

Congress Is Unlikely to Stop Trump’s “Emergency,” But Lawsuits Could

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Today, the House of Representatives is poised to adopt a resolution overturning Donald Trump’s trumped-up [“national emergency” proclamation](#), in which he claims authority to fulfill his campaign promise to build a wall at the southern border.

The [National Emergencies Act](#) requires Senate Majority Leader Mitch McConnell to bring the House resolution to a vote within 18 days. In order to prevail in the Senate, four Republicans would have to defy Trump. If the bill passes both houses of Congress, Trump has pledged to veto it and there is little chance Congress could muster the two-thirds necessary to override his veto.

In the likely event the legislature fails to void Trump’s “emergency” declaration, the judicial branch will have the opportunity to check and balance the executive. Six lawsuits have already been filed in federal courts around the country. They quote Trump’s own words to demonstrate that even he doesn’t believe there’s a bona fide emergency. The suits claim Trump violated the Constitution’s Separation of Powers mandate by circumventing the will of Congress, which has rejected Trump’s \$5.7 billion demand for his wall. And they allege violation of the National Environmental Policy Act.

The Protect Democracy Project, which filed the lawsuit in [El Paso County & Border Network for Human Rights v. Trump](#), noted that courts traditionally defer to a president’s claims that national security is under threat. “But no such deference is owed to the executive here, where the president is violating statutes and usurping the legislative branch’s role.” The lawsuit, which was filed in the Western District of Texas, argues,

“[H]aving seized the power of the legislative branch to make law and spend federal funds, the president may not attempt to sideline the judicial branch by arguing that it cannot interpret and apply the law.”

On February 15, after months of wrangling and a 35-day government shutdown during which Trump held the country hostage, Congress passed the [2019 Consolidated Appropriations Act](#) and Trump signed it. The [bill](#) rejects Trump’s demand for \$5.7 billion to build his border wall. It allocates \$1.375 billion to repair existing border barriers or fencing and build 55 miles of new fencing, using a previously approved design. It forbids wall construction in wildlife areas and parks and requires consent of local officials and a public comment period before construction begins in border cities.

The same day he signed that legislation, Trump issued a [proclamation](#) declaring a “national emergency.” It states:

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.

Trump also published a statement titled "[President Donald J. Trump's Border Security Victory](#)" specifying how he intends to repurpose money that Congress has already allocated to pay for his wall. He plans to pilfer \$3.6 billion from military construction projects, \$2.5 billion from counterdrug enforcement, and \$601 million from the Treasury Forfeiture Fund.

Although Trump has been demanding that Congress allocate \$5.7 billion for his wall, he now asserts authority to redirect funds that, when combined with the \$1.375 billion Congress did approve, total almost \$8.1 billion.

The lawsuits claim that by repurposing funds Congress has already designated, Trump has exceeded his constitutional and statutory powers.

No Bona Fide Emergency

The National Emergencies Act, enacted to limit the president's authority to declare a national emergency, requires a real emergency. Trump's claim that the entry of criminals, drugs and gangs at the southern border constitutes a national security threat is spurious.

When he announced in the Rose Garden that he was declaring an "emergency," Trump admitted there was no real emergency. He [said](#), "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster." Trump was expressing a personal preference, not describing a national emergency.

Sixteen states filed a lawsuit in the Northern District of California. In [California v. Trump](#), the states marshaled data demonstrating that migration on the southern border does not constitute a national threat.

On February 25, a bipartisan group of 58 former national security and homeland security officials [issued a Joint Declaration](#), stating, "there is no factual basis for the declaration of a national emergency" at the southern border. They wrote:

- Illegal border crossings are at near 40-year lows;
- There is no documented terrorist or national security emergency;
- There is no emergency related to violent crime;
- There is no human or drug trafficking emergency that can be addressed by a wall;
- This proclamation will only exacerbate the humanitarian concerns that do exist;
- There is no basis for circumventing the appropriations process;
- The situation at the border does not require the use of the armed forces, and a wall is unnecessary to support the use of the armed forces; and
- Redirecting funds for the "national emergency" will undermine U.S. national security interests "by needlessly pulling resources from Department of Defense programs that are responsible for keeping our troops and our country safe and running effectively."

On January 29, the Director of National Intelligence issued a "[Worldwide Threat](#)

[Assessment](#).” That report makes no mention of any security threat posed by migrant caravans at the southern border. It states that most asylum applicants are “fleeing violence at home.” On the same day, the directors of the Office of National Intelligence, the FBI and the CIA [testified](#) about global threats at a hearing of the Senate Intelligence Committee. None of them described a security crisis at the southern border.

A 2018 [State Department report](#) found “no credible evidence indicating that international terrorist groups have established bases in Mexico, worked with Mexican drug cartels, or sent operatives via Mexico into the United States.”

Several studies have determined that undocumented immigrants do not commit crimes at a greater rate than U.S. citizens. For example, a [2018 study in Criminology](#) concluded that “undocumented immigration does not increase violence.” In fact, “increases in the undocumented immigrant population within states are associated with significant decreases in the prevalence of violence.”

And the overwhelming majority of heroin, cocaine, methamphetamine and fentanyl smuggled into the United States comes in [through official ports of entry](#) rather than through illicit border crossings.

Moreover, a border wall could actually increase the clout of the drug cartels. A wall would squeeze smaller drug operators “and force them into the hands of the large organizations, increasing their income and power,” Don Winslow [wrote](#) in *The San Diego Union-Tribune*. “The wall would not cost the cartels money. It would make them more money.”

Violation of Separation of Powers

[California v. Trump](#) argues that Trump’s scheme to secure money for his wall constitutes a “flagrant disregard of fundamental separation of powers principles engrained in the United States Constitution.” Congress has the power to make the laws and the power of the purse. The president has the duty to faithfully carry out the law.

The Lawmaking Power (Article I, Section 1) provides,

“All legislative Powers herein granted shall be vested in a Congress.”

The Spending Clause (Article I, Section 8, Clause 1) says,

“The Congress shall have Power to ... provide for the common Defence and general Welfare of the United States.”

The Appropriations Clause (Article I, Section 9, Clause 7) states,

“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”

The Presentment Clause (Article I, Section 7, Clause 2) requires that all bills passed by both houses of Congress must be presented to the president for signature. The president then

has only two options. He can sign the bill or veto it.

The Take Care Clause (Article II, Section 3) says that the president “shall take Care that the Laws be faithfully executed.”

In [*Youngstown Sheet & Tube Co. v. Sawyer \(1952\)*](#), the Supreme Court said that when the president seeks to circumvent 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.” Presidential claim to such power “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”

The Constitution gives Congress, not the president, the power to authorize expenditures of federal funds. Congress has specifically considered and refused to appropriate the \$5.7 billion Trump is demanding for his border wall. By using the pretext of a national emergency to steal money Congress already assigned to other purposes, Trump is circumventing the will of Congress. No president has ever declared a national emergency as an end run around Congress after it rejected his spending demand.

Trump is claiming the right to take \$3.6 billion away from military construction projects, under [Tit. 10 USC sec. 2808](#); \$2.5 billion away from counterdrug enforcement, under [Tit. 10 USC sec. 284](#); and \$601 million from the Treasury Forfeiture Fund.

Diverting Money From Military Construction (Section 2808)

Trump cannot lawfully invoke section 2808. It allows a president who claims an emergency that “requires the use of the armed forces” to [divert funds](#) that have not been “obligated” and use them for construction projects “necessary to support” the military.

The funds Trump seeks to usurp have already been obligated to other purposes. Building a border wall does not constitute “military construction,” which must support a military installation.

In *El Paso County*, the Protect Democracy Project asserts,

“Since 1996, hundreds of miles of southern border barriers have been built without any use of the armed forces. Likewise, policing the southern border has been the function of the Department of Homeland Security, and prior to that the Immigration and Naturalization Service, not the military.”

Moreover, the use of the military to enforce domestic law is [prohibited by the Posse Comitatus Act](#), unless Congress makes exceptions, which it has not done here.

The civilian construction of a border wall does not require the use of the military, nor is it “necessary to support” the military.

“The Proclamation turns the statute on its head, seeking to mobilize the armed forces to engage in a civil construction project; not to engage in a construction project necessary to support the mobilization of the armed forces,” Project Democracy argues.

Diverting Money From Counterdrug Enforcement (Section 284)

[Section 284](#) does not allow shifting the money Congress has allocated for counterdrug operations to construct a border wall. Use of those funds is limited to “roads, fences and installation of lighting to block drug smuggling corridors.” The entire 2,000-mile southern border is not a “drug smuggling corridor.” Money under this section can be used for repair and maintenance of equipment, and transporting personnel. Small-scale construction projects are permitted, but not border wall construction.

Diverting Money From the Treasury Forfeiture Fund

The Treasury Forfeiture Fund can only be used for specific purposes, including paying law enforcement officers, consultants and informants, and upgrading law enforcement vehicles. They do not include construction.

National Environmental Policy Act

The [National Environmental Policy Act](#) mandates the preparation of environmental impact statements for major federal projects that “significantly affect the quality of the human environment.” There has been no environmental impact statement here. Yet Stephen Miller said people [would be “shocked”](#) at the speed with which the administration will build the wall.

Several environmental organizations filed litigation to overturn Trump’s declaration. The ACLU [filed a lawsuit](#) in the Northern District of California on behalf of the Sierra Club and the Southern Border Communities Coalition. Another suit [was filed in the District of Columbia](#) by the Center for Biological Diversity, Defenders of Wildlife, and the Animal Legal Defense Fund.

A 2017 study by the Center for Biological Diversity found that Trump’s border wall threatens 93 endangered and threatened species, including jaguars, ocelots, Mexican gray wolves and cactus ferruginous pygmy owls.

“The border wall won’t be effective at stopping people seeking a better life from getting to this country, but it will destroy habitat and divide wildlife populations,” Noah Greenwald, the center’s endangered species director, [noted](#) in a statement. “Building a wall across the entirety of the border would cause massive damage to one of the most biologically diverse regions in North America.”

“Beyond jeopardizing wildlife, endangered species and public lands, the U.S.-Mexico border wall is part of a larger strategy of ongoing border militarization that damages human rights, civil liberties, native lands, local businesses and international relations,” the [Center for Biodiversity said](#) in a statement announcing the filing of its lawsuit. “The border wall impedes the natural migrations of people and wildlife that are essential to healthy diversity.”

Public Citizen Litigation Group [filed a lawsuit](#) in the District of Columbia on behalf of Frontera Audubon Society and three Texas landowners whose land would be seized to build the wall.

And Citizens for Responsibility and Ethics in Washington [sued the Department of Justice in the District of Columbia](#), alleging that the Freedom of Information Act requires the Office of

Legal Counsel to disclose its opinions about the power of the president to declare a national emergency, and specifically to build a wall or barrier on the southern border.

Ultimately, the Supreme Court will likely decide whether Trump's action is illegal. He is counting on the high court to affirm his "emergency" declaration like it upheld his rewritten Muslim Ban. But Chief Justice John Roberts, though conservative, is mindful of the legacy of his Court. He may well vote to overturn Trump's unprecedented end run around Congress and uphold the Constitution's separation of powers mandate.

There is much at stake. Congress should do its duty to check and balance this out-of-control executive. Failing that, it is up to the courts to halt Trump's illegal assertion of executive power.

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