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# Judge weighs feds' move to block emergency funding lawsuit

[Pamela King](#), E&E News reporter Published: Monday, December 16, 2019

A federal judge today seemed sympathetic to arguments by the Trump administration that Congress — not the courts — has the power to review the president's declaration of a national emergency at the U.S.-Mexico border.

But U.S. District Court for the District of Columbia Judge Trevor McFadden appeared less persuaded by the government's claims that the barrier projects constitute military projects and that the court should immediately boot many parties in a lawsuit that alleges the executive branch sidestepped Congress in its quest to fund a wall along the nation's southern border ([Greenwire](#), Feb. 18).

The judge, a Trump appointee, did not say how soon he would reach a decision on the government's [request](#) to scrap the case, which was the focus of a three-hour hearing this morning.

Federal counsel argued that the National Emergencies Act precludes judicial review because the statute contains a "robust congressional enforcement scheme" that lawmakers declined to invoke to challenge President Trump's declaration.

"This is not the sort of thing Congress intended to be in court," said Justice Department attorney James Burnham.

The judge echoed Burnham's arguments to Brian Segee, an attorney for the Center for Biological Diversity, one of the Trump administration's challengers.

McFadden said he would find it "surprising if any old district judge" could undo what Congress did not.

Segee responded that the statute's inclusion of a congressional review mechanism was a "slender and insufficient" reason to block the courts from examining the question at the core of the case.

McFadden later asked DOJ attorney Andrew Warden to grapple with the judge's "instinct" that the judiciary might have a role in examining some issues in the dispute — such as whether the border wall is a military construction project — but not others.

The judge questioned how his ruling on the government's motion would fit within the broader scope of case law on funding for barrier projects, such as the Supreme Court's decision this summer that the government could proceed with construction backed by \$2.5 billion in emergency funding.

Judges for the 9th U.S. Circuit Court of Appeals must still reach a final decision in the case ([Greenwire](#), July 29).

Warden said the Supreme Court's preliminary ruling should serve as a "clear indication" of how the justices would handle future questions over the president's authority to lock in funds for the border wall.

McFadden appeared reluctant to drop several challengers from the case, noting that several parties have simply filed claims that are not yet ripe.

The judge closed this morning's proceedings without reaching a decision and instructed the parties to file supplementary briefs.

## 9th Circuit appeal

Government attorneys late last week appealed a recent ruling by a federal court in California.

The Trump administration asked the 9th Circuit to review a decision by Judge Haywood Gilliam for the U.S. District Court for the Northern District of California blocking use of military funds for a set of projects in Arizona, California and Texas.

"After a lengthy legislative process, Congress specifically declined to provide the funding sought by the Executive for the border barrier construction at issue in this case," Gilliam, an Obama appointee, wrote earlier this month ([Greenwire](#), Dec. 11).

"The Executive has made plain its determination to nonetheless proceed with the construction by any means necessary, notwithstanding Congress' contrary exercise of its constitutionally-absolute power of the purse," he wrote.

Gilliam declined to freeze the funding pending appeal.