

**U.S. House of Representatives**  
**Committee on the Judiciary**

Washington, DC 20515-6216  
One Hundred Sixteenth Congress

February 15, 2019

President Donald J. Trump  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Mr. President,

As the Chairs and Vice-Chair of the House Judiciary Committee and its Subcommittees, we write to express our alarm over your proclamation “Declaring a National Emergency Concerning the Southern Border of the United States” and your reassignment of funds approved by Congress for other purposes in order to access certain funds denied to you by Congress for the construction of a border wall. We are particularly troubled in light of your statement today that “I didn’t need to do this, but I would rather do it much faster.”

The House Judiciary Committee is commencing an immediate investigation into this matter, which raises both serious constitutional and statutory issues. We ask that you make those individuals involved in this declaration—including White House Counsel Pat Cipollone and the appropriate individuals at the Department of Justice—available to us for a hearing in the coming days so that we may fully understand both the substantive rationale and legal justification for your unilateral declarations. (As you may know, the House Judiciary Committee has previously conducted a series of hearings and reported legislation in the past when the then Republican Majority had voiced concerns over what they perceived to be executive overreach.<sup>1</sup>)

We believe your declaration of an emergency shows a reckless disregard for the separation of powers and your own responsibilities under our constitutional system. The Constitution vests the Congress with the power of the purse and expressly provides that “no money shall be drawn from the Treasury, but in consequence of appropriations made by law.”<sup>2</sup> Congress has entrusted you and your predecessors with emergency authority in order to respond quickly and effectively to real crises, such as wars and natural disasters. The Judiciary

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<sup>1</sup> See *The President’s Constitutional Duty to Faithfully Execute the Laws*, Hearing before the Committee on the Judiciary, Dec. 3, 2013 (serial no. 113-55); *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws*, Feb. 26, 2014 (serial no. 113-63); H.R. 4138, “Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law Act of 2014” (report 113-377); and H.R. 3973, “Faithful Execution of the Law Act of 2014” (report 113-376).

<sup>2</sup> U.S. CONST., art. I, sec. 9, cl. 7.

Committee, which has jurisdiction over the National Emergencies Act, did so based on an understanding that the President would “take care that the laws be faithfully executed”<sup>3</sup> and would resort to this authority only when absolutely necessary. By fabricating an emergency in order to bypass the political process for allocating a budget, you appear to be abusing both this trust and your own oath of office.

Contrary to a series of misleading statements that have come from the White House, including your referring to a number of incorrect and unsubstantiated statistics today, there is no national emergency at the southern border. Undocumented immigration has been decreasing for years. Border crossing attempts are at 40-year lows. For example, Customs and Border Protection (CBP) apprehended over 1.6 million people attempting to enter the country without authorization in 2000; but over the last few years, CBP has apprehended just a fraction of that, between 400 and 500 thousand individuals annually.<sup>4</sup>

You have also referred to the flow of unaccompanied children and families across the southern border—but these individuals are expressly permitted by law to seek asylum. Their efforts to do so can hardly be deemed an “emergency.” These children and families, who are fleeing violence in Central America, are not attempting to evade immigration authorities. Instead, they have been actively approaching ports of entry or seeking out Border Patrol officers in order to make their asylum claims. A physical wall would have no effect on their ability to do so. In any event, net migration as a whole has not increased in recent years: although the number of unaccompanied children and family units from Central America has risen, migration from Mexico has decreased.<sup>5</sup>

Moreover, there is no plausible “emergency” with respect to the flow of drugs across the southern border that could be solved by a border wall. The overwhelming majority of narcotics move through ports of entry. According to a 2017 Drug Enforcement Agency report: “The most common method employed by these [transnational criminal organizations] involves transporting illicit drugs through U.S. ports of entry (POEs) in passenger vehicles with concealed compartments or commingled with legitimate goods on tractor trailers.”<sup>6</sup>

Lastly, the White House’s previous statements that terrorists are crossing illegally through the southern border are demonstrably false. No one in the modern era who committed a terrorist attack in the United States has been found to have crossed illegally from Mexico. A

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<sup>3</sup> U.S. CONST., art. I, sec. 3.

<sup>4</sup> United States Customs and Border Patrol, *Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year*, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf>.

<sup>5</sup> U.S. Customs and Border Protection, *Southwest Border Migration: FY 2019* (Dec. 10, 2018).

<sup>6</sup> U.S. Department of Justice Drug Enforcement Administration, *2017 National Drug Threat Assessment* (Oct. 2017).

2017 report by the State Department found “no credible information that any member of a terrorist group has traveled through Mexico to gain access to the United States.”<sup>7</sup> Indeed, your own intelligence agencies do not believe there is an emergency at the southern border: the Intelligence Community’s most recent annual Worldwide Threat Assessment scarcely mentions immigration or the southern border—and it nowhere describes the situation there as an emergency, a crisis, or even as a threat.<sup>8</sup>

These are not mere policy disagreements. By raiding the military’s budget to build a wall that Congress has not authorized with funds that Congress has not approved for that purpose, you are violating a core tenet of the separation of powers and subverting one of the key principles of the Constitution. And those actions will have real consequences. Although you stated today that the projects for which these funds have been allocated “didn’t sound too important to me,” your plan would strip billions of dollars from critical funds needed to construct and make improvements on military bases around the world. The misallocation of those funds could undermine the training, readiness, and quality of life of our men and women in the armed forces and could have serious national security consequences.

Moreover, the law you have cited in support of your actions to reprogram military funds, 10 U.S.C. § 2808, only permits the Secretary of Defense to reallocate funds for projects that are “necessary to support” a “use of the armed forces.” Unsurprisingly, nearly all uses of this authority have been for purposes of funding overseas military construction projects. A border wall cannot plausibly be necessary to support a lawful military mission because the military is not charged with enforcing our nation’s immigration laws. In fact, it is prohibited from conducting domestic law enforcement operations except as expressly authorized by Congress.<sup>9</sup>

The fact that you would use an emergency declaration only after years of failing to obtain congressional approval for construction of your wall further indicates that there is no true emergency at present. You have previously said that whether you declared a national emergency would depend on whether you could “make a deal with people that are unreasonable.”<sup>10</sup> At your press conference today you also acknowledged that you were “disappointed” with the failure of Congress to fund the wall during the first one and one-half years of your presidency when you were “new to the job.”

Recent reports indicate that your emergency declaration “was an option that Republican leaders had urged [the President] to avoid but eventually accepted as necessary to avoid the

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<sup>7</sup> U.D. Department of State, Bureau of Counterterrorism, *Country Reports on Terrorism 2016*, at 290 (July 20

<sup>8</sup> See *Worldwide Threat Assessment of the U.S. Intelligence Community* (Jan. 29, 2019).

<sup>9</sup> See 10 U.S.C. § 275; 18 U.S.C. § 1385.

<sup>10</sup> Greg Sargent, *Trump: I have the ‘absolute right’ to declare a national emergency if Democrats defy me*, Wash. Post, Jan. 9, 2019.

corner in which Trump—and his party—were trapped,” and that “Trump and his aides frantically scrambled to get barricades built by any means and to convince his political supporters that he was fulfilling his campaign promise.”<sup>11</sup> Your own White House Counsel reportedly “expressed concerns that the emergency declaration would be legally dicey.”<sup>12</sup> Just today, when asked by a reporter whether you were required to go through Congress to get funding for a wall, you replied, “I did go through Congress. . . . I got \$1.4 billion, but I’m not happy with it.” Significantly, there is no instance in American history where a President declared a national emergency after failing to win congressional approval.

Of additional legal concern is the fact that more than two thirds of border property is owned by private parties or the relevant states. This means that your efforts to unilaterally build a wall will require taking significant amounts of property not owned by the federal government. In the landmark *Youngstown Sheet and Tube* decision in 1952, the Supreme Court held that President Truman’s declaration of national emergency, even in the midst of an international armed conflict, did not permit him to unilaterally seize private property.<sup>13</sup> Whether a border wall could be unilaterally constructed in contravention of dozens of federal legal prohibitions, such as the Clean Water Act and the Farmland Policy Protection Act, also raises profound concerns.

In addition to making the White House Counsel and appropriate individuals at the Department of Justice available to us, we would ask that the White House and Department of Justice provide responses to the following questions as part of our investigation:

1. Did the White House seek an opinion, whether formal or informal, from the Office of Legal Counsel (OLC) before the President issued his emergency declaration? If so, please provide a copy of that opinion and/or of any other written analysis produced by OLC regarding this emergency declaration.
2. Did the White House solicit or consider any analysis from the Department of Defense regarding the consequences of asserting a national emergency and reallocating funds already designated for other projects? Did it seek or consider such an analysis from any other agencies potentially affected by these actions? If so, please provide copies of those analyses or any other written analyses produced by DOD or other affected agencies regarding this emergency declaration.
3. What was the legal basis for your determination that (1) there is an “emergency” at the southern border and (2) a border wall is “necessary to support” a “use of the armed

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<sup>11</sup> Robert Costa et al., ‘Off the rails’: Inside Trump’s attempt to claim victory in his border wall defeat, Wash. Post, Feb. 14, 2019.

<sup>12</sup> *Id.*

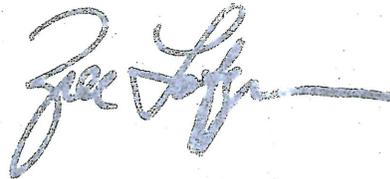
<sup>13</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

forces” at the border? Please explain the nature of any anticipated uses of the armed forces at the border.

4. What was the legal basis for your determination that funds allocated for the Defense Department’s drug interdiction efforts could be used to construct a border wall?
5. What was the legal basis for your determination that the Treasury Forfeiture Fund could be used to construct a border wall?
6. Please provide copies of any documents or communications between the White House and Department of Justice employees dated from November 1, 2018 to February 15, 2019 relating to the matter of declaring a national emergency to support border security initiatives.
7. Please provide copies of any documents or communications between the White House and Department of Justice employees dated from November 1, 2018 to February 15, 2019 relating to the matter of seizing private property for military, national security, or border security purposes.
8. Please provide copies of any documents or communications between Department of Justice and Department of Defense and/or Army Corps employees dated from November, 2018 to February 15, 2019 relating to the matter of declaring a national emergency.

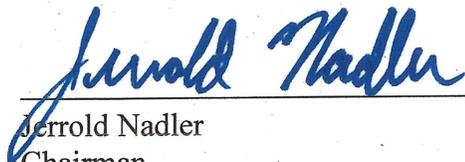
Please provide us with the above information no later than February 22, 2019. Thank you for your prompt attention to this matter.

Sincerely,



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Zoe Lofgren  
Chair  
Subcommittee on Immigration and  
Citizenship



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Jerrold Nadler  
Chairman  
House Committee on the Judiciary



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Steve Cohen  
Chair  
Subcommittee on the Constitution,  
Civil Rights, and Civil Justice

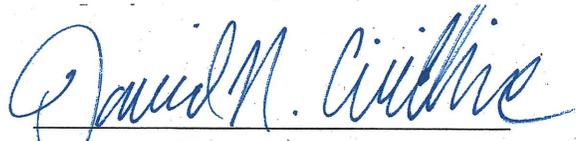


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Henry “Hank” Johnson Jr.  
Chair  
Subcommittee on Courts, Intellectual  
Property, and the Internet



Karen Bass  
Chair  
Subcommittee on Crime, Terrorism,  
and Homeland Security



David Cicilline  
Chair  
Subcommittee on Antitrust, Commercial,  
and Administrative Law



Mary Gay Scanlon  
Vice Chair  
House Committee on the Judiciary

cc: William Barr, Attorney General of the United States  
Pat Cipollone, White House Counsel  
The Hon. Doug Collins, Ranking Member, House Committee on the Judiciary  
The Hon. Nita Lowey, Chair, House Committee on Appropriations  
The Hon. Adam Smith, Chair, House Armed Services Committee