

Can the Department of Defense Build the Border Wall?

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UPDATE: On February 15, 2019, President Trump issued a [proclamation](#) declaring a national emergency at the southern border of the United States, and invoking, among other authorities, the military construction authority provided in [10 U.S.C. § 2808](#). At the same time, the White House released a [statement](#) identifying additional funds that would be made available to build the border wall under [10 U.S.C. § 284](#). The Army Corps of Engineers reprogramming authority at [33 U.S.C. § 2293](#) was not invoked as part of this declaration.

Following the President's declaration of a national emergency, [Public Citizen](#) and a collection of [state attorneys general](#) filed suits in federal district courts seeking injunctions prohibiting the use of federal funds to construct a border wall, beyond the amounts appropriated by Congress for such purposes.

The text of the original post from January 10, 2019, includes a discussion of these three authorities and follows below.

According to multiple [reports](#), President Trump may be [contemplating](#) declaring a national emergency in order to fund the construction of a physical barrier along the southern border with Mexico. The funding for such construction has been the focal point of the partial government shutdown that began on December 22, as Congress has thus far refused the President's demand for \$5.7 billion in funding for the construction of physical barriers by the Department of Homeland Security (DHS) (the lead agency responsible for deterring illegal border crossings). A number of media outlets have reported that the President is considering whether to resolve this impasse by directing the Department of Defense (DOD) to construct border fencing with its existing appropriations. Certain federal statutes potentially provide the DOD with limited authority to construct physical barriers along the border. However, the President may seek to avail himself of broader authorities by declaring a "national emergency" under the [National Emergencies Act](#) (NEA). Such a declaration could enable the President to invoke certain emergency military construction authorities established by the Military Construction Codification Act (MCCA). Whether these authorities—individually or in combination—extend to the construction of a border wall would present a reviewing court with several questions of first impression.

This Sidebar provides an overview of the NEA; the military construction authorities available in the event of a declared emergency that the Administration may rely upon to deploy border fencing; and other statutory authorities that may provide the DOD with the authority to engage in certain construction

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operations. The Sidebar also discusses the availability of judicial review of a decision to invoke such authorities, along with critical questions that would arise in litigation over the lawfulness of a DOD border fencing project. Because the NEA and related military construction authorities do not appear to have been employed to construct barriers along the U.S. border, the invocation of such authorities for that purpose would raise a variety of novel legal issues, including (1) the circumstances in which conditions along the border rise to the level of a “national emergency” that “requires use of the armed forces,” and the circumstances in which military construction is “necessary to support such use of the armed forces”; (2) the meaning of the term “military construction” in the MCCA; (3) how a court would review different segments of border wall construction; and (4) the relationship between military construction authorities and various other federal laws and constitutional considerations that shape the manner in which federal agencies carry out construction projects.

The National Emergencies Act

The Supreme Court has [explained](#) that the President’s authority “must stem either from an act of Congress or from the Constitution itself.” Because Article II of the Constitution contains no provision granting the Executive general emergency powers, the President generally must rely upon authority conferred by Congress to act beyond his ordinary Article II authorities. However, Congress has traditionally supplied the President with robust powers to act in times of crisis. By 1973, Congress had [enacted](#) over 470 statutes granting the President special authorities upon the declaration of a “national emergency,” but had imposed no substantive or procedural limitations on either the President’s discretion to declare an emergency or the duration of such emergencies.

After a Special Committee of the Senate concluded in [a 1973 report](#) that the President’s crisis powers “confer[red] enough authority to rule the country without reference to normal constitutional process,” Congress enacted [the NEA in 1976](#) to pare back the President’s emergency authorities. Specifically, the NEA established a framework for presidential declarations of national emergencies intended to provide enhanced congressional oversight and prevent emergency declarations from continuing in perpetuity. To accomplish these goals, the NEA [terminated](#) all then-existing presidentially declared emergencies. The Act also established procedures for future declarations of national emergencies, requiring the President to:

- [specify](#) which statutory emergency authorities he intends to invoke upon a declaration of a national emergency (in contrast with the pre-NEA regime, under which the declaration of an emergency operated as an invocation of all of the President’s emergency authorities);
- [publish](#) the proclamation of a national emergency in the *Federal Register* and transmit it to Congress;
- [maintain](#) records and transmit to Congress all rules and regulations promulgated to carry out such authorities; and
- [provide](#) an accounting of expenditures directly attributable to the exercise of such authorities for every six-month period following the declaration.

The NEA further provides that national emergencies [terminate](#) (1) automatically after one year unless the President publishes a notice of renewal in the *Federal Register*, (2) upon a presidential declaration ending a national emergency, or (3) if Congress enacts a joint resolution terminating the emergency (which would likely require the votes of two-thirds majorities in each house of Congress to override a presidential veto). Although the original NEA authorized termination through a concurrent resolution, which does not require the President’s signature, Congress amended the provision in 1985 to require a joint resolution as a response to a 1983 Supreme Court [decision](#) holding that legislative vetoes were unconstitutional. While the NEA directs each house of Congress to meet every six months to consider

whether to terminate a national emergency by joint resolution, Congress has never met to consider such a vote.

Although the NEA was intended to end perpetual states of emergency, it authorizes the President to renew an emergency declaration to avoid the Act's automatic termination provision. Today, [31 national emergencies](#) declared pursuant to the NEA are in effect, with Presidents having renewed [certain emergencies](#) for decades. The declaration of a national emergency under the NEA may enable the President to invoke a wide array of emergency authorities conferred by statute. According to a recent study by the Brennan Center for Justice, [136 statutes](#) provide the President with emergency authorities that he can invoke pursuant to the NEA.

Section 2808's Emergency Military Construction Authority

Upon declaring a national emergency pursuant to the NEA, the President may invoke the emergency military construction authority set forth in [10 U.S.C. § 2808](#) (Section 2808). Originally enacted in 1982, Section 2808 provides that upon the President's declaration of a national emergency "that requires use of the armed forces," the Secretary of Defense may "without regard to any other provision of law . . . undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." Section 2808 limits the funds available for emergency military construction to "the total amount of funds that have been appropriated for military construction" that have not been obligated. With certain limited exceptions, Presidents have generally [invoked](#) this authority in connection with construction at military bases in foreign countries.

Congress has [appropriated](#) a significant amount of money for various forms of military construction for the 2019 fiscal year (and additional funds may still be available from prior fiscal years) that may be available for military construction activities authorized under Section 2808. However, the circumstances in which the Section 2808 authority could be used to deploy fencing along the border appears to be a question of first impression, and one that is likely to be vigorously litigated. The legal arguments surrounding the outcome of litigation over Section 2808 can be divided into three general categories.

First, there may be dispute about whether conditions at the border provide a sufficient factual basis to invoke Section 2808. Before the Section 2808 authority may be used, the President must determine that the relevant construction project (*i.e.*, border fencing) would address a problem qualifying as a national emergency "that requires use of the armed forces." Moreover, even if the problem "requires use of the armed forces," the construction project must be "necessary to support such use of the armed forces." Because Section 2808 does not set forth any substantive criteria to assess whether a national emergency "requires use of the armed forces" or whether a contemplated military construction project is "necessary to support such use of the armed forces," a court may decline to review such determinations on the grounds that they involve non-justiciable [political questions](#). If a court were to review such determinations, it may evaluate (1) the factual record supporting the Administration's conclusion that the situation at the border qualifies as a national emergency that "requires use of the armed forces"; (2) the role that the armed forces have played and will play in addressing that emergency; and (3) the extent to which the construction of a border wall "support[s]" such activities. However, even if a court were to review these factual determinations, courts have traditionally [afforded](#) significant deference to executive claims of military necessity, which may stand as a substantial obstacle to legal challenges to any factual findings supporting the invocation of Section 2808.

Second, if a court were to conclude that the situation at the border qualifies as a national emergency that "requires use of the armed forces" and that construction of a border wall is "necessary to support such use of the armed forces," it would then need to assess whether construction of a border wall qualifies as a

“military construction project” within the meaning of Section 2808. Title 10 [defines](#) the term “military construction project” for purposes of Section 2808 to include “military construction work,” and defines “military construction” in turn as “includ[ing] any construction, development, conversion, or extension of any kind carried out with respect to a military installation . . . or any acquisition of land or construction of a defense access road.” Because there does not appear to be case law addressing the scope of this definition of “military construction,” the question of whether Section 2808 extends to the construction of a border wall appears to be an issue of first impression.

On the one hand, the construction of a border wall along most parts of the southern border would not appear to qualify as construction that would be undertaken “with respect to a military installation” (Title 10 [defines](#) the term “military installation” to mean a “base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department”). On the other hand, the Supreme Court has [explained](#) that the use of the term “include” in a statutory definition [indicates](#) that the examples set forth in the definition are illustrative rather than exhaustive. That Title 10 defines “military construction” to “include[]” construction undertaken “with respect to a military installation” accordingly does not establish that other types of construction undertaken by the military are necessarily excluded from that definition. However, pursuant to the canon of statutory construction known as *ejusdem generis*, non-exhaustive lists of terms are generally interpreted to include only those unnamed items that are of a similar character to the expressly enumerated items. Whether a court would conclude that the construction of a border wall qualifies as “military construction” may accordingly depend on whether it determines that such construction is sufficiently similar to the sort of construction undertaken “with respect to a military installation” to fall within the scope of Section 2808.

Section 2808’s legislative history provides only limited guidance in resolving this interpretive difficulty. A House Armed Services Committee report accompanying the original 1982 legislation indicated that while “[i]t is impossible to provide in advance for all conceivable emergency situations,” the Section 2808 authority was intended to address contingencies “ranging from relocation of forces to meet geographical threats to continuity of efforts after a direct attack on the United States during which the Congress may be unable to convene.” While the construction of a border wall accordingly does not appear to fall within the specific categories of construction that Congress contemplated in enacting Section 2808, a court may nevertheless interpret this report’s reference to “all conceivable emergency situations” as evincing Congress’s intent to give “military construction” a broad meaning.

A judicial determination of whether the construction of a border wall qualifies as “military construction” may ultimately depend on whether a court concludes that Title 10’s definition of that term is ambiguous. If the DOD were to conclude that Section 2808 authorizes the construction of a border wall, its interpretation may be entitled to [Chevron](#) deference. Under *Chevron*, courts defer to agency interpretations of ambiguous statutes they are charged with administering as long as those interpretations are reasonable. Accordingly, if a court were to conclude that Title 10’s definition of “military construction” is ambiguous, it may accept the DOD’s reading of Section 2808 as including the construction of border fencing even if it would not adopt such an interpretation in the first instance. In assessing whether such an interpretation is reasonable under *Chevron*, a court may evaluate the extent to which the military currently supports DHS’s activities at the border. This may lend support to the argument that DOD’s deployment of barriers qualifies as “military construction” because it supports military activities. By contrast, a court might instead conclude that because DHS has primary responsibility for securing the border and the fencing deployed by DOD would likely be used primarily by DHS to assist with its long-term immigration enforcement functions, interpreting the term “military construction” as including a border wall is not sufficiently reasonable to pass muster under *Chevron*.

Third, if a court reviews the invocation of Section 2808 to construct a border wall, the court’s analysis might be informed by the location of particular barriers. It is possible, for example, that securing certain areas of the border is more likely to “require[] use of the armed forces” than securing other areas, and that

a border wall may be “necessary to support such use of the armed forces” at some locations but not others. Likewise, the construction of a wall over certain areas of the border—specifically, [areas](#) that directly abut military bases—would appear to have a greater claim to qualifying as construction undertaken “with respect to a military installation” than construction at other locations along the border. Whether a court would engage in separate legal analysis for different portions of a border wall may ultimately depend on specific details concerning the apportionment of the relevant funds and the construction of different portions of such a wall.

Other Statutory Authorities

Several other statutes may provide the DOD with some authority to construct barriers along the border. The President may cite these authorities either individually or in combination with Section 2808 to support such construction. However, many of these authorities standing alone come with significant limitations concerning the types of authorized construction and the funds available for such construction. [33 U.S.C. § 2293](#) (Section 2293), for example, authorizes the Secretary of the Army to [terminate or defer Army civil works projects](#) that are “not essential to the national defense” upon a declaration of a national emergency under the NEA. The Secretary of the Army can then use the funds otherwise allocated to those projects for “authorized civil works, military construction, and civil defense projects that are essential to the national defense.” As with Section 2808, it is unsettled whether the construction of a border wall would qualify as an “authorized civil works, military construction, [or] civil defense project[.]” This uncertainty is compounded by the difficulty of determining whether the qualifier “authorized” modifies all of the items enumerated in Section 2293 or only the term “civil works.” If the term “authorized” modifies all of the items in the relevant sentence, then Section 2293 arguably would not allow the President to construct a border wall if that term is read to mean *specifically* authorized by Congress.

A separate emergency military construction statute may also provide the President with certain limited authorities to construct barriers along the border without declaring a national emergency. [10 U.S.C. § 2803](#) (Section 2803) provides that the Secretary of Defense “may carry out a military construction project not otherwise authorized by law” upon determining that (1) “the project is vital to the national security or to the protection of health, safety, or the quality of the environment,” and (2) “the requirement for the project is so urgent that” deferring the project “would be inconsistent with national security or the protection of health, safety, or environmental quality.” The money available under Section 2803 is limited to up to \$50 million of funds already appropriated for military construction projects that have not been obligated. Unlike Section 2808, an invocation of Section 2803 would *not* require a declaration of a national emergency. However, like Section 2808, reliance on Section 2803 to construct border fencing might be subject to legal challenge, including challenges based on the claim that such fencing does not qualify as “military construction.”

Another statute that authorizes the Secretary of Defense to assist civilian law enforcement with counterdrug activities may provide some authority for the construction of barriers along the border. [10 U.S.C. § 284](#) (Section 284) provides that the Secretary of Defense “may provide support for the counterdrug activities or activities to counter transnational organized crime” of any law enforcement agency, including through the “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” Use of Section 284 would *not* require a declaration of a national emergency under the NEA. However, the DOD’s Section 284 authority to construct fences appears to extend only to “drug smuggling corridors,” a condition that may limit where DOD could deploy fencing.

Availability of Judicial Review

If the President were to invoke the authorities discussed above to facilitate the construction of barriers along the southern border, the use of those authorities may be challenged in federal court. Such challenges would be especially likely if the DOD were to construct barriers on private lands, which make up a [significant portion](#) of the remaining unfenced border. The construction of fencing along private land would likely [require](#) the federal government to seize land through its eminent domain power, which may generate litigation over the lawfulness of such “takings” and trigger an obligation to pay [just compensation](#) to property owners.

In order to challenge the construction of fencing along the southern border, a plaintiff would need to establish standing—a requirement stemming from Article III of the Constitution that limits the parties that may seek relief from a federal court. Under the Supreme Court’s standing jurisprudence, a plaintiff must demonstrate, among other things, an injury that is [“concrete and particularized”](#) in order to ensure that the plaintiff [“has a personal stake in the outcome of the controversy.”](#) A number of plaintiffs may attempt to sue to enjoin the President’s invocation of the statutory authorities discussed above. Property owners whose lands are seized through eminent domain to construct border fencing would likely have standing to challenge the legality of such seizures and the underlying invocation of the relevant statutes. Some state and local governments and advocacy organizations have [challenged](#) previous border construction projects undertaken by DHS and may have standing to challenge DOD border construction projects in some instances. By contrast, the ability of Members of Congress or a house of Congress to challenge construction of a border wall seems limited. Controlling [case law](#) on legislative standing would seem to preclude an individual Member from challenging a decision to deploy fencing. While there are perhaps [narrow circumstances](#) in which an individual house of Congress may challenge executive action, reviewing [courts have developed](#) strict tests to assess claims of legislative standing that could pose hurdles to such litigation.

An additional issue that may arise in litigation over the authorities discussed above concerns the application of a wide range of federal laws that typically apply to federal construction projects. In constructing existing physical barriers along the southern border, DHS relied on specific authority relating to DHS barrier deployment projects to [waive](#) the application of dozens of federal laws, such as the [Antiquities Act](#), the [Clean Water Act](#), and the [Farmland Protection Policy Act](#). While DOD does not appear to have similarly clear authority to waive any law that may impede border fence construction, some federal statutes that might otherwise apply to federal construction projects have clear [exemptions](#) for construction pursued for national defense purposes. Moreover, Section 2808 provides that the Secretary of Defense may undertake emergency military construction “without regard to any other provision of law.” Because of the lack of case law interpreting this provision, the scope of this clause would present a reviewing court with a question of first impression concerning whether such projects must comport with federal statutes that would generally apply to military projects in the absence of a declared emergency.

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