

3-25-2019

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## **President Donald Trump Has the Authority to Build the Wall Using Executive Funds**

**By Jason Kusnerick\***

The controversy over whether or not the United States should build a wall on its southern border has been a hot topic in recent years. One of the main goals upon which President Trump focused during his campaign for the presidency in 2016 was the construction of a wall between the United States and Mexico.<sup>1</sup> On January 25, 2017, President Trump issued the executive order Border Security and Immigration Enforcement Improvements to begin the process of building the wall on our southern border.<sup>2</sup> Pursuant to the Immigration and Nationality Act, the Secure Fence Act of 2006,<sup>3</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>4</sup> the executive order seeks to “ensure that the Nation’s immigration laws are faithfully executed” and to protect the country from a “recent surge of illegal immigration at the southern border with Mexico.”<sup>5</sup> Congress did not meet this executive order with open arms and decided not to provide the necessary funds to construct the wall. Thus, Trump ordered the longest governmental shutdown in U.S. history.<sup>6</sup> However, President Trump can build the wall on the border between the United States and Mexico without Congressional approval because (1) he has the power under the implied “emergency power” of the presidency to oversee immigration; (2) he is not the first President to use executive funds against Congressional approval; and (3) the Supreme Court will likely defer to the President on this issue.

### **(1) Implied “Emergency Power”**

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<sup>1</sup> Aarthi Swaminathan and Adriana Belmonte, National emergency: How Trump’s ‘wall’ could actually be built, (Mar. 2, 2019), available at <https://finance.yahoo.com/news/border-wall-trump-where-stands-building-200101320.html>.

<sup>2</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>3</sup> Pub. L. No. 109-367, 120 Stat. 2638 (2006).

<sup>4</sup> Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 at 724 (1996).

<sup>5</sup> Gerald S. Dickinson, *Cooperative Federalism and Federal Takings After The Trump Administration’s Border Wall Executive Order*, 70 Rutgers U.L. Rev. 647, 651 (2018).

<sup>6</sup> Swaminathan, *supra* note 1.

Though not specifically mentioned in the Constitution, the Executive Branch has emergency power that usually is limited to times of war or, in this case, national emergencies.<sup>7</sup> Because emergency power is not specifically stated in the Constitution, its scope is somewhat limited, typically extending only to situations that comprise or threaten the safety or well-being of the public.<sup>8</sup> In 1976, Congress enacted The National Emergencies Act to better define the roles of the President and Congress when a national emergency is declared.<sup>9</sup> The National Emergencies Act requires the President to cite the statute they are using and to show Congress where the money is spent during the emergency.<sup>10</sup> On February 15, 2019, President Trump used his executive powers and declared a national emergency in order to build the wall along the southern border of the United States.<sup>11</sup> The executive order, Border Security and Immigration Enforcement Improvements, states the wall is a national emergency since border security is critically important to the national security of the United States.<sup>12</sup> Aliens illegally entering the United States without inspection or admission presenting a significant threat to national security and public safety were another reason for the executive order's issuance.<sup>13</sup> Also, the executive order focuses on the protection from criminal organizations that contribute to the significant increase in violent crimes and deaths in the United States.<sup>14</sup>

The Supreme Court gave “plenary power” – absolute power – over immigration to Congress and the Executive Branch in a judicially created doctrine known as the “plenary power” doctrine.<sup>15</sup> The Supreme Court also

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<sup>7</sup> Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, (Feb. 2019), available at <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

<sup>8</sup> *Id.*

<sup>9</sup> The National Emergencies Act, U.S.C. § 1601-1651 (1976).

<sup>10</sup> *Id.* at Sec. 202.

<sup>11</sup> Danny Cevallos, *Can Trump use a 'national emergency' to build a border wall? His own words offer clues.*, (Feb. 18, 2019), available at <https://www.nbcnews.com/politics/donald-trump/can-trump-use-national-emergency-build-border-wall-his-own-n972556>.

<sup>12</sup> Exec. Order No. 13,767, *supra* note 2, at Sec. 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Margaret D. Stock, *Immigration and the Separation of Powers*, (Sep. 14, 2015), available at <https://fedsoc.org/commentary/blog-posts/immigration-and-the-separation-of-powers>.

has allowed Congress to delegate much of their immigration authority to the Executive Branch.<sup>16</sup> Under current federal laws, Kirstjen Nielson, Secretary of Homeland Security, may take necessary steps to allocate resources to construct the wall and, with the assistance of Attorney General William Barr and the Department of Justice, acquire the necessary land to construct the wall by voluntary sale or eminent domain.<sup>17</sup> Thus, President Trump has the ability to construct a wall based on his authority under the powers of the Executive Branch.

## (2) Precedent

President Trump is not the first President to use executive funds against Congressional oversight.<sup>18</sup> Most recently, President Barack Obama spent billions on health care without Congressional authorization.<sup>19</sup> The Obama Administration tried to give money to insurance companies in order to protect the financial threat to the stability of their new health care law, Affordable Care Act.<sup>20</sup> Upwards of \$7 billion dollars were given out in this cost reduction program before members of the House brought action in federal court to cease this production of funds.<sup>21</sup>

President Bush in 2001, through a series of Executive Orders, created the White House Office of Faith-Based and Community Initiatives. Under the Faith-Based and Community Initiatives order, the White House organized nationwide conferences to aid religious institutions in their applications for federal aid.<sup>22</sup> These Faith-Based Initiatives were challenged in *Hein v. Freedom From Religion Foundation, Inc.*, where the Respondents believed

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<sup>16</sup> *Id.*

<sup>17</sup> Immigration and Nationality Act, 8 U.S.C. 1103(a)-(b) (2012); Dickinson, *supra* note 5, at 651.

<sup>18</sup> The Heritage Foundation, Executive Orders, available at <https://www.heritage.org/political-process/heritage-explains/executive-orders>. (noting that many other presidents enacted controversial executive orders such as Roosevelt in 1933, Truman in 1948, Eisenhower in 1957, Kennedy in 1961, Clinton in 1996, and George W. Bush in 2001).

<sup>19</sup> Carl Hulse, House G.O.P. Returns Focus to Obamacare's Spending Authority, (July, 7, 2016), available at <https://www.nytimes.com/2016/07/07/us/politics/house-gop-returns-focus-to-obamacares-spending-authority.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 593-94 (2007).

the Faith-Based Initiative was in violation of the Establishment Clause by organizing conferences at which faith-based organizations allegedly “are singled out as being particularly worth of federal funding, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services.”<sup>23</sup> They thought the faith-based conferences were designed to promote, and had the effect of promoting, religious community groups over secular ones.<sup>24</sup> The Court found that taxpayer standing in Establishment Clause disputes is limited to cases involving specific Congressional action.<sup>25</sup> Here, the Court found that Congress did not specifically authorize the use of federal funds to pay for the conferences or speeches but instead, the conferences and speeches were paid out of general Executive Branch appropriations.<sup>26</sup> Thus, the Court found there was no standing.<sup>27</sup>

### (3) What May Happen Going Forward?

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court struck down President Harry Truman’s seizure of steel mills during the Korean War, holding that the President’s power weakens if it lacks Congressional support.<sup>28</sup> The Court found that the President has the most power when he acts with Congressional authority and has the least amount, “at its lowest ebb”, of power when Congress has forbidden a particular action.<sup>29</sup> Thus, since Congress has not approved the building of the wall, President Trump is on unstable ground moving forward.

The Supreme Court has the authority to veto the executive order declaring it unconstitutional, but the Supreme Court usually defers to the President

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<sup>23</sup> *Id.* at 595.

<sup>24</sup> *Id.* at 595-596.

<sup>25</sup> *Id.* at 589.

<sup>26</sup> *Id.* at 593.

<sup>27</sup> *Id.* at 608 (the court held this case falls outside “the narrow exception” that Flast “created to the general rule against taxpayer standing. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific enactment, respondents’ lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite “logical nexus” between taxpayer status “and the type of legislative enactment attacked,”).

<sup>28</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>29</sup> *Id.* at 637 (Jackson, J., concurring).

on matters involving implantation of Executive powers.<sup>30</sup> Congress may always step in and pass legislation to end the funding for the wall entirely. Congress can end the national emergency by a joint resolution under the National Emergencies Act.<sup>31</sup> However, this is likely not possible given the current make-up of the House and Senate. Thus, one of the last ways opponents could put a stop to this wall is to vote President Trump out of office next election period.

Edited by Carter Gage

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<sup>30</sup> Sarah Kessler, There are three ways to revoke a US president's executive orders, and they rarely succeed, (Jan. 31, 2017), available at <https://qz.com/898683/can-an-executive-order-be-revoked/>.

<sup>31</sup> The National Emergencies Act, *supra* note 9, at Sec. 202(c)(1).