



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

January 19, 2021

The Honorable John Yarmuth  
Chairman  
Committee on the Budget  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Yarmuth:

I write to take strong exception to the baseless allegation in your Committee's "report" that President Trump declared a "bogus 'national emergency' to try to steal approximately \$6.725 billion in congressionally appropriated defense funding for construction of the border wall." In declaring a national emergency to address a serious national security crisis at the border, the President acted lawfully and consistent with the very statutory authorities that Congress established to address these types of emergencies and transferred funds exactly in the manner Congress provided.

Given its mission and position within the Executive Office of the President, the Office of Management and Budget ("OMB") plays the lead role in developing and directing the execution of the President's agenda across the Executive Branch. One of President Trump's highest national security priorities coming into office was to build a wall along the southern border of the United States to prevent illegal crossings into our country. After Congress refused to appropriate sufficient funds for this project, the President directed OMB to identify funds and statutory authorities to build the wall. Working with other agencies within the Executive Branch, OMB did just that, identifying several authorities at the Executive Branch's disposal to fully fund and expeditiously construct a wall in accordance with the President's national security priorities. These authorities include, but were not limited to, 10 U.S.C. § 2808 ("section 2808"), 10 U.S.C. § 284 ("section 284"), and 31 U.S.C. § 9705 ("section 9705").

Section 2808 authorizes the Secretary of Defense ("Secretary"), in the event of a declaration by the President of a national emergency that requires use of the armed forces, "to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces." On February 15, 2019, President Trump declared a national emergency at the southern border of the United States due to longstanding and large-scale unlawful migration through the southern border that compromises our core national security interests. Under section 2808, in the event of a Presidential declaration of a national emergency, the Secretary is legally authorized to transfer military construction funds to support the armed forces in its work responding to such national emergency. The authority for such transfers is provided directly in the statute.



Previous Presidents have declared national emergencies and used the authorities provided under section 2808 to divert billions of dollars from projects authorized for other purposes to respond to such emergencies. For example, President George W. Bush issued Proclamation 7463 on September 14, 2001, declaring a national emergency in response to the terrorist attacks on the World Trade Center and the Pentagon, and because of the continuing and immediate threat to the national security of the United States of further terrorist attacks. Two months later, President Bush issued a supplemental Executive Order invoking section 2808 to make that authority available to the Department of Defense in responding to further threats of terrorism that threatened the national security of the United States. By the end of his two terms in office, President Bush had diverted \$200 million in funding for other projects pursuant to section 2808.

Likewise, the Obama Administration used section 2808 to divert \$1.2 billion in military construction funding from various congressionally authorized projects to other projects. In fact, more than a decade after President Bush declared a national emergency in the wake of the September 11 terrorist attacks, the Obama Administration relied on that same national emergency declaration to invoke section 2808 to divert \$228 million from congressionally authorized projects to build a task force compound at Camp Lemonnier in Djibouti. OMB can find no record of you or any other Democrat objecting to President Obama's reprogramming of these funds from congressionally authorized projects. Based on this usage by previous Presidents, Congress and this Committee should know that section 2808 permits the President to redirect military construction funds away from initial congressionally authorized purposes, including to build a wall along the southern border, if that is what is necessary for the armed forces to respond to a declared national emergency.

Section 284 permits the Secretary to provide support for counterdrug activities to any Federal agency or department, including the "construction of roads and fences . . . to block drug smuggling corridors across international boundaries of the United States." It is undisputed that drugs are smuggled across the southern border. Therefore, it is perfectly legal to use section 284 and available funding to support the building of the wall, which will impede the ability of smugglers to smuggle drugs across the southern border. In addition, Congress annually provides transfer authority in section 8005 and section 9002 of the Department of Defense ("DOD") Appropriations Act to permit the Secretary of Defense to transfer and merge up to \$6 billion of funds made available for military functions (except military construction) between and among the various DOD accounts for unforeseen and higher priority military requirements, provided that the Secretary determines that "such action is necessary in the national interest" and OMB approves. The Secretary used this authority to access an additional \$2.5 billion in fiscal year 2019 and an additional \$3.831 billion in fiscal year 2020 to support section 284 projects in areas in which there were known drug smuggling activities.<sup>1</sup>

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<sup>1</sup> OMB is aware that the U.S. Court of Appeals for the Ninth Circuit recently concluded that sections 8005 and 9002 of the DOD Appropriations Act of 2019 did not authorize the Secretary to make these transfers because "the border wall was not an unforeseen military requirement" and "funding for the wall had been denied by Congress." *Sierra Club v. Trump*, 963 F.3d 874, 886-887 (9th Cir. 2020). OMB respectfully disagrees with the Ninth Circuit's holding (and note that the Government Accountability Office does, too) and look forward to the Supreme Court revisiting this issue in the current term.

Section 9705 establishes the Treasury Forfeiture Fund (“TFF”), which contains funds that are confiscated by, or forfeited to, the Federal government pursuant to laws enforced by various law enforcement agencies. Section 9705 requires the Secretary of the Treasury to make certain payments from the TFF to other Federal law enforcement agencies, and authorizes the Secretary of the Treasury to make other discretionary payments for various law enforcement purposes. If, at the end of the fiscal year, there are still unobligated balances in the TFF after reserving sufficient amounts for such mandatory and discretionary payments, section 9705 expressly authorizes the Secretary of the Treasury to use such unobligated amounts for “the law enforcement activities of any Federal agency.” Utilizing this authority, and upon request from the Department of Homeland Security (“DHS”), the Department of the Treasury obligated and outlaid \$601 million from the TFF at the end of fiscal year 2019 to support border wall construction activities of DHS and U.S. Customs and Border Protection.

OMB lawyers, along with many other Administration lawyers, reviewed all statutes and funding sources to provide options to the President to allow him to use every legal means available to implement his national security policies. As a result, more than 450 miles of border wall have been built along the southern border. The Administration used the very statutes and transfer authorities Congress provided to address emergent law enforcement and national security needs to make good on the President’s promise to build the wall and safeguard our national security interests.

Sincerely,



Mark R. Paoletta  
General Counsel

cc: The Honorable Jason Smith, Ranking Member, House Budget Committee