

## THE FUNDS AVAILABLE TO ADDRESS THE NATIONAL EMERGENCY AT OUR BORDER

*“The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency.” – President Donald J. Trump*

### **LEGAL JUSTIFICATION: President Donald J. Trump is clearly justified in declaring a national emergency and utilizing other statutory authorities to address the crisis at our border.**

- In declaring a national emergency, a President may invoke any of more than 100 available statutory authorities. President Trump’s declaration invoked two:
  - 10 U.S.C. § 12302 authorizes Department of Defense (DOD) officials to order the Ready Reserve to active duty to address a national emergency.
  - 10 U.S.C. § 2808 authorizes the Secretary of Defense to direct military construction necessary to support the use of the Armed Forces in connection with a “national emergency... that requires use of the armed forces.”
- The President reasonably determined that the national emergency at the southern border “require[d] use of the armed forces.”
  - An emergency that “requires use of the armed forces” means the President has determined that the armed forces are necessary to address the crisis.
  - More than 5,000 troops are deployed at the border.
  - DOD is now reviewing which emergency military construction projects, such as the building of barriers, may be “necessary to support” the use of the Armed Forces.
  - DOD is still in the process of making such determinations, so no funds have yet been authorized for use.
- Separate from the national emergency, the President invoked two other statutory authorities to direct needed funds to the border.
  - Congress expressly authorized the military to support Federal agencies in blocking drug-smuggling corridors across international boundaries, using 10 U.S.C. § 284(b).
  - Under 10 U.S.C. § 284(b)(7), the United States military may construct “fences and road and [install] lighting ... to block drug smuggling corridors across international boundaries of the United States” upon request from the responsible agency.
    - DHS has requested that DOD use this counterdrug authority to construct fencing and roads and to install lighting in high-priority drug-smuggling corridors.
    - To devote additional resources to such construction, DOD will augment existing counterdrug funds by transferring up to \$2.5 billion from other DOD accounts.
    - DOD’s transfer authority is provided in section 8005 of the FY19 DOD appropriations act.
    - In past years, DOD has relied upon its general transfer authority to reallocate up to \$4 billion from within the DOD budget.
  - Under 31 U.S.C. § 9705(g)(4)(B), the Secretary of the Treasury may provide money from the Treasury Forfeiture Fund to other agencies for use “in connection with the law enforcement activities of any Federal agency.”
    - Treasury has identified about \$601 million that will be made available to DHS for use in law enforcement border security efforts.

### **PAST USES OF NATIONAL EMERGENCY DECLARATIONS: Presidents have regularly declared national emergencies under the National Emergencies Act.**

- Presidents have declared nearly 60 national emergencies since the National Emergencies Act was passed in 1976.

- There were 31 ongoing national emergencies when President Trump declared the national emergency at our border, bringing the total number currently in effect to 32.
  - These ongoing national emergencies are reviewed every year by the President – and renewed as appropriate.
- In fact, President Obama declared a national emergency to deal with the threat of transnational criminal organizations, including cartels operating on our southern border.
- Presidents have regularly issued national emergency declarations to address problems overseas.
  - President Clinton declared a national emergency in response to the blood diamond trade in Sierra Leone.
  - President Obama declared national emergencies related to situations in Somalia, Libya, Yemen, Ukraine, South Sudan, Burundi, and more.
- National emergencies have also been used to address problems domestically, such as when President Obama declared a national emergency in response to the swine flu.
- Between 2001 and 2013, DOD undertook 18 emergency military construction projects using the same emergency construction authority President Trump has invoked.

**FUNDING SOURCES: President Trump is using funds appropriated by Congress, funds reallocated under statutory authority, and funds available when a national emergency is declared.**

- Nearly \$8.1 billion has been identified as available, including:
  - \$1.375 billion appropriated by Congress
  - \$3.1 billion under other statutory authorities
  - \$3.6 billion in military construction funds available under a national emergency
- These funding sources will be used sequentially and as needed, with the \$1.375 from appropriated funds used first, then the \$3.1 billion from other statutory authorities, then the \$3.6 billion from military construction.
- Only \$3.6 billion of the nearly \$8.1 billion is dependent on the President’s declaration of a national emergency.
- Under the President’s non-emergency statutory authority, \$3.1 billion is available.
  - \$601 million from the Treasury Forfeiture Fund will be made available to support border security.
    - The Secretary of the Treasury is authorized to use funds in the Treasury Forfeiture Fund not reserved for other purposes to support law enforcement activities.
    - The \$601 million will be available in two allocations, \$242 million available immediately and \$359 million from future anticipated forfeitures.
  - Up to \$2.5 billion will be made available from DOD funds transferred to its FY 2019 Drug Interdiction and Counter-Drug Activities account.
    - This construction to support counterdrug activities will be used on land already owned by the Federal Government.
- Based on the President’s national emergency declaration, DOD is authorized to undertake certain military construction projects using up to \$3.6 billion in unobligated military construction funding.
  - DOD will ensure that high-priority projects with national security implications remain funded. Family housing projects will remain funded.
  - The Administration will ask Congress for new military construction funding for the existing projects affected by this, so that no projects will be canceled – only delayed.

**HOW FUNDS CAN BE USED: These funds will be available to help secure the border and protect the safety and well-being of our country.**

- The potential projects that could be built using these funds include:
  - Constructing new, 18 to 30 foot high steel primary pedestrian barriers in various areas.
  - Replacing outdated pedestrian fencing and vehicle barriers with modern, 18 to 30 foot high steel barrier.
  - Constructing new secondary barriers to provide a patrol zone in between the secondary and primary barriers.