



Written by [Joe Wolverton, II, J.D.](#) on January 14, 2019

## The Constitution and the Use of the National Emergencies Act to Build the Border Wall

While President Trump continues mulling whether to use the National Emergencies Act as authorization to build his border wall, it's critical for Americans to consider the constitutionality of this statute.

For those unfamiliar (how is that possible?) with the situation, President Trump is demanding that Democrats in Congress agree to fund the construction of a wall along the southern border of the United States. Should they continue to refuse, the president says he is prepared to keep part of the federal government unfunded "for a long time."



Putting aside the issue of the "shutdown" of the federal government (in reality, [only eight percent of the federal government remains unfunded](#)), the potential for presidential use of the National Emergencies Act is 100 percent constitutionally suspect.

First, assuming the president announces his intent to rely on the National Emergencies Act for authority to build the border wall; the building of it would still require about \$6 billion and Article I, Section 9 of the Constitution mandates: "No money shall be drawn from the treasury, but in consequence of appropriations made by law."

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Writing in his *Commentaries on Blackstone*, the eminent Founding Era jurist [St. George Tucker explained](#) the reason that the Founding Fathers — including those who drafted and ratified the Constitution — insisted that the executive branch not possess any power over the purse, without the consent of the people's representatives in Congress.

Tucker's quote is long, but I assure you it is worth the time to read it all:

All the expenses of government being paid by the people, it is the right of the people, not only, not to be taxed without their own consent, or that of their representatives freely chosen, but also to be actually consulted upon the disposal of the money which they have brought into the treasury; it is therefore stipulated that no money shall be drawn from the treasury, but in consequence of appropriations, previously made by law: and, that the people may have an opportunity of judging not only of the propriety of such appropriations, but of seeing whether their money has been actually expended only, in pursuance of the same; it is further provided, that a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. These provisions form a salutary check, not only upon the extravagance, and profusion, in which the executive department might otherwise indulge itself, and its adherents and dependents; but also against any misappropriation, which a rapacious, ambitious, or otherwise unfaithful



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executive might be disposed to make. In those governments where the people are taxed by the executive, no such check can be interposed. The prince levies whatever sums he thinks proper; disposes of them as he thinks proper; and would deem it sedition against him and his government, if any account were required of him, in what manner he had disposed of any part of them. Such is the difference between governments, where there is responsibility, and where there is none.

As Tucker's statement so clearly reveals, the Founders were intent that the people's representatives be granted exclusive power over the people's money, at least that portion that was collected into the federal treasury.

Notice what Tucker explicitly lists as one reason the Constitution did not grant the president power to spend money without the consent of Congress: "the executive department might otherwise indulge itself, and its adherents and dependents."

That's about as specific as you can get, including as specific as one need be when analyzing the reasons why a standing president cannot simply take his "pen and phone" (as President Trump's predecessor famously quipped) and carry out his own whims, no matter how well-intentioned.

Here is one final highlight from St. George Tucker's text. After describing how an executive left to spend the wealth of the people might do so without account, Tucker ends by pronouncing the essential reason why the Constitution empowers Congress alone to spend money, rather than allowing a president to fund his own plans: "Such is the difference between governments, where there is responsibility, and where there is none."

Now, one last constitutional inquiry is appropriate: Does Congress have the power to delegate its powers (in this case, that of spending money) to the president?

The short answer is no.

In constitutional law this fact is known as nondelegation, and it is a principle that holds that the Constitution grants distinct powers to the three branches of the federal government and that those powers must remain separated and that no one of the branches may constitutionally cede its delegated authority to one of its sister branches.

In other words, in the Constitution, the states granted to Congress the power to spend money. The states did not, however, grant to Congress the power to regift that power, if you will. The reality of the situation is, however, that for decades one Congress after another has punted its power to the executive branch.

The most egregious example of this is in the millions of federal regulations that are promulgated by the innumerable executive branch agencies, the violation of which are punishable as if these regulations were law. Which, of course, they are not. The Constitution also defines how federal law (the laws of the United States) is made. Here is the process as mandated in Article I, Section 7 of the U.S. Constitution:

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law.



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Furthermore, we must remember that the National Emergencies Act of 1976 was enacted to curtail the frequent declaration by presidents of “national emergencies.” The text of the statute leaves Congress with the power to override a presidential declaration of emergency (NB: The president doesn’t have to prove there’s an emergency, he merely has to declare it) by use of a concurrent resolution. The problem today, though, is given its love of power and its loathing of accountability, Congress is unlikely to be able to agree on a such a resolution.

Notice, however, that if they possessed the will and if they had not already established a long custom of kowtowing to the president, preferring the safety of seeming powerless over the electoral danger of being powerful, they would likely be able to agree on such a resolution.

Finally, contributing editor of *Law and Liberty*, Greg Weiner, [summed up the situation](#) and its true source perfectly in an article on the constitutionality of President Trump’s use of the National Emergencies Act. Weiner wrote:

We have outcome-based constitutionalism, under whose terms it is the policy that results, not the process that yielded it, that matters. This is not constitutionalism at all. But it is Congress’ job to fix. There are reasons for that. Maintaining the separation of powers is foremost among them. But the primacy of Congress also reflects the high value the Constitution places on deliberation and the importance of nuanced representation of the full range of political views.

It is now up to the American people and the states that created the Constitution and ratified its grant of power to a general government to enforce the terms of that document. Even those who favor the construction of a border wall — and there are sound reasons for it — should be intellectually and constitutionally honest and insist that Congress spend the money to build it and insist that the president not take to himself unconstitutional power.

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