



## Presidential Power and the Wall

David Post

October 28, 2019

Our friends at the Cato Institute have submitted an amicus brief (jointly with NYU's Brennan Center for Justice) on behalf of the plaintiff in the case of *Sierra Club v. Trump* in the Central District of CA. [It is [posted online here](#)] The case challenges Pres. Trump's use of the National Emergencies Act to divert funds appropriated for other purposes towards the building of a wall on the U.S.- Mexico border, largely on statutory grounds—that the president's action is inconsistent with the congressional oversight mechanisms built into the NEA—with an underlying constitutional, separation-of-powers theme:

The Cato Institute has joined the Brennan Center for Justice in filing an amicus a brief in support of a motion to enjoin the president from going through with this power grab. The president's emergency declaration to build a wall along the southern border is a sharp departure from past practice. Without judicial intervention, it has the potential to create an extraordinarily dangerous precedent, *effectively giving the go-ahead for future presidents—of any party or political stripe—to invoke emergency powers to address routine or politically charged policy problems, or even use those powers to take actions for which Congress has expressly withheld consent.* This would be clearly inconsistent with NEA's intent and allow the executive branch to side-step the legislative branch in order to achieve its policy goals, effectively upsetting the balance of power between the president and Congress. [emphasis added]

More from the summary prepared by Cato:

Since the Constitution doesn't provide the president with any explicit power to declare a national emergency, Congress passed the National Emergencies Act ("NEA") in 1976 to ensure any use of so-called "emergency powers" would be subject to strict congressional oversight. Congress wanted to provide the president with the necessary latitude to act in the event of a true nationwide emergency, so it purposely didn't define the term "national emergency." However, the law's history makes it clear that Congress never intended to give the president wholly limitless power or discretion to declare national emergencies on a whim, let alone to allow the president to side-step Congress to fund a specific project.

Having unsuccessfully lobbied Congress for two years to acquire funding for the wall along the southern border, President Donald Trump invoked the NEA earlier this year and declared a state of national emergency to divert billions of dollars of appropriated federal funds to build a wall along the United States/Mexico border. The president issued an executive order citing a statutory provision that provides authorization and funding for military construction projects during emergencies that "require the use of the armed forces," but only if the projects "are necessary to

support such use of the armed forces" and meet the statutory definition of "military construction."

In passing the NEA, Congress clearly intended for criteria like those to provide meaningful and enforceable checks on the president's authority to issue emergency declarations. But the president's invocation of the NEA fails to meet those criteria. For one, at the time of the declaration, there had been no sudden, unexpected change in illegal immigration at the southern border. Official government data puts illegal border crossings in 2017 at their lowest point in 46 years. There were also no significant, unexpected changes in patterns of crime or drug smuggling along the border. Second, it is clear from the president's own actions that he did not believe the situation at the southern border merited "immediate action." For the first two years of his administration, he accepted Congress's decision not to provide border wall funding with little pushback. Lacking the political will to acquire funding through the legislative process, the president now seeks what amounts to an unconstitutional end run around Congress's constitutional authority to appropriate federal funds.

It's a very good piece of work on a vitally important issue. And the lineup is itself interesting; in how many cases have Cato, the Brennan Center, and the Sierra Club been aligned in pursuit of a common goal? The principle of congressional control over appropriations is a critical one, and those supporting Trump's actions here should consider the day—that is surely coming, whether in this election cycle or farther down the road—when politicians of a different stripe are in control of the White House and wielding this kind of power. Worth reading.

*David Post is currently an Adjunct Scholar at the Cato Institute, and was previously a professor at Beasley School of Law at Temple University.*