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Judge Wrestles With Environmental Claims Against Border Wall

By Ellen M. Gilmer

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A federal judge struggled Dec. 16 to determine how much power he has to review President Donald Trump's effort to build and strengthen a wall along the U.S.-Mexico border.

During roughly three hours of arguments, Judge Trevor N. McFadden of the U.S. District Court for the District of Columbia meticulously worked through claims in the case, quizzing both sides on whether he should grant the Trump administration's bid to dismiss a pair of lawsuits backed by environmental groups.

The Center for Biological Diversity, Defenders of Wildlife, and the Animal Legal Defense Fund are behind one of the cases McFadden is weighing; the other comes from Texas landowners, environmentalists, tribal advocates, and Latino advocacy groups represented by Earthjustice.

They say the Trump administration violated the Administrative Procedure Act and the Constitution by redirecting money to the wall without Congress' consent.

Trump issued an emergency order in February to move money from military accounts and other sources to finance construction after Congress refused to authorize \$5.7 billion for the project.

"He would not have declared the emergency if Congress had met his funding demands," Center for Biological Diversity attorney Brian Segee told the court.

Earthjustice attorney Sarah Burt called it a violation of the Constitution's separation of powers, arguing that spending money on the project directly contravenes Congress, which authorized a much smaller level of funding for border protections.

The courtroom showdown comes after judges in two other jurisdictions recently ruled against the Trump administration in separate border wall challenges.

'Any Old District Judge'

But Trump lawyers say most of the plaintiffs in the latest cases to land before a judge lack standing to sue, and that their claims aren't open to judicial review anyway.

An emergency declaration is "not the sort of thing that's fit for judicial review," Justice Department attorney James Burnham said during the Dec. 16 hearing.

"If he thinks there's an emergency, he can declare an emergency," he said of Trump.

McFadden took up that argument in a later exchange with Segee, the Center for Biological Diversity attorney, questioning whether "any old district judge" should be able to review a presidential action Congress failed to address. Congress twice voted to reverse the declaration, but lacked the votes to override the president's veto.

The Trump administration used multiple sources of legal authority to jump-start border wall construction in early 2019, including the president's emergency order.

McFadden wondered aloud during arguments whether some of those sources, including the emergency declaration, should be off-limits in court, while others should be fair game for him to review.

Segee argued that the court doesn't need to second-guess whether the border situation constitutes a national emergency, but should probe the president's motives.

He pointed to recent Supreme Court precedent in litigation involving adding a citizenship question to the census, in which the justices tossed the administration's rationale for the move as a pretext for other goals. The same is happening with the border wall, Segee told the court.

Standing

Segee said his group and others are directly harmed because the president's actions undermine "hard-fought" protections for the Organ Pipe National Monument in Arizona and other natural areas along the border.

Justice Department attorney Kathryn Celia Davis acknowledged that two plaintiffs—the California Wilderness Coalition and the Rio Grande International Study Center—have standing to challenge specific border wall segments that affect them, but argued that other groups and individuals in the cases shouldn't be allowed to pursue "abstract" claims about future potential projects and funding sources.

McFadden appeared unpersuaded on that point, saying border wall construction is a "fluid situation," and he's reluctant to dismiss parties from the case for lack of standing when the government could take an action any day that could more directly affect them.

Andrew I. Warden, another Justice Department attorney, pushed back on the plaintiffs' environmental and aesthetic claims against the wall, arguing that they fall outside the scope of legal arguments that can be brought in cases that target the laws the government relied on to green-light border projects—a legal test called the "zone of interests" for who has standing to challenge federal actions.

Warden said the Supreme Court "gave a clear indication of where they're headed" on the issue in a July ruling that sidelined a lower court's decision to freeze construction.

Nobody is injured, he argued later, "by money being moved from one column to another" of the government's budget.

Burt, the Earthjustice attorney, responded that the government hadn't properly raised that issue in briefs. McFadden ordered the parties to submit supplemental filings on the issue.