

# Trump's Diversion Of \$3.6B For Wall Draws Judge's Queries

By Khorri Atkinson

Law360, Washington (December 16, 2019, 10:00 PM EST) -- A D.C. federal judge appeared conflicted Monday over President Donald Trump bypassing Congress to transfer \$3.6 billion in military construction funds to build his long-promised southwest border wall, sharply challenging attorneys for both sides about the legality of Trump's reallocation of congressional funding.

U.S. District Judge Trevor N. McFadden expressed his reservations while hearing more than three hours of arguments in the administration's bid to toss a pair of consolidated suits by Texas landowners and environmental organizations over claims that the president violated the Administrative Procedure Act and the Constitution by redirecting funds without congressional approval.

The plaintiffs, including the Center for Biological Diversity and Animal Legal Defense Fund, are

seeking a court order reversing the president's national emergency declaration last February to

repurpose funds from the Department of Defense to support the Department of Homeland Security's

border-wall projects.

Judge McFadden, a Trump appointee, indicated to one of the plaintiffs' attorneys that Congress gives

the president broad authority to declare a national emergency under the National Emergencies Act

and that numerous presidents have done so in the past without being challenged in the court. The

judge continued that it's a long-running practice by the federal courts not to second-guess the

president on what is a national emergency — unless Congress did not explicitly delegate such

authority.

But Brian Segee, an in-house attorney with the Center for Biological Diversity, responded that he is

not urging the district court to examine whether the wall construction constitutes a national emergency. He asserted that Trump has willfully provoked the constitutional clash.

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"The president by his own words, he made [it] clear that he's using the authority of the NEA as a

bargaining chip with Congress," the attorney said, noting that lawmakers had ultimately rejected

Trump's request for border barrier funding after a monthslong partisan battle.

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"The use of the NEA, in this case, is unprecedented," Segee argued. "[It] has never been used before

to circumvent Congress, particularly in the arena of the core congressional authority of appropriation

... The president has thumbed his nose at Congress ... [and] abused his authority."

Judge McFadden later said that while it's "a pretty high bar" for Congress to step in and ask for a

review of the presidential action, the legislature did not.

"It would be surprising for a district judge to review something that Congress hasn't said no to," the

judge told the attorney.

After Trump declared a national emergency to make a total of \$8.1 billion available to build a wall

along the U.S.-Mexico border in the face of what he deems an immigration crisis, Congress voted

twice to terminate the proclamation. But Trump vetoed the resolution both times, doubling down that

the reallocation is a crucial method to curb unlawful entry at the border. Lawmakers did not have

enough votes to override the president's veto.

The Democratic-controlled House sued to block the declaration. But Judge McFadden, who oversaw

that case, tossed it in June, ruling that the House lacked standing to sue. The judge concluded that

lawmakers have other tools at their disposal to prevent the administration from overspending and

that allowing the suit to move forward would "conscript the judiciary in a political turf war."

The House asked the D.C. Circuit in October to overturn the ruling.

During oral arguments Monday in the current case, the judge seemingly agreed with the plaintiffs

that Trump circumvented Congress' authority, telling a government attorney: "The item was denied

by Congress."

U.S. Department of Justice attorney Andrew I. Warden told the judge that when Congress passed the

spending bill in January, it did not explicitly deny DOD funding to help provide support for

counternarcotics efforts. The government attorney also claimed that the funds from that pot of

money at the DOD were appropriately transferred to DHS for wall construction.

"That's a pretty narrow interpretation," the judge responded.

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"That strikes me. It [runs] in opposition to what Congress was clearly trying to do, which is to say,

'We get to decide where you're going to spend the money,'" the judge added.

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He said that the executive branch should not "ignore Congress' decision by coming up with a

different" reason to justify repurposing funds from one agency's budget to the next.

Judge McFadden was also unconvinced by DOJ attorney Kathryn Celia Davis' argument that two of

the plaintiffs, the California Wilderness Coalition and the Rio Grande International Study Center, have

standing to challenge sections of the wall that would affect them but that the other parties should be

tossed from the cases.

According to Davis, the remaining parties are merely asserting "abstract" claims concerning plans for

future wall construction projects and funding sources. The government, she added, wants to "avoid

unnecessary litigation that will be burdensome."

But the judge said he's inclined against dismissing the parties for lack of standing at this stage. Wall

construction is a "fluid situation" at the moment and the government could take action any day that

would most certainly affect the plaintiffs directly, the judge said.

"It doesn't feel like a wise thing to do," Judge McFadden concluded.

Monday's showdown came after federal judges ruled against Trump in two separate cases challenging

his emergency declaration.

U.S. District Judge David Briones in Texas on Dec. 10 issued a nationwide injunction blocking the

administration's plan. In that case, brought by the Texas county of El Paso and local immigrant rights

nonprofit Border Network for Human Rights, the judge said the reallocation was unlawful.

U.S. District Judge Haywood S. Gilliam Jr. in California issued a similar decision the next day, but he gave the government time to appeal before his order goes into effect.

Judge Gilliam had previously blocked the administration from using another \$2.5 billion in defense

funds for the border wall. But in a 5-4 decision in July, the U.S. Supreme Court **froze** the judge's

June ruling while it's under review at the Ninth Circuit. The high court did not examine the merits of

the case.

The landowners and Frontera Audubon are represented by Allison M. Zieve, Michael T. Kirkpatrick,

Scott L. Nelson and Rebecca Smullin of Public Citizen Litigation Group.

The Center for Biological Diversity and other environmental groups are represented by Brian Segee,

Tanya Sanerib, Anchun Jean Su and Howard M. Crystal of the Center for Biological Diversity, Jason C. Rylander and Michael P. Senatore of Defenders of Wildlife, and Anthony T. Elisesuson of the Animal

Legal Defense Fund.

The administration is represented by Andrew I. Warden, Kathryn C. Davis, Michael J. Gerardi, Leslie

Cooper Vigen and Rachael L. Westmoreland of the U.S. Department of Justice's Civil Division in both

suits.

The cases are Alvarez et al. v. Trump et al., case number 1:19-cv-00404, and Center for Biological

Diversity et al. v. Trump et al., case number 1:19-cv-00408, both in the U.S. District Court for the

District of Columbia.

--Additional reporting by Suzanne Monyak. Editing by Michael Watanabe.