com/news/world-us-canada-38753826> [<https://perma.cc/85VJ-62VQ>] (providing English subtitles and discussing the Twitter exchange between the presidents).

40. *Merkley: Dems Support Border Security, Not 'Racist Symbol' Border Wall* (MSNBC television broadcast Feb. 5, 2019), <https://www.msnbc.com/mtp-daily/watch/merkley-dems-support-border-security-not-racist-symbol-border-wall-1437745731696> [<https://perma.cc/GW3G-9LXX>]; see also Press Release, Sen. Jeff Merkley, Merkley Responds to State of the Union Address (Feb. 5, 2019), <https://www.merkley.senate.gov/news/press-releases/merkley-responds-to-state->

But the sentiment stuck—Trump and the Republican Party used the wall to gain support for this campaign. For example, although a CBS News/New York Times poll showed a drop in overall support for a border wall from 47 percent in January 2016 to 39 percent in July 2016,<sup>41</sup> a Rasmussen poll in December 2016 showed that Republican support for the wall remained unchanged in that time, with 65 percent of Republicans believing Trump should build the wall during his first year of office.<sup>42</sup> Thus, Republicans employed the wall as a mechanism to rally support for not only Trump, but the entire Republican party. Senator Ted Cruz, who had run against Trump in the Republican primaries, sought to excite the crowd at the Republican National Convention in Cleveland by criticizing then-President Barack Obama and drumming support for the wall:

President Obama is a man who does everything backwards. He wants to . . . open up our borders. He exports jobs, and imports terrorists. Enough is enough. . . . We deserve an immigration system that puts America first, and yes, builds a wall to keep America safe.<sup>43</sup>

Later that day, in his acceptance speech, Trump said, “[w]e are going to build a great border wall to stop illegal immigration, to stop the gangs and the violence, and to stop the drugs from pouring into our communities.”<sup>44</sup> The Republican Party endorsed Trump’s plan, amending its party platform to include support for the wall: “The border wall must cover the entirety of the southern border and must be sufficient to stop both vehicular and pedestrian traffic.”<sup>45</sup>

After Trump secured the Republican nomination, his advisors made it clear that he would not need the support of Congress to build a wall. Rudy Giuliani told CNN that “[Trump] can do it by executive order, by just

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of-the-union-address [<https://perma.cc/X9CT-DX9A>] (“[Trump] remains singularly focused on his unpopular, racist wall, and in using terror and trauma as a deterrent against refugees seeking asylum.”).

41. Sarah Dutton et al., *Poll: Trump and Clinton Voters on Immigration, Economy, Trade*, CBS NEWS (July 14, 2016), <https://www.cbsnews.com/news/donald-trump-hillary-clinton-voters-on-race-the-economy-trade-immigration/> [<https://perma.cc/MP6H-9S7R>].

42. *Most GOP Voters Want a Border Wall in Trump’s First Year*, RASMUSSEN REPS. (Dec. 6, 2016), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/december\\_2016/most\\_gop\\_voters\\_want\\_a\\_border\\_wall\\_in\\_trump\\_s\\_first\\_year](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/december_2016/most_gop_voters_want_a_border_wall_in_trump_s_first_year) [<https://perma.cc/T3BE-26X2>].

43. Sen. Ted Cruz, Speech at the Republican National Convention (July 21, 2016), <https://time.com/4416396/republican-convention-ted-cruz-donald-trump-endorsement-speech-transcript-video/> [<https://perma.cc/G3QN-KNAQ>].

44. Donald J. Trump, Acceptance of the Republican Nomination Speech (July 21, 2016), <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974> [<https://perma.cc/BE3A-A5EB>].

45. COMM. ON ARRANGEMENTS FOR 2016 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PLATFORM 2016, at 26 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) [<https://perma.cc/H4EH-8EQ6>].

reprogramming money within the [sic] immigration service, and not only that, they have actually approved a wall for certain portions of the border that hasn't even been built yet. So you could take a year building that out . . . ."<sup>46</sup> This foreshadowed various statements during the Trump presidency that would signal the president's willingness to use a national emergency and other reprogramming mechanisms in the event that Congress failed to make funds available. In a 2018 meeting with Democratic congressional leaders, for example, President Trump said, "if we don't get what we want, one way or the other—whether it's through [Congress], through a military, through anything you want to call—I will shut down the government."<sup>47</sup>

### *B. After the Election and Into the Shutdown*

Shortly after candidate Trump became President-Elect Trump, he scaled back his ambitions. He conceded that a wall-like physical barrier might not be necessary.<sup>48</sup> In various interviews after the election, Trump indicated that fencing might be more appropriate than an actual wall in some portions, and that, in some sections, "you don't need a wall, because you have, you know, you have mountains, you have other things. You have large and rather vicious rivers."<sup>49</sup> He continued that Mexico would not actually pay for the wall, and that was not what he had meant: "When—during the campaign, I would say, 'Mexico is going to pay for it.' Obviously, I never said this and I never meant they're going to write out a check."<sup>50</sup> He continued, "They are [going to pay for the wall]. They are paying for it with the incredible deal we made, called the United States, Mexico, and Canada USMCA deal. . . . So, Mexico is paying for the wall indirectly."<sup>51</sup> In time, it soon became clear that Mexico indeed would not pay for the wall.<sup>52</sup>

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46. *New Day With Chris Cuomo and Alisyn Camerota* (CNN television broadcast Nov. 10, 2016) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1611/10/nday.07.html> [<https://perma.cc/HCS7-TSGS>]).

47. President Donald Trump, Remarks in Meeting with Senate Minority Leader Chuck Schumer and House Speaker-Designate Nancy Pelosi (Dec. 11, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/> [<https://perma.cc/3XM7-RAKW>].

48. *Hannity: Here's Trump's Message to Those Who Are Upset About His Election Victory* (Fox News Channel television broadcast Dec. 01, 2016), <https://insider.foxnews.com/2016/12/01/donald-trump-hannity-his-election-victory-message-protesters> [<https://perma.cc/9MPU-FAUR>].

49. *Id.*

50. President Donald Trump, Remarks Before Marine One Departure (Jan. 10, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-30/> [<https://perma.cc/UWS8-F3SU>].

51. *Id.*

52. Mexican President Enrique Peña Nieto wrote on Twitter: "I repeat what I said personally,

More importantly, Congress declined appropriate funding for the wall. The president initially asked for support of “\$1.6 billion for 65 miles of new border wall construction in the the Rio Grande Valley . . . .”<sup>53</sup> During the negotiations leading up to the 2019 fiscal year appropriations bill, the president declared that he would not sign a bill that did not include funds for the border wall: “I’ve made my position very clear: Any measure that funds the government must include border security. . . . Walls work whether we like it or not. They work better than anything.”<sup>54</sup>

This impasse led to the longest government shutdown in history, which began on December 22, 2019.<sup>55</sup> The White House’s request nearly quadrupled on January 6, 2019, when the Acting Director of the Office of Management and Budget, Russell Vought, sent a letter to the United States Senate Committee on Appropriations, emphasizing that “any strategy to achieve operational control along the southern border is physical infrastructure to provide requisite impedance and denial.”<sup>56</sup> The White House thus requested \$5.7 billion for construction of a steel barrier for the Southwest border,<sup>57</sup> which “would fund construction of a total of approximately 234 miles of new physical barrier.”<sup>58</sup> Still, the House and Senate did not present the president with a bill that included his requested funding.<sup>59</sup>

### *C. Refocusing the Effort: Declaring a National Emergency*

When the shutdown ended with a temporary funding bill on January 25, 2019,<sup>60</sup> President Trump refocused his effort to obtain funding through an emergency declaration. Alluding to his emergency authority, he stated: “As everyone knows, I have a very powerful alternative, but I

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Mr. Trump: Mexico would never pay for a wall.” Enrique Peña Nieto (@EPN), TWITTER (Google trans., Sept. 1, 2016, 12:06 PM), <https://twitter.com/EPN/status/771423919978913792> [<https://perma.cc/9XS9-VKF6>].

53. U.S. DEP’T HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2019, at 3 (2018).

54. President Donald Trump, Remarks at Signing of H.R. 2, the Agriculture Improvement Act of 2018 (Dec. 20, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-2-agriculture-improvement-act-2018/> [<https://perma.cc/5MBP-ZK4L>].

55. 164 CONG. REC. H10590 (daily ed. Dec. 22, 2018) (statement of Rep. McGovern) (“I think it is embarrassing and it is wrong. 800,000 Federal employees will not get paid during this holiday season because of the shutdown.”).

56. 165 CONG. REC. H588 (daily ed. Jan. 15, 2019) (statement of Rep. Perry).

57. *Id.*

58. *Id.*

59. *See* 164 CONG. REC. S8012 (daily ed. Dec. 21, 2018) (statement of Sen. Feinstein) (“I cannot support the version of the short-term continuing resolution that the House passed last night. The \$5.7 billion in wall funding added by House Republicans is accompanied by no meaningful justification from the White House.”).

60. *See* Further Additional Continuing Appropriations Act, Pub. L. No. 116–5, 133 Stat. 10, 10 (2019) (providing funding for several agencies, but failing to provide any money for southern wall).

didn't want to use it at this time.”<sup>61</sup> President Trump furthermore made clear that he would see the issue through, whether he had Congress's approval or not: “The Wall will get built one way or the other!”<sup>62</sup> His Chief of Staff, Mick Mulvaney, confirmed that intent, stating that the president was going to “build the wall . . . [W]e'll take as much money as you can give us and then we will go off and find the money someplace else legally in order to secure that southern barrier. But this is going to get built with or without Congress.”<sup>63</sup> Mulvaney continued:

There are other funds of money that are available to [the President] through what we call reprogramming. There is money that he can get at and is legally allowed to spend, and I think it—needs to be said again and again that all of this is going to be legal. There are statutes on the books as to how any President can do this. . . . There are certain funds of money that he can get to without declaring a national emergency and other funds that he can only get to after declaring a national emergency.<sup>64</sup>

All-in-all, the Chief of Staff claimed these funds would amount to well over \$5.7 billion.<sup>65</sup> Further shedding light on the president's intent, he explained, “The President doesn't really want to do it. . . . He would prefer legislation because that's the right way to go, and it's the proper way to spend money in this country.”<sup>66</sup> However, the bipartisan funding bill for fiscal year 2019 authorized about \$1.375 billion—far short of the \$5.7 billion the president wanted.<sup>67</sup> On the same day the president signed into act the Appropriations Bill, he issued a proclamation “declaring a national emergency concerning the southern border of the United States.”<sup>68</sup>

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61. President Donald Trump, Remarks by President Trump on the Government Shutdown (Jan. 25, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-government-shutdown/> [<https://perma.cc/Y3D2-TSPJ>].

62. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2019, 4:02 PM), <https://twitter.com/realdonaldtrump/status/1094355899194454017?lang=en> [<https://perma.cc/35CJ-EA4Y>].

63. *Mick Mulvaney on Chances of Border Deal, Democrats Ramping Up Investigation of Trump Admin*, (Fox News Channel television broadcast Feb. 10, 2019), [https://www.youtube.com/watch?v=l\\_Z0xx\\_zS0M](https://www.youtube.com/watch?v=l_Z0xx_zS0M) [<https://perma.cc/ULT2-7UW7>].

64. *Id.*

65. *Id.*

66. *Id.*

67. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230(a)(1), 133 Stat. 13, 28. That \$1.375 billion was specifically designated “for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector . . .” *Id.*

68. Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019). The details of the proclamation and accompanying fact sheet are detailed *infra*, notes 102–04.

Following the declaration, Congress terminated the president's national emergency,<sup>69</sup> but he vetoed the termination,<sup>70</sup> and Congress failed to override that veto.<sup>71</sup> Texas Democratic Representative Joaquin Castro introduced the override measure in the House of Representatives, stating that:

The Constitution provides Congress with the power of the purse and expressly prohibits the President from spending funds that Congress has not appropriated. Here, Congress has not authorized or appropriated funding to build a wall on the southern border. Indeed, Congress has repeatedly chosen not to do so in response to the President's multiple requests for such funding since becoming President.<sup>72</sup>

Representative Castro's resolution passed in the House with a vote of 245-182, and in the Senate with a vote of 59-41, garnering bipartisan support in both chambers.<sup>73</sup> The president vetoed Congress's joint resolution on March 15, 2019.<sup>74</sup> In his statement accompanying the veto, the president described his reasoning:

[O]ur porous southern border continues to be a magnet for lawless migration and criminals and has created a border security and humanitarian crisis that endangers every American. Last month alone, [United States Custom and Border Protection (CBP)] apprehended more than 76,000 aliens improperly attempting to enter the United States along the southern border—the largest monthly total in the last 5 years. In fiscal year 2018, CBP seized more than 820,000 pounds of drugs at our southern border, including 24,000 pounds of cocaine, 64,000 pounds of methamphetamine, 5,000 pounds of heroin, and 1,800 pounds of fentanyl. . . . The situation at the southern border is rapidly deteriorating because of who is arriving and how they are arriving. . . . My highest obligation as President is to protect the Nation and its people. Every day, the crisis on our border is deepening, and with new surges of migrants expected in the coming months, we are straining our border enforcement personnel and resources to the breaking point. H.J. Res. 46 ignores these realities.<sup>75</sup>

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69. H.R.J. Res. 46, 116th Cong. (2019).

70. President Donald Trump, Veto Message to the House of Representatives for H.J. Res. 46 (Mar. 15, 2019) [hereinafter Veto Message], <https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/> [<https://perma.cc/2XM7-95M9>].

71. 165 CONG. REC. H2814-15 (daily ed. Mar. 26, 2019).

72. 165 CONG. REC. E193 (daily ed. Feb. 22, 2019) (statement of Rep. Castro).

73. H.R.J. Res. 46, 116th Cong. (2019); 165 CONG. REC. H2217-18 (daily ed. Feb. 26, 2019) (relating, through Roll Vote no. 94, to a national emergency declared by the president on February 15, 2019); 165 CONG. REC. H2814-15 (daily ed. Mar. 26, 2019); 165 CONG. REC. S1882 (daily ed. Mar. 14, 2019).

74. Veto Message, *supra* note 70.

75. *Id.*



The House responded with override proceedings.<sup>76</sup> Representative DeFazio spoke first, asking the House to “override the President’s veto of Congress’ bipartisan action to terminate his so-called national emergency declaration. The bottom line is that this emergency declaration is nothing more than an end run around a majority . . . in complete disregard of our constitutional system of separation of powers.”<sup>77</sup> On March 26, 2019, the House voted on whether to override the president’s veto.<sup>78</sup> In the end, all of the House Democrats and fourteen Republicans made a final tally of 248 votes in favor versus 181 against, short of the two-thirds required to override a presidential veto.<sup>79</sup>

## II. STATUTORY UNDERPINNINGS

Did the president have authority to divert congressional funds to build the wall? The president relied on three statutes for his authority to divert congressional appropriations to build the wall, relying on the Treasury Forfeiture Fund, funds in support of counterdrug activities, and Department of Defense funds for military reconstruction projects to divert congressional appropriations to build the wall.<sup>80</sup> This section addresses those claims, and concludes that not one of these statutes would authorize the president to build the wall.

### A. *Emergency Independent Statutes*

Two statutes the president relied upon do not require the declaration of a national emergency at all. This includes a provision of the Treasury Forfeiture Fund and a counterdrug activities construction fund. However, those cited non-emergency-tied statutes do not provide funding for the wall.

#### 1. Treasury Forfeiture Funds

Congress established the Department of the Treasury Forfeiture Fund, which is generally available to the Secretary of the Treasury “with respect to seizures and forfeitures made pursuant to [applicable] law,” and for certain “law enforcement purposes.”<sup>81</sup> These specific “law enforcement purposes” include the seizure of property, contracting services to

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76. 165 CONG. REC. H2806 (daily ed. Mar. 26, 2019).

77. *Id.* (statement of Rep. DeFazio).

78. 165 CONG. REC. H2814–15 (daily ed. Mar. 26, 2019).

79. *Id.*

80. *The Funds Available to Address the National Emergency at Our Border*, NAT’L SEC. & DEF. FACT SHEETS (Feb. 26, 2019) [hereinafter *Funds Fact Sheet*], <https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border> [<https://perma.cc/58TG-ZVBV>].

81. 31 U.S.C. § 9705(a) (2019).

maintain seized properties, and payment for training foreign law enforcement.<sup>82</sup> Notably excluded from the list is the use of funds to pay for a broad, multi-billion-dollar construction project tenuously related to non-Treasury law enforcement activities.

## 2. Counterdrug Activities

The second statutory provision on which the president relied, 10 U.S.C. § 284, authorizes “support for the counterdrug activities,” including the “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States” and “[t]he establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purposes of facilitating counterdrug activities[.]”<sup>83</sup> Section 284 further authorizes “support for the counterdrug activities . . . of any other department of the Federal Government” if “such support is requested . . . by the official who has responsibility for [such] counterdrug activities.”<sup>84</sup> Although this section may be used for a “fence,” in a “drug smuggling corridor” it does not authorize a wall spanning the entirety of the southern border.<sup>85</sup> Moreover, an authorized “minor military construction project” must have a cost less than \$6 million, and Congress has only appropriated \$881 million under § 284—far short of the \$2.5 billion that the White House claims these funds will provide.<sup>86</sup>

The president claimed that his authority under § 284 works in conjunction with § 8005 of the 2019 Department of Defense Appropriations Act.<sup>87</sup> Under 31 U.S.C. § 1532, “[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.”<sup>88</sup> The president claims § 8005 provides such law.<sup>89</sup> Section 8005 authorizes the Secretary of Defense to augment the drug interdiction fund and authorizes the reprogramming of up to \$4 billion “of working capital funds of the Department of Defense or funds made available in this Act

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82. *Id.* §§ 9705(a)(1)(A)–(J).

83. 10 U.S.C. § 284 (2016).

84. *Id.* § 284(a), (a)(1)(A).

85. *Id.* § 284(b)(7).

86. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2982, 2997 (2018).

87. *Funds Fact Sheet*, *supra* note 80.

88. 31 U.S.C. § 1532 (2019).

89. *Funds Fact Sheet*, *supra* note 80.

to the Department of Defense.”<sup>90</sup> However, in order to reprogram funds under the Act, § 8005 requires that “such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated.”<sup>91</sup> Further, § 8005 provides that reprogramming will be proscribed “in [any] case where the item for which funds are requested has been denied by the Congress.”<sup>92</sup>

## B. *The National Emergencies Act*

### 1. Statutory Framework

The NEA allows the president to declare a national emergency.<sup>93</sup> The NEA passed and went into effect on September 14, 1976; it prescribes rules for the declaration of modern national emergencies.<sup>94</sup> It states that “[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect . . . only when the President . . . specifically declares a national emergency.”<sup>95</sup> The NEA is the main statutory source for the president’s ability to declare a domestic national emergency.

The NEA lacks substantive limits on the president’s ability to declare a national emergency.

The initial draft of the bill provided that the president could declare a national emergency in the event the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States.<sup>96</sup>

Legislators removed this text because they were concerned that a future president would see it as a conferral of substantive authority.<sup>97</sup> But the removal of this requirement was not meant to provide the president with a blank check for declaring an emergency—the NEA does not provide an independent legal basis that justifies declaring an emergency. To the contrary, Congress intended “that the NEA regulate emergency powers

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90. § 8005, 132 Stat. at 2999.

91. *Id.*

92. *Id.*

93. National Emergencies Act, Pub. L. No. 94-412, § 201, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1621 (1976)).

94. *See generally id.*

95. 50 U.S.C. § 1621(b) (2019).

96. Patrick A. Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 749 (2013) (quoting S. REP. NO. 93-1170, at 7 (1974)).

97. *Id.*

exercised pursuant to other statutes.”<sup>98</sup> Even so, Congress ultimately did not provide any substantive limits in the NEA.

Substantive limits within the NEA have been ruled unconstitutional. The initial draft of the NEA had a mechanism for oversight of national emergencies through accountability and reporting requirements.<sup>99</sup> In the original framework of the NEA, Congress had to vote by concurrent resolution to extend a national emergency after six months, and could vote to terminate one at any time.<sup>100</sup> Concurrent resolutions were later found unconstitutional in *INS v. Chadha*, which struck down a concurrent resolution process in the context of authority over aliens.<sup>101</sup> Congress responded to this by implementing a joint resolution mechanism to overturn a presidential declaration of emergency, which requires the president’s signature to become law.<sup>102</sup> Although Congress can override a president’s veto of a joint resolution, the effect is that two-thirds of both chambers is required to invalidate a president’s emergency declaration.

As a result, the limits on presidential authority to declare an emergency that do appear in the text of the NEA are procedural. The NEA allows the president to “declare [a] national emergency” with respect to “[statutes] authorizing the exercise, during the period of a national emergency” and requires that a president transmit the declaration of a national emergency to Congress and publish it in the Federal Register.<sup>103</sup> Moreover, the NEA

eliminated or modified some statutory grants of emergency authority, required the President to formally the existence of a national emergency and to specify what statutory authority activated by the declaration would be used, and provided Congress a means to countermand the President’s declaration and the activated authority being sought.<sup>104</sup>

Once an emergency is declared, the president must “specif[y] the provisions of law under which he proposes that he, or other officers will act.”<sup>105</sup> Finally, the NEA states that “Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated” no more than six months after an emergency is declared.<sup>106</sup>

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98. *Id.*

99. See National Emergencies Act § 201(b), 50 U.S.C. § 1621(b) (2019) (restricting the powers and authorities of the Act to “(1) only when the President . . . specifically declares a national emergency, and (2) only in accordance with this Act”).

100. See National Emergencies Act § 202, 50 U.S.C. § 1622 (2019).

101. *INS v. Chadha et al.*, 462 U.S. 919 (1983).

102. 50 U.S.C. § 1622(a)(1).

103. *Id.* § 1621(a).

104. L. ELAINE HALCHIN, CONG. RESEARCH SERV. REP. 98-505: NATIONAL EMERGENCY POWERS, at Summary (2019).

105. 50 U.S.C. § 1631 (2018).

106. *Id.* § 1622(b).

The result is that the president is given a lot of discretion with respect to substance, so long as they follow these procedural requirements.

Even these procedural requirements, however, do not have the full force the framers of the statute intended. In *Beacon Products Corp. v. Reagan*, the First Circuit interpreted the procedural requirement that “Congress shall meet” to consider a joint resolution to determine whether the emergency will be terminated.<sup>107</sup> Even though both parties stipulated that Congress did not meet to consider such a resolution after President Reagan had used a national emergency declaration to impose trading restrictions with Nicaragua, the First Circuit found the emergency valid:

It seems far more likely that Congress meant the “shall meet to consider a vote” language to give those who want to end the emergency the chance to force a vote on the issue, rather than to *require* those who do *not* want to end the emergency to force congressional action to prevent automatic termination.<sup>108</sup>

The NEA’s lack of substantive requirements, coupled with the softening of its procedural requirements, has led to abuse of the Act.<sup>109</sup>

## 2. The President’s Contentions and Section 2808

Invoking his authority under the NEA, the president proclaimed:

The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch’s exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and

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107. *Beacon Products Corp. v. Reagan*, 814 F.2d 1, 4–5 (1st Cir. 1987) (discussing what legal remedy the NEA affords for Congressional inaction violating the “periodic meeting” clause).

108. *Id.* at 5.

109. See Thronson, *supra* note 96, at 753–54 (questioning whether emergency powers are “consistent with our conceptions of the presidency or limited government” given how the powers have been used to justify “extrajudicial authority to deprive” persons and organizations of personal assets and “unilaterally suspend wage-rate requirements for public contracts”).

resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.<sup>110</sup>

The White House issued additional information regarding the declaration in a fact sheet.<sup>111</sup>

The president wishes to use the NEA as a key to access § 2808, which he claims will provide up to \$3.6 billion in military reconstruction funding to build the wall.<sup>112</sup> Section 2808 allows the Secretary of Defense to “undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law.”<sup>113</sup> Section 2808 requires (1) that the president declare a national emergency under the NEA, which “requires the use of the armed forces,” (2) the use of funds be for “military construction projects,” and (3) those construction projects be “necessary to support such use of the armed forces.”<sup>114</sup>

The legal basis of the use of the non-emergency-tied statutes is dubious. First, although 31 U.S.C. § 9705 authorizes Treasury Forfeiture Funds “in connection with the law enforcement activities of any Federal agency,”<sup>115</sup> it also limits the use of those funds by listing the specific “law enforcement purposes.”<sup>116</sup> Expressly allowed in this list are using funds to pay for seizure of property, contracting services to maintain seized properties, and payment for training foreign law enforcement.<sup>117</sup> Notably excluded from the list is the use of funds to pay for a broad, multi-billion-dollar construction project tenuously related to non-Treasury-related law enforcement activities. Additionally, while § 284 authorizes the construction of a “fence,” in a “drug smuggling corridor,”<sup>118</sup> it does not

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110. Press Release, President Donald Trump, Presidential Proclamation Declaring a National Emergency Concerning the Southern Border of the United States (Feb. 15, 2019) [hereinafter *National Emergency Declaration*], <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/> [<https://perma.cc/S6DZ-MDZQ>].

111. For a discussion of this fact sheet in more detail, see generally *supra* note 13.

112. See *Funds Fact Sheet*, *supra* note 80 (stating that, after declaring a national emergency, the president may invoke 10 U.S.C. § 2808 allowing the Secretary of Defense to direct the military construction); see also 31 U.S.C. § 1532 (2018) (providing that “an amount authorized to be withdrawn and credited” from one agency or department “is available for the same purpose and subject to the same limitations provided by the law appropriating the amount”).

113. 10 U.S.C. § 2808(a) (2018).

114. *Id.*

115. 31 U.S.C. § 9705(g)(4)(B) (2018).

116. *Id.* § 9705(a).

117. *Id.* §§ 9705(a)(1)(B)–(J).

118. 10 U.S.C. § 284 (b)(7) (2018).

authorize a wall spanning the entirety of the United States-Mexico border. However, 10 U.S.C. § 2805 also states that an authorized “unspecified minor military construction project” in support of counterdrug activities is one that has an approved cost equal to or less than \$6,000,000.<sup>119</sup> In toto for fiscal year 2019 Congress only appropriated \$881 million under § 284—far short of the \$2.5 billion that the White House claims these funds will provide, and of course, far short of the \$5.7 billion the president requested that Congress provide for the wall.<sup>120</sup>

### 3. Tall Story for a Tall Wall? Substantive Challenges to the National Emergency Declaration Under the NEA

After President Trump declared a national emergency, fifty-eight former national security officials, including Madeleine Albright, filed a Joint Declaration against the decision challenging the substantive validity of the president’s national emergency.<sup>121</sup> The officials cited four main reasons for their protestation:

To our knowledge, the President’s assertion of a national emergency here is unprecedented, in that he seeks to address a situation: (1) that has been enduring, rather than one that has arisen suddenly; (2) that in fact has improved over time rather than deteriorated; (3) by reprogramming billions of dollars in funds in the face of clear congressional intent to the contrary; and (4) with assertions that are rebutted not just by the public record, but by his agencies’ own official data, documents, and statements.<sup>122</sup>

According to the report, border crossings are at a historic low, rather than a current, urgent issue.<sup>123</sup> Moreover, the report cites to the administration’s own reports that “there was no credible evidence indicating that international terrorist groups have established bases in Mexico” and a lack of terrorists crossing the United States-Mexico border.<sup>124</sup> Additionally, the declaration criticizes the president’s justifications, namely the presence of violent crime at the southern border

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119. 10 U.S.C. § 2805(d)(1)(A) (2018).

120. Letter from Russell T. Vought, Acting Dir., Exec. Office President, Office Mgmt & Budget, to Richard Shelby, Chairman, U.S. Senate Comm. Appropriations (Jan. 6, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/01/Final-Shelby-1-6-19.pdf> [<https://perma.cc/7T4F-W5JM>].

121. FORMER UNITED STATES GOVERNMENT OFFICIALS, JOINT DECLARATION 1–5 (Feb. 25, 2019), (available at [https://www.washingtonpost.com/read-the-letter-58-former-national-security-officials-protest-trump-s-emergency-declaration/f5bbafbb-eabd-41d9-8cab-740fd515e8a7\\_note.html?utm\\_term=.0938210747cb](https://www.washingtonpost.com/read-the-letter-58-former-national-security-officials-protest-trump-s-emergency-declaration/f5bbafbb-eabd-41d9-8cab-740fd515e8a7_note.html?utm_term=.0938210747cb) [<https://perma.cc/Q4LW-DQCZ>]).

122. *Id.* at 6.

123. *Id.*

124. *Id.* at 7.

and the occurrence of human and drug trafficking.<sup>125</sup> Finally, the report challenges the use of a national emergency to circumvent the typical appropriations process.<sup>126</sup>

Additionally, sixteen states sued the president over the diversion of funds.<sup>127</sup> The complaint in *California v. Trump* alleged that the president's declaration is substantively invalid. The complaint argued that, while President Trump has alleged a crisis since his campaign, he did not declare a national emergency until 2019, undermining any urgency of the emergency declaration.<sup>128</sup> Similar to the joint declaration of former defense officials, the complaint alleged that there is no "crisis" or "invasion" at the southern border to support the declaration of an emergency; that the "[a]dministration's assertions that terrorism concerns justify its actions are without factual basis"; that there is no evidence that a wall will decrease crime rates; and that there is therefore no basis to divert funds.<sup>129</sup> Moreover, it claimed that "[t]he federal government's own data prove[s] there is no national emergency at the southern border that warrants [the] construction of a wall."<sup>130</sup> It accused the president of using the wall as a "vanity project" that would "cause significant harm to the public safety, public fisc, environment, and well-being" of the people living in those states.<sup>131</sup> Citing the Constitution, the complaint claimed that the declaration of a national emergency violates the separation of powers, that the president may not spend money that Congress has not expressly appropriated, and that any agency acting to carry out the wall would be acting beyond the powers of their offices.<sup>132</sup> On May 24, 2019, the United States District Court for the Northern District of California agreed.<sup>133</sup>

In *El Paso City v. Trump*, the plaintiffs in a Western District of Texas also challenged the substantive validity of the president's national emergency declaration.<sup>134</sup> First noting that President Trump's declaration

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125. *Id.* at 7–8.

126. *Id.* at 10–11.

127. *See generally* Complaint, *California v. Trump*, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (No. 19-CV-00872), 2019 WL 669456 [hereinafter *California v. Trump* Complaint].

128. *Id.* at 21–25.

129. *Id.* at 37–38.

130. *Id.* at 4; *see also* Complaint at 1, *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019) (No. 19-CV-00892), 2019 WL 669456 [hereinafter *Sierra Club* Complaint] (alleging very similar concerns to plaintiffs in *California v. Trump*).

131. *California v. Trump* Complaint, *supra* note 127, at 5.

132. *Id.* at 49–52.

133. *See California v. Trump*, 379 F. Supp. 3d 928, 948 (N.D. Cal. 2019) (stating that it agrees with the plaintiff's contention that, the use of the funds in this way would likely violate separation of powers principles).

134. First Amended Complaint, *El Paso Cty. v. Trump*, 407 F. Supp. 3d 655 (W.D. Tex. Feb. 20,



“marks the first time a President has used the NEA to contravene the clearly expressed will of Congress on a policy and appropriations matter,”<sup>135</sup> those plaintiffs allege that the “NEA thus permits the President to direct the use of certain resources, but only in a qualifying emergency and only in the manner and to the extent that Congress has previously authorized by statute.”<sup>136</sup> Thus, while the NEA grants broad authority, those plaintiffs claim that the president has “fabricate[d] an improper or pretextual basis for [his] declaration.”<sup>137</sup>

#### 4. Faithful Execution & the Take Care Clause

The president’s arguments are categorical yet untenable. President Trump’s national emergency declaration under the NEA claimed that there is a “border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency.”<sup>138</sup> It continued that the “border is a major entry point for criminals, gang members, and illicit narcotics.”<sup>139</sup> It additionally claimed unlawful immigration at the southern border has been continuing and long-standing and characterizes migration as worsening.<sup>140</sup>

The declaration employs the use of the Armed Forces to aid in the construction of the wall.<sup>141</sup> In addition to the \$601 million from the Department of the Treasury Forfeiture Fund and \$2.5 billion from funds pursuant to 10 U.S.C. § 284, President Trump planned to reprogram \$3.6 billion from the Department of Defense military construction budget.<sup>142</sup> The \$3.6 billion are the only funds the president is attempting to use that require the declaration of a national emergency.

The declaration of a national emergency grants the president 136 new statutory powers.<sup>143</sup> However, despite these new statutory powers and the NEA’s lack of statutory substantive and procedural requirements, the NEA cannot be used where Congress has expressly declined to fund the project at issue. Given the lack of clear statutory guidance, there must be a standard under which to judge the president’s decision. This section will

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2019) (No. 19-CV-00066), 2019 WL 6689002.

135. *Id.* at 24.

136. *Id.* at 11.

137. *Id.*

138. *National Emergency Declaration*, *supra* note 110.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Border Security Fact Sheet*, *supra* note 13.

143. BRENNAN CTR. JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE (Dec. 5, 2018), <https://www.brennancenter.org/analysis/emergency-powers> [https://perma.cc/5DC6-4PCT].

develop an approach and standard under which a declaration of a national emergency may be judged.

a. The Need for a Standard

The NEA does not impose any substantive limits on the declaration of a national emergency.<sup>144</sup> However, that does not mean that decisions made under it should be unreviewable.

First, in an influential article, *Emergency Power and the Decline of Liberalism*, Jules Lobel argued that the main underlying issue surrounding modern national emergencies is that executives have strayed too far from a liberalist theory of emergencies.<sup>145</sup> Under that theory, emergency action is viewed as aberrational—where only the gravest emergencies warrant drastic action—and as “extra-legal”—that is, inherently unconstitutional (because the Constitution does not expressly provide for it).<sup>146</sup> Additionally, liberalists would require the executive to act outside of the scope of her powers in hopes that Congress later indemnifies him,<sup>147</sup> essentially raising the stakes of declaring an emergency.<sup>148</sup> In the wake of World War II, Vietnam, and the Korean War, the “line separating executive emergency power and normal constitutional government [became] blurred . . . primarily because of an aggressive United States assertion of power in the international arena.”<sup>149</sup> Lobel argues that the answer to emergency powers does not lie in creating a standard by which to judge the executive’s actions but requires a return to this liberalist train of thought.<sup>150</sup>

However, such a return would first require a redefinition of American national security, wherein executives “reject a foreign policy based upon an ever present worldwide communist threat.”<sup>151</sup> A return to liberalism

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144. See *Beacon Products Corp. v. Reagan*, 814 F.2d 1, 4–5 (1st Cir. 1987) (holding that the NEA does not require Congress to meet in order to avoid automatic termination of a declared national emergency, but rather allows those who wish to end the emergency to “force a vote” on the matter); see also Thronson, *supra* note 96 at 752–53 (discussing how the First Circuit interpreted “Congress shall meet” requirement of 50 U.S.C § 1622(b)).

145. See generally Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1386 (1989).

146. Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736, 738 (1989) (stating “[t]he Constitution is predicated on the assumption that crisis is aberrational”).

147. See Lobel, *supra* note 145, at 1390 (stating that this system has “allowed the executive to act without creating inherent emergency power under the Constitution”).

148. *Id.*

149. *Id.* at 1424.

150. See *id.* at 1389–90 (explaining how liberalism creates a legally significant dividing line between societal and political positions and how liberalism seeks to separate emergency rule from constitutional order by preserving the Constitution while still providing the executive power).

151. Lobel, *supra* note 145, at 1430.

seems unlikely after the War on Terror—something that Jules Lobel could not have foreseen at the time of his article. Moreover, Lobel was focused specifically on the issues surrounding international crises that invoked emergency powers with their primary effects abroad, such as trade restrictions and the like. Trump’s national emergency will have its broadest impact in the United States, and part of the answer may lie in defining what national emergencies the president can and cannot declare. This would reduce use of emergencies just for the sake of grabbing additional power at will.

Likewise, the sheer amount of power that comes with the declaration of a national emergency may warrant a standard to determine whether the emergency is valid. Upon the declaration of a national emergency, the president gains access to 136 new authorities, 96 of which require “nothing more than her signature on the emergency declaration.”<sup>152</sup> For example, the Communications Act of 1934 allows a president to “modify, change, suspend, or annul . . . any facility or station for wire communication” upon a national emergency declaration.<sup>153</sup> Perhaps more shocking, another statute allows the president to suspend its proscription of tests and experiments of chemical and biological agents on civilians “during the period of any national emergency declared . . . by the President.”<sup>154</sup> Given the sheer amount of power an emergency declaration grants a president, a standard for judging the legitimacy of any emergency declaration would serve as a prudent check upon the executive.

#### b. Developing a Standard

Article II of the Constitution specifies that it is the president’s duty to “take Care that the Laws be faithfully executed.”<sup>155</sup> While the Supreme Court has not fully delved into what this clause permits or requires, it has noted:

[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as

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152. Elizabeth Goitein, *Trump’s Hidden Powers*, BRENNAN CTR. JUSTICE (Dec. 5, 2018), <https://www.brennancenter.org/blog/trump-hidden-powers> [<https://perma.cc/S8VE-D5KY>].

153. 47 U.S.C. § 606(a) (2018).

154. 50 U.S.C. § 1515 (2018) (stating a president may suspend any portion or chapter of Title 50 during a period of war declared by Congress, including § 1520a(a)(1), which prohibits the Secretary of Defense from conducting any tests or experiments involving the use of chemical or biological agents on a civilian population).

155. U.S. CONST. art. II, § 3.

it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’<sup>156</sup>

In terms of the statutory provisions, President Trump’s national emergency simply does not “take care” to see that the NEA’s provisions are “faithfully executed.” A fundamental canon of statutory construction holds that, unless otherwise defined, words must be interpreted as taking their ordinary, contemporary, and common meaning.<sup>157</sup> The meaning of the term “national emergency,” evidenced through Merriam-Webster’s dictionary, is “a state of emergency resulting from a danger or threat of danger to a nation from foreign or domestic sources and usually declared to be in existence by governmental authority.”<sup>158</sup> Moreover, prior to the NEA, the Tenth Circuit held that “[a] national emergency must be based on conditions beyond the ordinary. Otherwise it has no meaning. The power of the Soviet Union in world affairs does not justify placing the United States in a constant state of national emergency.”<sup>159</sup> In Congress, an early version of the NEA provided:

In the event the President finds that a proclamation of a national emergency is essential to preservation, protection, and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States, the President is authorized to proclaim the existence of a national emergency.<sup>160</sup>

Elsewhere in the United States Code, “emergency” is defined as: [A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.<sup>161</sup>

Finally, during the debates surrounding the NEA, Senator Matthias explained: “[t]o understand the full significance of the National Emergencies Act, one must place it within the context of Congressional efforts to reclaim prerogatives abandoned to the Executive.”<sup>162</sup>

In 1976, in a study written at the request of Senators Frank Church and Charles Mathias, who were on the Special Committee on National Emergencies in the Senate, Dr. Harold C. Relyea, an analyst in American National Government at the Library of Congress, wrote that

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156. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

157. Perrin v. United States, 444 U.S. 37, 42 (1979).

158. *National Emergency*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/national%20emergency> [<https://perma.cc/74YS-LEDY>].

159. United States v. Bishop, 555 F.2d 771, 777 (10th Cir. 1977).

160. H.R. 3844, 94th Cong. § 201(a) (1976).

161. 42 U.S.C. § 5122 (2018).

162. 121 CONG. REC. S2302 (daily ed. Mar. 6, 1975) (statement of Sen. Charles Mathias).

“[e]mergency powers must be carefully managed if for no other reason than their authoritarian nature and breadth of scope.”<sup>163</sup> He continued, “the necessity of the Executive meeting a crisis or national exigency in the absence of a declaration of war could prompt the utilization of emergency powers, and this authority extends into almost every aspect of public business.”<sup>164</sup> According to Dr. Relyea, these concerns necessitated procedures for the declaration of an emergency as well as “equitable controls upon their use,” which he saw as “fundamental to the continuance of a democratic order.”<sup>165</sup>

Echoing these concerns, Congress enacted the NEA in 1976 after a Senate committee found that the United States had been operating under four presidentially declared states of emergency for over forty years.<sup>166</sup> Such a state made it “distressingly clear . . . that our Constitutional government has been weakened by 41 consecutive years of emergency rule.”<sup>167</sup> Thus, the NEA was Congress’s attempt to “comprehensively regulate and limit future declarations of national emergency.”<sup>168</sup>

This goal of preventing this proliferation of national emergencies has, in large part, failed. As of 2019, “the United States has been in a continuous state of emergency for four full decades—since 1979.”<sup>169</sup> Almost all these declarations have involved international relations.<sup>170</sup>

One of the few relating to domestic policy involved Hurricane Katrina, in which President Bush suspended the Davis-Bacon minimum wage provisions in the wake of a national emergency in New Orleans.<sup>171</sup> The effect of his proclamation was to authorize payment lower than wages paid to workers employed on federally funded construction projects in

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163. Harold C. Relyea, *Declaring and Terminating a State of National Emergency*, 6 PRES. STUDS. Q. 36, 41 (1976).

164. *Id.*

165. *Id.*

166. See H.R. REP. NO. 93-1170, at 1 (1974) (discussing how the United States has been in a state of emergency for the past four decades dating back to President Roosevelt declaring an emergency in 1933 for the Great Depression).

167. *Id.*

168. See Thronson, *supra* note 96, at 737–38, 743–46 (giving a thorough account of the legislative record and intent leading to the passage of the NEA).

169. Rudalevige, *supra* note 16.

170. BRENNAN CTR. JUSTICE, *DECLARED NATIONAL EMERGENCIES UNDER THE NATIONAL EMERGENCIES ACT* (Oct. 18, 2019), <https://www.brennancenter.org/sites/default/files/2019-10/Declared%20Emergencies%20under%20NEA101719.pdf> [<https://perma.cc/Y9R7-YJ5M>].

171. See Proclamation 7924—To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina, 70 Fed. Reg. 54,227 (Sept. 8, 2005) [hereinafter Proclamation 7924] (suspending Section 3142(b) of Title 40 which provides federal minimum wages that are determined by the Secretary of Labor).

the area devastated by Hurricane Katrina.<sup>172</sup> Although few would argue that Hurricane Katrina did not constitute a national emergency, paying relief workers less than other federal workers was controversial.<sup>173</sup> The president laid out the following justifications:

- (a) Hurricane Katrina has resulted in unprecedented property damages.
- (b) The wage rates imposed by section 3142 of title 40, United States Code, increase the cost to the Federal Government of providing Federal assistance to these areas.
- (c) Suspension of the subchapter IV of chapter 31 of title 40, United States Code . . . , and the operation of related acts to the extent they depend upon the Secretary of Labor's determinations under section 3142 of title 40, United States Code, will result in greater assistance to these devastated communities and will permit the employment of thousands of additional individuals.<sup>174</sup>

President Bush rescinded the emergency less than one month later.<sup>175</sup>

Another domestic policy declaration involved President Obama's declaration of a national emergency in the wake of the H1N1 influenza epidemic in the United States.<sup>176</sup> The president sought to "proactively address the ongoing pandemic," by "allow[ing] healthcare systems to quickly implement disaster plans should they become overwhelmed."<sup>177</sup> Specifically, the declaration allowed healthcare facilities to "petition for HHS approval of waivers in response to particular needs within the geographic and temporal limits of the emergency declarations."<sup>178</sup>

The question then becomes whether President Trump's national emergency falls within or outside of this precedent for domestic national emergencies. In both above mentioned cases, the underlying emergencies carried a sense of urgency. First, the effects of Hurricane Katrina necessitated the use of federal aid after the hurricane swept across much of the southeastern United States. Second, the H1N1 pandemic caused widespread panic and killed more than one thousand Americans and

172. *See id.* (stating that lowering minimum wage will provide result in greater assistance to the devastated areas).

173. *See A Shameful Proclamation*, N.Y. TIMES, Sept. 10, 2006, at A16 (criticizing the suspension of federal minimum wage because it harms those who already are poor, and stating this proclamation subjects individuals to subpar wages).

174. Proclamation 7924, *supra* note 171, at 54,227.

175. *See generally* Proclamation 7959—Revoking Proclamation 7924, 70 Fed. Reg. 67,899 (Nov. 3, 2005).

176. *See* Proclamation 8443—Declaration of a National Emergency With Respect to the 2009 H1N1 Influenza Pandemic, 74 Fed. Reg. 55,439 (Oct. 23, 2009) (detailing the public health emergency and declaring the rapid increase in illness due to the H1N1 virus a national emergency).

177. *President Obama Signs Emergency Declaration for H1N1 Flu*, WHITE HOUSE (Oct. 25, 2009), <https://obamawhitehouse.archives.gov/blog/2009/10/25/president-obama-signs-emergency-declaration-h1n1-flu> [<https://perma.cc/T2F9-7Q5X>].

178. *Id.*

hospitalized over twenty thousand.<sup>179</sup> The use of powers associated with President Bush's declaration was controversial and political pressures led to the rescission of the emergency action; the H1N1 emergency expired when the pandemic ended.

President Trump's declaration lacks these urgencies. Political pressures and campaign promises, not a sudden change of circumstances like a hurricane or flu pandemic, actually led to the declaration of a national emergency. Additionally, the nature of the emergency at the southern border—the influx of drugs—could potentially be dire, but building a wall could take at least ten years, even with thousands of workers.<sup>180</sup> Thus, the wall is fundamentally different in scope and duration from the other two declarations, which allowed lowering the price of contracts allowed the federal government to employ more workers to get reconstruction work done faster; allowing medical facilities to seek HHS waivers and provide more medical care. Here, the wall is a massive, long term project meant to solve a long term, non-emergency issue, which does not require those sorts of measures, particularly in light of President Trump consistently saying he didn't need to declare a national emergency.

### III. CONSTITUTIONAL CONSIDERATIONS

#### A. *Youngstown and Congressional Disapproval*

*Youngstown Sheet & Tube Co. v. Sawyer* guides the constitutional analysis of President Trump's emergency declaration.<sup>181</sup> There, the Supreme Court famously held that President Truman did not have the authority to issue a national emergency to seize and operate the nation's steel mills in order to avert to expected effects of a strike by the United Steelworkers of America.<sup>182</sup> In an oft-cited concurring opinion on the relation between executive and congressional power, Justice Jackson wrote:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these

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179. Jackie Calmes & Donald G. McNeil, Jr., *H1N1 Widespread in 46 States as Vaccines Lag*, N.Y. TIMES (Oct. 24, 2009), <https://www.nytimes.com/2009/10/25/us/politics/25flu.html> [<https://perma.cc/U3VB-AJQM>].

180. Todd C. Frankel, *Build the Wall? It Could Take at Least 10 Years, Even with 10,000 Workers*, WASH. POST (Jan. 9, 2019), [https://www.washingtonpost.com/business/economy/build-the-wall-it-could-take-at-least-10-years-even-with-10000-workers/2019/01/09/62d5eaae-1376-11e9-803c-4ef28312c8b9\\_story.html?utm\\_term=.d11f940a5f37](https://www.washingtonpost.com/business/economy/build-the-wall-it-could-take-at-least-10-years-even-with-10000-workers/2019/01/09/62d5eaae-1376-11e9-803c-4ef28312c8b9_story.html?utm_term=.d11f940a5f37) [<https://perma.cc/SCH5-KRS7>].

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

182. *Id.* at 588.

circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. . . .

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>183</sup>

President Trump's declaration of a national emergency appears to be a straightforward application of scenario three of Justice Jackson's *Youngstown* concurrence.

Congress has expressly declined to provide funding for the wall on two occasions. Congress has expressly disapproved the president's utilization of the NEA to build the wall. Bipartisan majorities in both the House and the Senate voted to disapprove the use of congressional appropriations to build the wall.<sup>184</sup> In March 2017, White House Office of Management and Budget Director Mick Mulvaney announced that the president was seeking \$4.1 billion to build the wall.<sup>185</sup> In May 2017, the White House scaled back this request and asked for \$1.6 billion in a budget submitted to Congress.<sup>186</sup> In the 2018 Consolidated Appropriations Bill, H.R. 1625, Congress approved \$1.6 billion for "14 miles of secondary fencing . . . along the southwest border in the San Diego Sector," "25 miles of primary pedestrian levee fencing along the southwest border in the Rio Grande Valley Sector," "primary pedestrian fencing along the southwest border in the Rio Grande Valley Sector," and "the replacement of existing primary pedestrian fencing along the southwest border."<sup>187</sup>

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183. *Id.* at 635–38 (Jackson, J., concurring).

184. 165 CONG. REC. H2814, H2217–18 (daily ed. Feb. 26, 2019); 165 CONG. REC. S1882 (daily ed. Mar. 14, 2019).

185. H.R. 3219—*Make America Secure Appropriations Act, 2018*, WHITE HOUSE (Jul. 24, 2017), <https://www.whitehouse.gov/briefings-statements/h-r-3219-make-america-secure-appropriations-act-2018/> [<https://perma.cc/LY4N-SBQ2>]; see also *Off-Camera Briefing of the FY18 Budget by Office of Management and Budget Director Mick Mulvaney*, WHITE HOUSE (May 2, 2017) [hereinafter *Mulvaney Briefing FY18 Budget*], <https://www.whitehouse.gov/briefings-statements/off-camera-briefing-fy18-budget-office-management-budget-director-mick-mulvaney-052217/> [<https://perma.cc/SK2U-BA7Q>].

186. *Mulvaney Briefing FY18 Budget*, *supra* note 185.

187. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 230, 132 Stat. 348, 616–



Additionally, Congress approved of “\$38,000,000 for border barrier planning and design.”<sup>188</sup> Thus, the Republican-controlled Congress declined to fund outright the wall.

The president persisted but did not get the money from Congress. On January 6, 2019, the president wrote a letter to Congress asking it appropriate \$5.7 billion for “construction of a steel barrier for the Southwest border.”<sup>189</sup> While Congress considered his funding request in the End the Shutdown and Secure the Border Act, a Senate Amendment to H.R. 268, the Senate eventually rejected the request on a 50-47 vote—leading to the longest government shutdown in United States history, spanning thirty-one days from December 22, 2018 until January 25, 2019.<sup>190</sup> In late December 2018, House Democrats introduced legislation that would fund many important agencies through September 30, 2019 and a Continuing Resolution to fund the Department of Homeland Security through February 8, 2019.<sup>191</sup> Eventually, on January 25, 2019, the Senate passed H.J. Resolution 28, a Continuing Resolution that funded all federal agencies through February 8, 2019, without a penny for the wall.<sup>192</sup> Between the end of December and January 25, members of Congress introduced various bills that proposed to provide appropriations for the wall, including a bill that would give the president \$25 billion, and a bill that would create a separate account in the Treasury to hold deposits to be used to secure the southern border.<sup>193</sup> No House or Senate Committee held hearings on these proposals. The government reopened on January 25, 2019 when the president signed a bill that funded the government for three weeks.<sup>194</sup> Thus, the president’s use of congressionally appropriated funds to build the wall is in conflict with Congress’s will.

When the president made his February 15, 2019 emergency declaration, he also relied on the authority vested in his office by the Constitution. Under *Youngstown*, he cannot proceed except in reliance on his independent powers. No such independent power exists. This section

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17 (2018); U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-614, SOUTHWEST BORDER SECURITY: CBP IS EVALUATING DESIGNS AND LOCATIONS FOR BORDER BARRIERS BUT IS PROCEEDING WITHOUT KEY INFORMATION (2018), <https://www.gao.gov/assets/700/693488.pdf> [<https://perma.cc/H6QM-7JWX>].

188. Pub. L. No. 115-141, § 230(a)(5).

189. 165 CONG. REC. H587, H588 (daily ed. Jan. 15, 2019).

190. 165 CONG. REC. S327–482 (daily ed. Jan. 22, 2019).

191. 164 CONG. REC. S8012 (daily ed. Dec. 21, 2018).

192. Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10, 11–12 (2019).

193. 164 CONG. REC. S7319 (daily ed. Dec. 5, 2018) (statement of Sen. Inhofe for himself, Sen. Rounds, Sen. Kennedy, and Sen. Cruz).

194. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 10, 13 (2019).

will detangle the arguments associated with these powers, beginning first with the notion of an inherent presidential power. Next, the section will show neither his foreign affairs power to recognize nations nor Commander-in-Chief authority to repel sudden attacks authorize the president to spend funds appropriated by Congress for other purposes to build the wall on the United States-Mexico border. Ultimately, the president has unconstitutionally usurped Congress's spending power to fulfill his campaign promise to build the wall.

*B. Inherent "Emergency Power": Traditional Notions & Modern Understandings*

The Constitution does not provide for any general "emergency power"—but that does not mean that the framers did not contemplate emergencies.<sup>195</sup> Thomas Jefferson, for example, believed that emergencies were necessarily contrary to the law—that is, using the law to circumvent the law—and that reading an emergency power into the executive would be unwise because that would lead to unjustified emergencies acting as an underpinning for "vast assertions" of power.<sup>196</sup> He believed that the Constitution was designed to carefully limit executive emergency power and thus acknowledged that some emergency actions were unlawful.<sup>197</sup> Alexander Hamilton, on the other hand, believed that the constitutional power to defend the nation

[O]ught to exist without limitation, because it is impossible to foresee or define the extent and variety of national emergencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.<sup>198</sup>

In that essay, Hamilton was discussing joint congressional and congressional authority; however, some presidents have used these arguments to justify power under a unilaterally declared emergency.<sup>199</sup> President Franklin Roosevelt, in demanding that Congress repeal the Price Control Act, told Congress: "In the event the Congress should fail

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195. 3 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 907 (3d ed. 1970) (contrasting various constitutions from several Asian, Latin American, and European countries).

196. Lobel, *supra* note 145, at 1396–97 (describing how this principle is understood as the "Jeffersonian" position regarding national emergencies).

197. *Id.* at 1392.

198. THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (J. Cooke ed., 1961).

199. Lobel, *supra* note 145, at 1388.

to act, and act adequately, I shall accept the responsibility, and I will act . . . .” Roosevelt later noted that “[t]he President has the power . . . to take measures necessary to avert a disaster which would interfere with winning of the war.”<sup>200</sup> President Nixon believed the difference between constitutional and unconstitutional conduct with respect to national security was the president’s judgment: “When the President does it, that means that it is not illegal.”<sup>201</sup> President Trump also echoed these arguments in his speech declaring a national emergency at the southern border after failing to secure congressional funding: “So we are going to confront the national security crisis on our southern border. And we’re going to do it one way or the other.”<sup>202</sup> He continued, “I didn’t need to do this, but I’d rather do it much faster.”<sup>203</sup>

The proliferating use of emergency powers led Clinton Rossiter to publish *Constitutional Dictatorship*, which examined the experiences of crisis governments ranging from the ancient constitutional state of Rome to the United States.<sup>204</sup> He uses the term “constitutional dictatorship” as a “convenient hyperbole” underscoring how many and how extensive emergency powers have been utilized by American presidents.<sup>205</sup> Therein, he discussed the need for Congress to pass legislation that would allow the executive to respond to emergency situations.<sup>206</sup> Rossiter recognized that “[t]he use of constitutional emergency powers may well become the rule and not the exception.”<sup>207</sup> As such, the future of the nation may very well “rest in the capacity of the Presidency as an institution of constitutional dictatorship.”<sup>208</sup> Rossiter believed that a “criterion of cardinal importance” was that Congress adopt a stringent procedure for the invocation of executive power during emergencies, which would dictate that emergency powers be narrowly drawn and subject to tight control:

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200. BILL PRESS, TRAIN WRECK: THE END OF THE CONSERVATIVE REVOLUTION 109 (2008).

201. James M. Naughton, *Nixon Says a President Can Order Illegal Actions Against Dissidents*, N.Y. TIMES (May 19, 1977), <https://www.nytimes.com/1977/05/19/archives/nixon-says-a-president-can-order-illegal-actions-against-dissidents.html> [https://perma.cc/G96E-TUMJ].

202. Aaron Blake, *Trump’s National Emergency Press Conference, Annotated*, WASH. POST (Feb. 15, 2019), [https://www.washingtonpost.com/politics/2019/02/15/trumps-bewildering-national-emergency-press-conference-annotated/?utm\\_term=.7e7cc66860fc](https://www.washingtonpost.com/politics/2019/02/15/trumps-bewildering-national-emergency-press-conference-annotated/?utm_term=.7e7cc66860fc) [https://perma.cc/Z2LK-6FVG].

203. *Id.*

204. *See generally* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 209 (1948).

205. *Id.* at 292.

206. *Id.* at 297.

207. *Id.* at 297.

208. *Id.* at 309.

All uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements. In short, constitutional dictatorship should be legitimate. It is an axiom of constitutional government that no official action should ever be taken without a certain minimum of constitutional or legal sanction. This is a principle no less valid in time of crisis than under normal conditions.<sup>209</sup>

But Rossiter's concerns went unanswered until the passage of the NEA. The second half of the twentieth century brought the largest increase of emergency powers ever seen in the United States. President Truman started the trend on December 16, 1950, when he declared a national emergency in response to the Korean conflict.<sup>210</sup> This declaration remained in effect for almost twenty-five years and gave subsequent presidents authority to

[S]eize property and commodities, organize and control the means of production, call to active duty 2.5 million reservists, assign military forces abroad, seize and control all means of transportation and communication, restrict travel, and institute martial law, and, in many other ways, manage every aspect of the lives of all American citizens.<sup>211</sup>

The passage of the NEA may not eliminate naked claims of inherent emergency power. But the law removed the argument that Congress has conceded that point of view undercuts any argument today that the president has an inherent emergency power under the Constitution.

### C. Commander-in-Chief & Foreign Affairs

A persistent but doubtful claim that the president is “the sole organ of foreign affairs” has been used to justify broad emergency power. In 1800, then-Representative John Marshall explained: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>212</sup> Justice Sutherland cited Marshall in *United States v. Curtiss-Wright Export Corp* to justify claims of broad claims of emergency power.<sup>213</sup>

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209. *Id.*

210. Proclamation No. 2914—Proclaiming the Existence of a National Emergency, 15 Fed. Reg. 9029 (daily ed. Dec. 19, 1950).

211. U.S. GOV'T PRINTING OFFICE, THE NATIONAL EMERGENCIES ACT (PUBLIC LAW 94-412) 20 (1976) (citing S. REP. NO. 93-1170 (1974)).

212. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (citing 10 ANNALS OF CONG. 613 (1800)).

213. *Id.* at 316–19.

But the few cases on the foreign affairs powers of the president don't lend the claim of sole authority much support.<sup>214</sup> *Curtiss-Wright* involved the presidential exercise of authority pursuant to congressional statute. *Youngstown* struck down the presidential seizure of the steel mills during the Korean War.<sup>215</sup> The Supreme Court decision in *Dames & Moore v. Regan*,<sup>216</sup> which approved President Carter's seizure of Iranian assets during the Tehran American Embassy hostage crises, as well as his suspension of Iranian claims in United States courts, turned on the Court's conclusion that Congress had authorized and acquiesced in these specific action, not on the approval of a "sole authority" theory.<sup>217</sup>

Nor is the Commander in Chief power, which all agree permits the president to "repel sudden attacks," a province of sole emergency authority. Although it is true that the presidents of both parties have used military troops without advance authorization, they have also sought and received from Congress authorization to use military troops in combat.<sup>218</sup> In *Hamdan v. Rumsfeld*, a divided Supreme Court declared that the president could not establish military commissions to try enemy combatants without express Congressional authority.<sup>219</sup> And in *Boumediene v. Bush*,<sup>220</sup> the Supreme Court struck down the congressional suspension of habeas corpus with respect to enemy combatants.<sup>221</sup>

Under the War Powers Act, § 2(c) states the policy that the powers of the president as commander in chief to introduce United States armed forces into situations of hostilities or imminent hostilities "are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>222</sup> The resolution required presidential consultation with Congress in advance

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214. Linda S. Greene, *Comment: After the Imperial Presidency*, 47 MD. L. REV 99, 103-04 (1987).

215. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 603 (1952).

216. *Dames & Moore v. Regan*, 453 U.S. 654, 659-65 (1981).

217. *Id.* at 673, 680-81.

218. *See generally*, Jennifer K. Elsea & Matthew C. Weed, Cong. Research Serv., RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf> [<https://perma.cc/E7VT-DS5M>].

219. *Hamdan v. Rumsfeld*, 548 U.S. 557, 559 (2006).

220. *Boumediene v. Bush*, 553 U.S. 723, 730 (2008).

221. *Id.*

222. 50 U.S.C § 1541(c) (2018).

“in every possible instance” and as long as troops are involved in hostilities.<sup>223</sup>

The record shows that both democratic and republican presidents have used military force with and without congressional authorization. But presidents of both parties have provided the required reports to Congress in 168 times between 1973 and 2019, and that Congress has also ordered the termination of the use of military force.<sup>224</sup> The record is not a perfect one and presidents have not always reported and important areas of disagreement on obligation and definition remain.<sup>225</sup> But the clear picture is one of joint responsibility for war and congressional oversight over the commander in chief consistent with Congress’s war related enumerated powers.

The words of the Supreme Court in *Ex Parte Milligan* still ring true.

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. . . . [I]t could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.<sup>226</sup>

#### *D. Appropriations Clause & the Separation of Powers*

The separation of powers doctrine provides the most disapproving glance at the notion of presidential inherent authority justifying the national emergency declaration. The Constitution’s system of the separation of powers and checks and balances is designed to prevent any one branch from gaining too much power. The federal separation of powers is inferred from the vesting clauses in Articles I, II, and III of the Constitution. It is through the separation of powers lens that we should be viewing the spending power and the Appropriations Clause.

The Constitution expressly vests the spending power in the legislature. The Appropriations Clause is the cornerstone of Congress’s power to spend, providing that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>227</sup> Early on in the nation’s history, James Madison enumerated this understanding in Federalist No. 58:

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223. 50 U.S.C § 1542 (2018).

224. MATTHEW C. WEED, CONG. RESEARCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 68–94 (2019), <https://fas.org/sgp/crs/natsec/R42699.pdf> [<https://perma.cc/ZQY9-S6C2>] (reporting when presidents have acted under the War Powers Resolution).

225. *Id.* at 95.

226. *Ex Parte Milligan*, 71 U.S. 2, 120–26 (1866) (highlighting the responsibility for both war and congressional oversight).

227. U.S. CONST. art. I, § 9, cl. 7.

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They in a word hold the purse; that powerful instrument by which we behold in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people . . . .<sup>228</sup>

The Court's interpretation of the spending power has underscored this understanding. In *Cincinnati Soap Co. v. United States*, the Court found that the Appropriations Clause was "intended as a restriction upon the disbursing authority of the Executive department."<sup>229</sup> It continued, the Appropriations Clause is an explicit command that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."<sup>230</sup> In *United States v. MacCollom*, the Court again explained that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."<sup>231</sup> The Constitution solely vests the spending power in Congress. The president's attempts to gather funding for the wall by declaring a national emergency violates the Constitution and are a serious attempt to usurp the powers of another branch of the national government.

#### IV. WHAT NOW MY LOVE: RESOLUTION IN THE FEDERAL COURTS OR POLITICAL PROCESS?

What now, my love, now that you've left me? How can I live through another day? Watching my dreams turn into ashes, and all my hopes into bits of clay? Once I could see, once I could feel. Now I am none, I've become unreal.

—Shirley Bassey<sup>232</sup>

Despite the several lawsuits pending during the writing of this paper, one question still remains: Is this a controversy that will be resolved in the courts or in the political process? One lawsuit has been dismissed on justiciability grounds. In *United States House of Representatives v.*

228. THE FEDERALIST NO. 58, at 296–97 (James Madison) (Buccaneer Books 1992).

229. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (holding the Appropriations Clause was "intended as a restriction").

230. *Office of Pers. Mgmt. v. Richmond*, 466 U.S. 414, 424 (1990) (quoting *Cincinnati Soap*, 301 U.S. at 321) (interpreting the commands of the Appropriations Clause).

231. *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (citing *Reese v. Walker*, 52 U.S. 272, 291 (1851)) (explaining that spending is only proper if congress has authorized it).

232. SHIRLEY BASSEY, WHAT NOW MY LOVE (Columbia Records 1962).

*Mnuchin*, the District Court for the District of Columbia ruled that Democrats in the House of Representatives did not have standing to enjoin the Secretaries of Departments of the Treasury, Defense, Homeland Security, and the Interior from spending funds to build a wall.<sup>233</sup> The court found that there was no concrete and particularized injury required for Article III standing. The court reasoned that historical practice and precedent signals that the House of Representatives may not challenge injury to official authority and the availability of institutional remedies in the statute providing for two-thirds override of the president's veto of a National Emergency Declaration.<sup>234</sup>

Two additional doctrines are significant in this realization: the political question doctrine and ripeness. This section aims to dissect these doctrines with respect to national emergency declarations, ultimately concluding that the question is not a political question and is ripe for judicial resolution.

Under the political question doctrine, a controversy is a nonjusticiable political question when there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .”<sup>235</sup> The doctrine is prudential, and generally a matter of constitutional interpretation that attempts to determine whether the controversy falls within the judiciary's purview.<sup>236</sup> This means that the “textually demonstrable commitment” element and the “lack of judicially discoverable and manageable standards” element are not entirely distinct.

In the context of national emergencies, some courts have ruled the declaration of an emergency a nonjusticiable political question when the emergency dealt with foreign relations.<sup>237</sup> In *Beacon Products Corp. v.*

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233. U.S. House of Reps. v. Mnuchin, 379 F. Supp. 3d 8, 10 (D.D.C. 2019) (holding that spending was improper).

234. *Id.* at 15–23 (citing *Raines v. Byrd*, 521 U.S. 811, 826 (1997)).

235. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating the rules and test regarding when there is a nonjusticiable political question).

236. *See, e.g., Nixon v. United States*, 506 U.S. 224, 229–38 (1993); *see also Baker*, 369 U.S. at 211 (“[W]hether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”).

237. *See Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (“[T]o the extent that the plaintiffs’ inquiry into the ‘true facts’ of the Libyan crisis would seek to examine the President’s motives and justifications for declaring a national emergency, such an inquiry would likely present a nonjusticiable political question.”); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)) (“Matters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1194–95 (D. Mass 1986), *aff’d*, 814 F.2d 1 (1st Cir. 1987) (emphasizing that the concerns underlying the political question doctrine are “particularly acute whenever a court is called upon to



*Reagan*, for example, the District of Massachusetts found that President Reagan's declaration of a national emergency prohibiting imports into the United States from Nicaragua and exports to Nicaragua from the United States was a nonjusticiable political question.<sup>238</sup> There, the Reagan Administration found that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States,"<sup>239</sup> and declared a national emergency under the International Emergency Economic Powers Act.<sup>240</sup> The court began its analysis by emphasizing that the justifications underlying the prudential political question doctrine are "particularly acute whenever a court is called upon to review the conduct of American foreign policy."<sup>241</sup> Then, the court noted that addressing whether or not Nicaragua actually posed an unusual and extraordinary threat "would be an imprudent exercise of judicial review," which would "require the court to assess the wisdom of the President's judgment concerning the nature and extent of that threat, a matter not susceptible to judicially manageable standards."<sup>242</sup> Because the court does not have the resources to determine whether Nicaragua poses more than an ordinary or usual threat, a decision would boil down to "policy judgments about national security and foreign policy, judgments best left to the political branches of the federal government."<sup>243</sup>

Although matters dealing with foreign governments are commonly considered political questions, there is no reason that a national emergency affecting primarily domestic relations would face the same fate. Recently, in *Rucho v. Common Cause*, the Supreme Court found the domestic issue of political redistricting was non-reviewable as a political question.<sup>244</sup> There, however, the Supreme Court emphasized that it would be impossible for the judiciary to determine "fairness" in the context of redistricting:

"Fairness" does not seem to us a judicially manageable standard. . . .  
Some criterion more solid and more demonstrably met than that seems

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review the conduct of American foreign policy," the court found that "whether Nicaragua poses a sufficient threat to trigger the President's IEEPA powers is a nonjusticiable political question").

238. *Beacon Products*, 633 F. Supp. at 1199 (holding President Reagan's declaration was a nonjusticiable political question).

239. Proclamation No. 12513, 50 Fed. Reg. 18,629 (1985).

240. 50 U.S.C. § 1701 (2018).

241. *Beacon Products*, 633 F. Supp at 1194 (finding separation of powers issues particularly acute when foreign policy is involved).

242. *Id.* at 1194–95.

243. *Id.* at 1195.

244. *Rucho v. Common Clause*, 139 S. Ct. 2484, 2506–07 (2019) ("[P]artisan gerrymandering claims present political questions beyond the reach of federal courts.").

to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.<sup>245</sup>

In contrast, there are judicially manageable standards to determine what constitutes an "emergency."

Second, the doctrine of ripeness may present a barrier to judicial resolution. Under the doctrine, federal courts require that a dispute be sufficiently mature to warrant a decision. Under the doctrine, courts will address to main factors: (1) the fitness of the issues for judicial resolution—that is, whether they are factual or legal; and (2) the hardship to the parties of withholding court consideration.<sup>246</sup>

While the first element of the ripeness inquiry would likely be met, the facts relevant to actual hardship are more nuanced. The parties including the states who have sued the president because they lost the diverted funding suffered immediately from the diversion of funding from other sources. For example, California has alleged injury "due to the loss of federal drug interdiction, counter-narcotic, and law-enforcement funding to the State caused by Defendants' diversion of funding."<sup>247</sup> Similar injuries will occur immediately to the other states should a court not decide the case on the merits. Those hardships are both qualitative and quantifiable.

Thus, it is not surprising that no lower federal court has concluded that litigation challenging the President Trump's invocation of emergency power raise nonjusticiable political questions. Although the Court may properly defer to the president foreign affairs cases or to Congress in the a pure domestic relations context, and short term funding diversions will escape judicial scrutiny on mootness grounds, the federal courts will decide the legality of multi-billion dollar multiyear funding diversions.<sup>248</sup>

#### CONCLUSION

It has been long settled that presidential power must stem from an act of Congress or from the president's executive power under the Constitution. That understanding need not embrace the view that the

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245. *Id.* at 2499–500 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004)).

246. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Cmty.*, 461 U.S. 190, 190–91 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

247. *California v. Trump* Complaint, *supra* note 127, at 7.

248. *But see Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018) (holding in a 5–4 Supreme Court ruling that the president had authority under two statutes to ban from the United States Muslims who lacked "credible claims" of a relationship with a United States national or entity).

president does not have flexibility to carry out her responsibilities whether they are based on explicit constitutional provisions or implicit claims related to the effective discharge of enumerated powers.<sup>249</sup>

But here, the president has no constitutional safe harbor. Congress expressly declined to provide funding for the wall on two occasions. The statutory sources that the president cited do not support justification his national emergency declaration. Thus, the president's use of congressionally appropriated funds to build the wall is in conflict with Congress's will and the president has failed to "take care" that the laws were "faithfully executed."<sup>250</sup>

Under *Youngstown*, the president cannot proceed except in reliance on his independent powers. Neither the foreign affairs power to recognize nations nor the commander in chief authority to repel sudden attacks authorize the president to spend funds appropriated by Congress for other purposes to build the wall on the United States-Mexico border. Ultimately, courts will conclude that the president has unconstitutionally usurped Congress's spending power to fulfill his campaign promise to build the wall.

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249. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 883 (1983).

250. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."); *id.* at 633 (Douglas, J., concurring) ("Section 3 also provides that the President 'shall take Care that the Laws be faithfully executed.' But, as Mr. Justice Black and Mr. Justice Frankfurter point out, the power to execute the laws starts and ends with the laws Congress has enacted."); *id.* at 646–55 (Jackson, J., concurring) ("The third clause in which the Solicitor General finds seizure powers is that 'he shall take Care that the Laws be faithfully executed . . . .' That authority must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty or property, without due process of law . . . .' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules. . . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law."). *Compare Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (affirming that Obama's authorization of deferred action undocumented immigrants children violated the Administrative Procedure Act), *with Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016). *See also* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019) ("But our findings here at least suggest that the President—by original design—is supposed to be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his self-interest, and who must diligently and steadily execute Congress's commands.").

## EPILOGUE: STAY IN YOUR LANE

The ultimate question may not be the question of whether the president's actions are legal, but whether the courts can—and should—find that these issues can be resolved in the courts rather than through the political process. So far, the lower courts have all found that plaintiffs had standing, that the claims were ripe, and, by focusing discretely on whether the president's acts are within the statutory provision, the claims were not political questions. Yet, as the litigation continues to unfold in the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court, the questions presented include not simply whether the reprogramming action is legal, but whether it is subject to judicial review, who or what entities may make those claims, and whether judicial disposition will prevent or enable unlawful actions by the executive branch.

A. *California v. Trump*

In *California v. Trump*, with which the lawsuit Sierra Club case had been consolidated,<sup>251</sup> eighteen states initially challenged the reprogramming of funds for the El Paso sector Project 1 portion of the wall.<sup>252</sup> On May 24, 2019, the United States District Court for the Northern District of California concluded that the reprogramming exceeded the president's authority.<sup>253</sup>

Defendants argue that “Congress never denied DoD funding to undertake the [Section] 284 projects at issue,” Opp. at 20, such that Section 8005 and Section 2214(b) are satisfied. But in the Court's view, that reading of those sections is likely wrong, when the reality is that Congress was presented with—and declined to grant—a \$5.7 billion request for border barrier construction. Border barrier construction, expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress denied the requested funds for that item. . . . It thus would be inconsistent with the purpose of these provisions, and would subvert “the difficult judgments reached by Congress”. . . to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here.<sup>254</sup>

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251. *Sierra Club v. Trump*, 929 F.3d 670, 685 (9th Cir. 2019).

252. Compare *California v. Trump* Complaint, *supra* note 127, at 1, with *California v. Trump*, 379 F. Supp. 3d 928, 935–36 (N.D. Cal. 2019) (noting that the original complaint had sixteen states and the District of Columbia but by the time the court consolidated there were twenty states not including the District of Columbia).

253. *California v. Trump*, 379 F. Supp. 3d at 945–46.

254. *Id.* at 946.

The Court also concluded that the Defendant's would be unlikely to establish that the need for a wall was based on an "unforeseen military requirement."<sup>255</sup>

Defendants' argument that the need for the requested border barrier construction funding was "unforeseen" cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018. . . . [In] February 2018 [the administration made a] White House Budget Request describing "the Administration's proposal for \$18 billion to fund the border wall". . . , failed bills . . . , [and] December 11, 2018 transcript from a meeting with members of Congress, where the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other—whether it's through you, through a military, through anything you want to call [sic]—I will shut down the government."<sup>256</sup>

The Court denied without prejudice the States' motion for a preliminary injunction, and set a date less than two weeks later for a case management conference to plan for resolution of the case on the merits.

After the Secretary of Defense announced on May 10, 2019, that the Pentagon would re-program \$1.5 billion in funding Congress appropriated for security in Afghanistan to build a border wall in Tucson, Arizona and in El Centro, Texas,<sup>257</sup> the *California v. Trump* state plaintiffs expanded their motion for summary judgment to include this reprogramming as well.<sup>258</sup> The court in *California v. Trump* relied on its finding that the president exceeded his statutory authority in connection with the El Paso Sector to reach an identical conclusion with respect to the new reprogramming.

The Court previously only considered Defendants' reprogramming and subsequent use of funds for border barrier construction for El Paso Sector Project 1. It did not consider Defendants' more-recently announced reprogramming and subsequent diversion of funds for border barrier construction for the El Centro Sector Project, pending further development of the record as to this project. . . . Defendants . . . present no new evidence or argument for why the Court should depart from its prior decision, and it will not. The Court thus stands by its prior finding that Defendants' proposed interpretation of the statute is unreasonable, and agrees with Plaintiffs that Defendants' intended reprogramming of funds . . . to the Section 284 account for border

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255. *Id.* at 947.

256. *Id.*

257. Robert Burns, *Pentagon Shifting \$1.5 Billion to Border Wall Construction*, ASSOCIATED PRESS (May 10, 2019), <https://apnews.com/fde3f382fb1943e69d773eaac9f75eb1> [<https://perma.cc/XMP7-9B3Y>] (discussing that the \$1.5 billion in funds was "originally targeted for support of the Afghan security forces").

258. *California v. Trump*, 379 F. Supp. 3d at 944 n.9.

barrier construction is unlawful . . . . Because no new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong, Plaintiffs' likelihood of success on the merits has ripened into actual success. The Court accordingly grants Plaintiffs' request for declaratory judgment that such use of funds reprogrammed . . . for El Paso Sector Project 1 and El Centro Sector Project is unlawful.<sup>259</sup>

### B. *Sierra Club v. Trump*

#### 1. In the Northern District of California

In *Sierra Club v. Trump*, in which environmental plaintiffs in sought a preliminary injunction to halt wall construction, the Northern District of California also found that the plaintiffs were likely to succeed on their claim that the president was acting ultra vires because of § 8005's requirements.<sup>260</sup> The court found that the plaintiffs had "shown a likelihood of success as to their argument that Congress previously denied 'the item for which funds [were] requested,' precluding the proposed transfer."<sup>261</sup> Because the president asked Congress for \$5.7 billion, and Congress did not grant that amount in the Consolidated Appropriations Act, the plaintiffs were likely to show that "Congress denied funding, and that [the reprogramming] thus [ran] afoul of the plain language of § 8005."<sup>262</sup> Second, the court found that the plaintiffs were likely to succeed on a claim that the president failed to meet the "unforeseen military requirement" of § 8005.<sup>263</sup> Refusing the president's argument that the "unforeseen" events "did not arise until February 2019, when DHS requested support from [Department of Defense] to construct fencing in drug trafficking corridors," the court found that the "argument that the need for the requested border barrier construction funding was 'unforeseen' cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018."<sup>264</sup>

The Northern District of California also found that challenges to the president's authority under § 2808 had a likelihood of success.<sup>265</sup>

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259. *Id.* at 941–52.

260. Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction, at 27, *Sierra Club v. Trump*, No. 19-CV-00892 (N.D. Cal 2019), 2019 WL 2715422, at \*27 [hereinafter *Sierra Club* Preliminary Injunction Order] (noting that the order granting injunctive relief held plaintiffs were likely to succeed on their first claim).

261. *Id.* at 32.

262. *Id.* at 33.

263. *Id.* at 34–36.

264. *Id.* at 35.

265. *Id.* at 42.

Congress has defined the term “military construction” to “include[] any construction, development, conversion, or extension of any kind carried out with respect to military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road.”<sup>266</sup> “Military installation” is in turn defined as:

[A] base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.<sup>267</sup>

The president argued that although the statute defines both “military construction” and “military installation,” both terms broadly define “military construction as ‘includ[ing] (but not limited to . . . ) construction with respect to a military installation, and defin[e] military installation to include non-specified ‘other activity.’”<sup>268</sup> The president therefore claimed that these broad definitions “are not the kind of clear and mandatory statutory language that is a necessary predicate to an *ultra vires* claim.”<sup>269</sup>

Casting these arguments aside, the court found that under “traditional tools of statutory construction,” the statute “likely precludes treating the southern border as an ‘other activity’” qualifying for military construction treatment.<sup>270</sup> “Other activity,” the court reasoned, must be read in conjunction with “the company it keeps”—that is, with the words “base, camp, post, station, yard, center,” and “defense access road.”<sup>271</sup> Otherwise, the statute would be “so broad as to transform literally any activity conducted by a Secretary of a military department into a ‘military installation,’” and there “would have been no reason to include a list of specific, discrete military locations.”<sup>272</sup> The Northern District of California thus found that the president acted outside of his authority under § 2808. Importantly, the court not address the substantive validity of the president’s declaration under the NEA.<sup>273</sup>

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266. 10 U.S.C. § 2801(a) (2018).

267. *Id.*

268. *Sierra Club* Preliminary Injunction Order, *supra* note 260, at 43.

269. *Id.*

270. *See id.* at 43 (noting that the court dedicated one sentence to this argument before reaching the merits of the claim, and that the “defendants misunderstand the standard for *ultra vires* review”).

271. *Id.*

272. *Id.* at 45.

273. Order on Plaintiff’s Motion For Summary Judgment at 12, *Sierra Club v. Trump*, 2019 U.S. Dist. LEXIS 108933 at 12, No. 19-CV-00892, (N.D. Cal., June 28, 2019) [hereinafter *Sierra Club* Summary Judgment Order].

The court did grant a permanent injunction enjoining the Trump Administration from diverting funds after ruling that the public's interest in "ensuring that statutes enacted by their representatives are not imperiled by executive fiat" outweighs the public's "'weighty' interest 'in efficient administration of the immigration laws at the border.'"<sup>274</sup> The court emphasized that "Congress considered all of [the Administration's] proffered needs for border barrier construction, weighed the public interest in such construction against [the Administration's] request for taxpayer money, and struck what it considered to be the proper balance—in the public's interest—by making available only \$1.375 billion in funding."<sup>275</sup>

## 2. In the Ninth Circuit

In the Ninth Circuit, whether Courts should resolve these claims arose and took center stage alongside the merits.<sup>276</sup> The Ninth Circuit took pains to identify the issues not before the court:

Before turning to the merits, we highlight what is not at issue in end, this appeal. First, Defendants at oral argument acknowledged that they are "not challenging [Article III] standing for purposes of the stay motion." Thus, Defendants do not dispute that Plaintiffs have suffered an "actual or imminent," "concrete and particularized," "injury in fact" that is "fairly traceable" to Defendants' actions and that will "likely" be "redressed by a favorable decision." We have satisfied ourselves that Defendants' assessment is correct. Plaintiffs have alleged enough to satisfy the requirements for standing under Article III at this stage of the litigation.<sup>277</sup>

In contrast, the president's lawyers argued that district court decision was an inappropriate "'intrusion into the budgeting process' which 'is between the legislative and executive branches—not the judiciary.'"<sup>278</sup> The Ninth Circuit majority responded with authority dating to *Marbury v. Madison*,<sup>279</sup> an indication that the issue presented was about much more than Congress' authority over appropriations but about the role of the judiciary in the resolution of a dispute over the performance of a duty Congress has assigned to the executive branch.<sup>280</sup> In the Ninth Circuit's words:

Chief Justice Marshall's answer to "whether the legality of an act of the head of a department be examinable in a court of justice" or "only

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274. *Id.* at 12–13.

275. *Id.* at 13.

276. *Id.*

277. *Id.* at 27 (citations omitted).

278. *Id.* at 29.

279. *Id.* at 30–31.

280. *Id.* at 30.



politically examinable” remains the same: “[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.” Pursuant to its exclusive power of appropriation, Congress imposed on the Executive Branch a duty—contained in section 8005—not to transfer funds unless certain circumstances were present. As discussed above, . . . Defendants have not disputed that Plaintiffs have sufficiently alleged injuries that satisfy Article III’s standing requirement to enable them to pursue this action. Although “our decision may have significant political overtones, courts cannot avoid their responsibility merely ‘because the issues have political implications.’” In sum, it is appropriate for this action to proceed in federal court.<sup>281</sup>

There were several arguments that the judiciary lacked the power to intervene. One argument was grounded on a difference of opinion as to whether Department of Defense § 8005 barred the transfer. The Ninth Circuit concluded that it was so barred under the circumstances.

Another question was whether the district court injunction ought to be stayed because the plaintiffs had no right to seek judicial review of the reprogramming decision.<sup>282</sup> If they did not have such a right, then they had no likelihood of success on the merits, the Government was likely to prevail, and the district court injunction ought to be stayed.

Ultimately, the debate over this issue took center stage in the Ninth Circuit decision whether to block the district court’s injunction against the use of the Department of Defense funds for wall construction.

One disagreement focused on whether the Sierra Club’s claim was statutory or constitutional. The majority concluded that the claim was based on the Appropriations clause and thus Constitutional in nature.<sup>283</sup> Another question was whether § 8005 permitted the reprogramming. The majority agreed with the district court that § 8005 did not permit the reprogramming.<sup>284</sup>

The second key question, answered in the affirmative by the district court and the Ninth Circuit and in the negative by the dissent, was whether the Sierra Club’s interests were within the “zone of interests”

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281. *Id.* at 30–31 (citations and internal cross-references omitted).

282. *Id.* at 9.

283. *Id.* at 33.

284. *Id.* at 40–44. The 9th Circuit majority also examined and rejected the possible argument that the Department of Defense’s reprogramming decision was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and its progeny as a congressionally authorized “agency’s interpretation of an ambiguous statute administered by the agency” or entitled to deference based on the doctrine in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (citations omitted), which permits judicial deference if the “agency’s reasoning is persuasive.”

implicated by § 8005. The Ninth Circuit majority concluded that the “zone of interests” tests was a limit on statutory based challenges, not constitutional ones such as Sierra Club’s appropriations claims.<sup>285</sup> The majority agreed with the dissent that the “zone of interest” test was applicable to the statutory claim of § 8005 violation, but concluded that zone of interests encompassed not merely those embodied in the statute allegedly violated but “claims about structural provisions of the Constitution . . . [where] it has applied a very lenient version of that test,” one the majority concluded that Sierra Club claim’s satisfied.<sup>286</sup>

Accordingly, if Plaintiffs must fall within a zone of interests served by the constitutional provision they seek to vindicate, we are persuaded that they do. The Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties—not merely separation for separation’s sake . . . Because “individuals, too, are protected by the operations of separation of powers and checks and balances,” it follows that “they are not disabled from relying on those principles in otherwise justiciable cases and controversies.”<sup>287</sup>

In contrast, the dissent concluded that, under *Dalton v. Specter*, “claims simply alleging that the President has exceeded his statutory authority are not ‘constitutional’ claims, subject to judicial review,”<sup>288</sup> because the president is not an agency and Congress has not otherwise provided for judicial review.<sup>289</sup> The dissent’s distinction between a statutory claim and a constitutional claim was integral to its conclusion that Sierra Club had no right of action. The dissent concluded that the plaintiff had no “implied right of action” because Congress did not intend to create a judicial remedy for violations of § 8005.<sup>290</sup>

The dissent agreed that the reprogramming actions of the Department could be the subject to APA review, but that the Sierra Club’s interest did not “fall within the zone of interests protected by [§ 8005] . . . .”<sup>291</sup> In contrast to the majority, which considered constitutional interests that lay beyond the four corners of § 8005 relevant, the dissent concluded that the transfer of funds did not affect the Sierra Club’s aesthetic, recreational, and environmental interests, nor did § 8005 require that the Department of Defense consider those interests before making transfers.<sup>292</sup> To be

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285. *Sierra Club* Summary Judgment Order, *supra* note 273, at 55–62.

286. *Id.* at 62.

287. *Id.* at 63–64 (citations omitted).

288. *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

289. *Sierra Club v. Trump*, 929 F.3d 670, 707 (9th Cir. 2019) (Smith J., dissenting).

290. *Id.* at 712.

291. *Id.* at 712–14.

292. *Id.* at 714–15.

sure, the dissent agreed that § 8005 arguably protects Congress and those who would have been entitled to funds as originally appropriated.<sup>293</sup> It also agreed the statute arguably protects economic interests in the use of the funds as originally appropriated.<sup>294</sup> Damning to Sierra Club, the dissent concluded that “[p]laintiffs interests are only ‘marginally related to . . . the purposes implicit in the statute [such] that it cannot reasonably be assumed that Congress intended to permit the suit . . . .’”<sup>295</sup>

### 3. The Supremes

In a tersely worded one paragraph unsigned opinion on July 26, 2019, a divided Supreme Court agreed to stay the June 28, 2019 district court decision, upheld by the Ninth Circuit, that had permanently enjoined the president and the Defense Department from using reprogrammed Department of Defense funds to build the wall.<sup>296</sup> The rationale was “that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with § 8005.”<sup>297</sup> The stay would remain in place until the litigation until the Ninth Circuit ruled on the merits and throughout any further Supreme Court litigation.<sup>298</sup>

Justice Breyer concurred in part and dissented in part from the grant of the stay.<sup>299</sup> He noted that the “case raises novel and important questions about the ability of private parties to enforce Congress’ [s] appropriations power,” but offered no view on those merits.<sup>300</sup> Instead, his opinion focused on the possibility that the stay might be tailored to avoid irreparable harm to both parties—to the environmental interests of the Sierra Club as well as to operational interests of the government in finalizing the contracts necessary for the construction of the wall before

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293. *Id.* at 715.

294. *Id.* at 714–15.

295. *Id.* at 715 (citing *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399 (1987)). A coalition of environmental groups, led by the Center for Biological Diversity, challenged the authority of DHS to waive dozens of laws, including the National Environmental Policy Act, the Endangered Species Act, and the Religious Freedom Restoration Act, to make it easier to build the border infrastructure. California Attorney General Xavier Becerra (D) also filed suit. *In re Border Infrastructure Evtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

296. *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019). Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh voted in favor of the stay, while Justices Ginsburg, Sotomayor, and Kagan voted to deny the application. *Id.* Justice Breyer concurred in part and dissented in part. *Id.* at 1–2.

297. *Id.* at 1.

298. *Id.*

299. *Id.*

300. *Id.*

the September 30th deadline to use those funds.<sup>301</sup> His solution was to grant the stay to permit the government to finalize its contracts so they would be in place should the government ultimately prevail, but to deny the stay of the injunction against wall construction to avoid irreparable harm to environment and the Sierra Club.<sup>302</sup>

I can therefore find no justification for granting the stay in full . . . [but] would grant the Government's application to stay the injunction only to the extent that the injunction prevents the Government from finalizing the contracts or taking other preparatory administrative action, but leave it in place insofar as it precludes the Government from disbursing those funds or beginning construction.<sup>303</sup>

The Supreme Court's cryptic disposition of the stay suggests several possibilities for the ultimate resolution of the litigation. Should the litigation return to the Court via a grant of certiorari, the stay language signals that a majority is prepared to dispose of the case on what might appear at first blush a narrow ground focused on the right of the Sierra Club to seek judicial review of the reprogramming decision. That resolution might focus on of whether Congress created a private right of action to enforce § 8005. This approach might include an endorsement of the view that private parties may not complain in court about executive spending in violation of congressional directives unless Congress explicitly or implicitly authorized those lawsuits. That majority could avoid a discussion of the justiciability of executive branch-congressional spending disputes, an argument the executive branch offered to Supreme Court in its stay application.<sup>304</sup> A slightly narrower approach, though still consistent with an executive win, would be the "zone of interest" approach endorsed by the Ninth Circuit dissent that the "reprogramming decision" itself did not affect the plaintiff.<sup>305</sup> These are a few of the possibilities presented by the four corners of the Stay Application, a portion of which the cryptic Supreme Court stay decision seems to endorse.<sup>306</sup>

In light of the Supreme Court stay of the district court injunction, involving a relatively small portion of the funding needed for the wall and the intervention of the Supreme Court, the resolution of this dispute at this stage is a symbolic win for the Trump administration but not the

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301. *Id.* at 1–2.

302. *Id.* at 2.

303. *Id.*

304. Application for Stay at 25, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (No. 19A-60).

305. *Sierra Club v. Trump*, 929 F.3d 670, 709 (9th Cir. 2019) (Smith, J., dissenting).

306. *Id.* at 4, 20–25.

end of its potential trouble in the federal court.<sup>307</sup> The injunction stayed by the Supreme Court involved questions on the president's funding diversion activity pursuant to Section 8005. But the litigation continued with respect to the president's diversions under Section 2808 in the *Sierra Club* companion case *California v. Trump*.<sup>308</sup> There, on December 11, 2019, the district court concluded that the president did not have authority under Section 2808 to "redirect military construction funds to the eleven border barrier projects . . ." <sup>309</sup> And the legal skirmishes continue.<sup>310</sup>

In the near term, the ball for control over the wall is in Congress's court. Congress continues to fund humanitarian efforts on the border,<sup>311</sup> while Court has provided and opportunity for the president to claim a victory in a battle while the war continues in the federal courts.<sup>312</sup> Thus even though lower Courts agree that the president acted unlawfully in his reprogramming of Defense Department funds, the Supreme Court stay of *Sierra Club* in effect permits the president to finalize contracts and begin wall construction pending the resolution of the dispute on the merits in the Ninth Circuit and the Supreme Court. And in its short decision granting the stay, the Supreme Court signaled that if the case arrives via certiorari and the Court grants review, a majority will likely conclude that those plaintiffs have no cause of action. Thus, though courts have so far concluded that the president has unlawfully usurped Congress's spending power to fulfill his campaign promise to build the wall, the favorable outcome for the president may ultimately turn on the nature of the litigants, not the constitutionality or legality of the president's decision. For those concerned with the stature of constitutional limitations on the executive, hope is alive.

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307. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.).

308. *See California v. Trump*, 407 F. Supp. 3d 869 (N.D. Cal. 2019).

309. *Id.* at 898–99.

310. In *El Paso Cty. v. Trump*, 407 F. Supp. 3d 655 (W.D. Tex. 2019), a district court declined to stay its prior decision that the president had no authority to build a Texas portion of his wall under Section 2808, *Id.* at 658, and entered a permanent injunction. *Id.* at 667. The Fifth Circuit stayed the district court injunction, relying on the Supreme Court stay in *Sierra Club*. *El Paso Cty. v. Trump*, No. 19-51144, 2020 U.S. App. LEXIS 567, at \*2 (5th Cir. Jan. 8, 2020).

311. *See* 107 CONG. REC. H5085 (daily ed. June 25, 2019) (noting that Democratic leadership was considering H.R. 3401, which provided \$4.5 billion in humanitarian assistance, but expressly declined the use of those funds for the wall).

312. After the stay decision, the president tweeted "Wow! Big VICTORY on the Wall. The United States Supreme Court overturns lower court injunction, allows Southern Border Wall to proceed. Big WIN for Border Security and the Rule of Law!" Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2019, 5:37 PM), <https://twitter.com/realdonaldtrump/status/1154883345546928128> [<https://perma.cc/NMG7-FH6N>].

The Ninth Circuit had concluded its opinion with this observation: In his concurrence in *Youngstown*, Justice Jackson made eloquent comments that seem equally apt today:

. . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. . . . 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. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.<sup>313</sup>

There is an old adage that a half a loaf is better than none at all. That option may satisfy a starving person, but it won't sate the hunger of a nation for the rule of law.

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