

Floor Statement on the Resolution on the President's Emergency Declaration
Senator Susan M. Collins

February 28, 2019

Mr. President, I rise today to speak on the Resolution I am that I am joining Senator Udall in introducing a resolution that would reverse the President's ill-advised decision to declare a "national emergency," and commandeer funding provided for other purposes by Congress and instead, redirected to construct a wall on our southern border.

I want to thank Senator Udall for his leadership, and also recognize the support that we have received from our cosponsors, Senator Murkowski and Senator Shaheen.

Let me be clear: The question before us is not whether to support or oppose the wall, or to support or oppose the President. Rather, it is this: Do we want the Executive Branch—now or in the future—to hold a power that the Founders deliberately entrusted to Congress?

It has been said that Congress's most precious power is the power in the purse—set out in plain language in Article 1, section 9 of our Constitution. It reads as follows:

"No money shall be drawn from the Treasury, but in consequence of Appropriations made by law."

Alexander Hamilton, in Federalist 72, made clear the Founders' view that only the legislative branch commands this power—not the Judiciary, and not the Executive.

James Madison, in Federalist 58, called the power of the purse "the most complete and effectual weapon with which any constitution can arm the [...] representatives of the people[.]"

Congress's power was jealously guarded in the early days of our Republic. No less an authority on our Constitutional framework than Supreme Court Justice Joseph Story, in his famous *Commentaries*, explained that "[i]f it were otherwise, the executive would possess an unbounded power over the public purse of the nation, and might apply all of its monied resources at his pleasure."

Throughout our history, the courts have consistently held that "only Congress is empowered by the Constitution to adopt laws directing monies to be spent from the U.S. treasury."

I support, strongly support protecting the institutional prerogatives of the United States Senate, and the system of checks and balances that is central to the structure of our government.

Mr. President, I support funding for better border security, including physical barriers where they make sense.

I understand that the President is disappointed that the funding he requested did not pass. But the failure of Congress to pass funding in the amount the President prefers cannot become an excuse for the President to usurp the powers of the Legislative branch.

This is not the first time I have made this argument against executive overreach. In 2015, I authored the *Immigration Rule of Law Act*, legislation that would have provided a statutory basis for the DREAMER population, while rolling back President Obama's 2014 executive orders expanding that program.

As I explained at the time, even though I supported comprehensive immigration reform and was disappointed that it had not passed, I rejected the notion that its failure could serve as a justification for President Obama to implement "by Executive fiat that which Congress has refused to pass, regardless of the wisdom of Congress's decision."

I would now like to turn to a discussion of the *National Emergencies Act*. This Act was passed in 1976 to standardize the process by which the President can invoke national emergency powers, and Congress can terminate the declaration through a Joint Resolution such as the one we are introducing today.

The Act is procedural in nature: it lays out the process the President must follow to declare a national emergency, but does *not* provide the President with any additional powers. Instead, it requires the President to specify where in existing law he has been granted the authority for the powers he intends to exercise.

By itself, the *National Emergencies Act* does not give the President the power to repurpose billions of dollars to build a wall. The President must look elsewhere for that authority.

In his declaration, the President cites the authority provided by Title 10, section 2808 of the U.S. Code, which relates to "Construction authority in the event of a declaration of war or national emergency." But that authorization applies only to "military construction projects" that are "necessary to support [the] use of the armed forces." I do not believe that this provision can be fairly read to bootstrap the presence of troops along the southern border into the authority to build a wall as a military construction project.

The question isn't whether the President can act in an emergency, but whether he can do so in a manner that would undermine the congressional power of the purse.

Here, I think, we need a better understanding of what should qualify as an "emergency." One place we could turn is to a five-part test originally developed by the Office of Management and Budget in 1991, under former President George Herbert Walker Bush, to determine whether requested funding merited an "emergency" designation under our budget rules. Under that test, a spending request was designated as an "emergency" only if all five of the following conditions were met:

First, expenditures had to be “necessary;”

Second, the need had to be “sudden,” coming into being quickly, not building up over time;

Third, the need had to be “urgent;”

Fourth, the need had to be “unforeseen;” and

Fifth, the need could not be permanent.

I raise this test only by way of analogy. But it is fair to say that whether or not you agree with the President that more should be done to secure the southern border—and I do agree with the President’s goal—his decision to fund a border wall through a national emergency declaration would not pass this five-part test.

The President’s declaration also has practical implications for the Military Construction appropriations process, as my colleague has pointed out.

Last year, in testimony before the Appropriations Committee, DOD said that the President’s budget request for military construction funding was crucial to support our national defense, including construction projects to improve military readiness and increase the lethality of the force. This includes Missile Defense, improved facilities in Europe to deter Russian aggression, and infrastructure to operationalize the F-35 stealth fighter.

This also included several important efforts at Portsmouth Naval Shipyard in Maine that are vital to the Navy conducting timely maintenance and refueling of our nation’s submarines.

Shifting funding away from these vital projects is short-sighted and could have very real national security implications.

Mr. President, we must defend Congress’s institutional powers as the Founders hoped we would, even when doing so is inconvenient or goes against the outcome we might prefer.

The gridlock we have experienced on difficult issues, like border security and immigration reform, is not simply a failure to get our work done, but a reflection of the fact that we have yet to reach a consensus.

The President’s Emergency Declaration is ill-advised precisely because it attempts to short-cut the process of checks and balances by usurping Congress’s authority. This Resolution blocks that overreach, and nothing more, and I open that regardless of our colleagues position on the construction of a border wall, that we will join together to assert Congress’s Constitution authority in the appropriations process. I urge my colleagues to support this important resolution. Thank you, Mr. President.

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