



Supreme Court Stays Injunction That Had Blocked a Portion of the Administration's Border Wall Funding

Updated July 29, 2019

UPDATE: On July 26, 2019, the Supreme Court in a divided decision [stayed](#) a June 28 injunction issued by a federal district court in California that had permanently prohibited the Trump Administration from using Sections 8005 and 9002 of the 2019 Department of Defense Appropriations Act to transfer any of the \$2.5 billion it had proposed to use for border-barrier projects. The Trump Administration had [appealed](#) the district court's permanent injunction to the U.S. Court of Appeals for the Ninth Circuit and asked that court to stay the injunction pending appeal, but the Ninth Circuit [denied](#) the Trump Administration's request earlier this month. In its order issuing a stay, the Supreme Court [stated](#) that "[a]mong the reasons" for its order was that the Trump Administration had "made a sufficient showing . . . that the plaintiffs have no cause of action to obtain review of" the Administration's transfer of funds pursuant to the 2019 Department of Defense Appropriations Act (discussed below). The Court did not rule on the lawfulness of the Trump Administration's actions. The stay is in effect during the pendency of the Trump Administration's appeal until the resolution of any petition for certiorari to the Supreme Court. As a result, the Trump Administration may now use funds transferred under Sections 8005 and 9002 to pay for border barrier construction.

In the interim, both houses of Congress continue to move through the annual appropriations process. The House of Representatives has passed [its version](#) of the Department of Defense Appropriations Act for FY 2020 and [its version](#) of the National Defense Authorization Act (NDAA) for FY 2020. The House version of the 2020 Defense Appropriations Act contains a provision [prohibiting](#) the use of funds for the construction of border barriers, as [does](#) the House-passed version of the NDAA. Meanwhile, the Senate has passed its [version](#) of the NDAA for FY 2020, which does not appear to include such a prohibition.

The original post from June 17, 2019 is below.

In recent months, the Trump Administration has taken steps to secure additional funds to pay for the construction of barriers along the U.S.-Mexico border, and various entities have brought suits challenging the lawfulness of those actions. On May 24, 2019, the U.S. District Court for the Northern District of California issued a preliminary injunction in one lawsuit, *Sierra Club v. Trump*, barring the Administration from using funds reprogrammed under [Section 8005](#) of the 2019 Department of Defense

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LSB10310

Appropriations Act to pay for specified barrier construction projects in New Mexico and Arizona while the lawsuit is pending. But the court declined to issue a preliminary injunction with respect to any construction project not involved in that lawsuit (even if Section 8005 is used to fund the project) or to opine on the lawfulness of the Trump Administration's other proposed funding sources.

This Sidebar discusses the district court's determination that Section 8005 does not authorize the transfer of funds for border wall construction. Next, it addresses how the court dealt with the Administration's use of other funding sources. Finally, the Sidebar identifies potential considerations for Congress.

Background

The Trump Administration has [long declared](#) the deployment of additional fencing, walls, and other barriers along the U.S.-Mexico border to be a priority and has sought to secure funding from Congress for this purpose. To that end, earlier this year the Administration requested that Congress appropriate \$5.7 billion for additional border barrier construction, but Congress did not grant this request. Following an extended lapse in appropriations due to disagreement on this issue, President Trump signed the Consolidated Appropriations Act of 2019, which [appropriated](#) \$1.375 billion to DHS for "the construction of primary pedestrian fencing" along a portion of the U.S. southern border. But the Trump Administration [said](#) it would deploy additional fencing by tapping other appropriated amounts to fund complementary construction activities by the Department of Homeland Security (DHS), the lead agency responsible for deterring illegal border crossings, and the Department of Defense (DOD).

On February 15, 2019, President Trump [announced](#) that his Administration would reprogram money from three sources. *First*, the President proposed to withdraw \$601 million in unobligated funds from the [Treasury Forfeiture Fund](#) available "for obligation or expenditure in connection with the law enforcement activities of any Federal agency" to be used by DHS for border wall construction. *Second*, the President proposed to use the transfer authority in [Section 8005](#) of the 2019 Department of Defense Appropriations Act to transfer \$2.5 billion to the DOD drug interdiction fund. These funds would then be used by DOD pursuant to [10 U.S.C. § 284](#), which authorizes DOD (upon request) to assist another agency's "counterdrug activities" through the construction of "roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." On March 25, 2019, the Administration invoked Section 8005 to transfer \$1 billion originally appropriated for military personnel costs for specific border barrier projects in New Mexico and Arizona. *Third*, the President stated that, in connection with his [declaration](#) of a national emergency along the U.S. southern border, he would invoke his authority under [10 U.S.C. § 2808](#) to repurpose \$3.6 billion allocated to "military construction projects" for border wall construction.

Lawsuits challenging the lawfulness of the Administration's actions have been filed in federal district courts in California, Texas, and the District of Columbia. (The last of these cases, brought by the U.S. House of Representatives, was recently [dismissed](#) on standing grounds.) In late May, the U.S. District Court for the Northern District of California issued a decision in *Sierra Club v. Trump*, concluding that Section 8005 does not authorize the transfer of money for border wall construction. As a result, the court issued a preliminary injunction barring the Administration from using \$1 billion in funds transferred under Section 8005 to fund specified projects in New Mexico and Arizona while the lawsuit is pending. Having granted a preliminary injunction in *Sierra Club*, the same district court judge declined to enter a preliminary injunction in *California v. Trump*—a related suit challenging the same proposed use of Section 8005 at issue in *Sierra Club*.

Preliminary Injunction on Use of Section 8005 To Fund Arizona and New Mexico Fencing Projects

A fundamental question in *Sierra Club* and other lawsuits challenging the Administration's recent border fence deployment strategy is whether the Trump Administration has authority to spend federal dollars in the manner it has proposed. The Constitution gives Congress the power of the purse, providing that "[n]o money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." Courts have **recognized** that this clause confers on Congress "absolute" authority over federal expenditures, such that no entity can "authorize the expenditure of funds beyond *what Congress has approved.*" To enforce this prerogative, Congress has provided by statute **that** "[a]ppropriations shall be applied only to the objects for which the appropriations were made" and **that** money "may be withdrawn from one appropriation account and credited to another . . . *only when authorized by law.*"

For DOD appropriations, that authorization is currently found in **Section 8005** of the 2019 Department of Defense Appropriations Act. While this provision grants the Secretary of Defense authority to "transfer" up to \$4 billion of DOD funds "for military functions (except military construction)," it also imposes restrictions on when this authority may be invoked. As relevant here, Section 8005's "authority to transfer" may only be used for "higher priority items, based on unforeseen military requirements, than those for which originally appropriated." And even then, Section 8005 is unavailable "where the item for which funds are requested has been denied by the Congress."

The district court in *Sierra Club* concluded that Section 8005 does not authorize the transfer of funds for the construction of border barriers because the transfer was for an "item" for which funds had been denied by Congress and because, in any event, the asserted need for the construction of border barriers was not "unforeseen." (The plaintiffs had not argued that the Trump Administration's proposed construction fell within the "military construction" exclusion in Section 8005 and the court's decision did not address that issue.)

With respect to whether the transfer was for an item for which Congress had denied funds, the Trump Administration had argued to the court that the relevant "item for which funds [were] requested" was DOD's assistance to DHS for "counterdrug activities" under 10 U.S.C. § 284, rather than the construction of border barriers generally. On this theory, because Congress had not "denied" a request for additional funding for Section 284 "counterdrug activities," Section 8005 would not prohibit the transfer. The court rejected this characterization and found instead that the historical context leading up to the transfer—including the previous disagreement between the Administration and Congress regarding the appropriate funding levels for border barriers that resulted in an extended lapse in appropriations—indicated that the "item for which funds [were] requested" was the construction of border barriers, regardless of the agency doing the constructing or the statutory authority on which it relied. "[T]he reality is that Congress was presented with—and declined to grant—a \$5.7 billion request for border barrier construction," the court concluded. Thus, "[b]order barrier construction, expressly, is the item [the Administration] now seek[s] to fund via the Section 8005 transfer, and Congress denied the requested funds for that item."

The court relied on portions of Section 8005's legislative history to support this conclusion. In particular, the court cited portions of a House report from 1973—when Congress first added the language in Section 8005 to DOD's annual appropriations bill—to conclude that Congress originally enacted this provision to "tighten congressional control of the reprogramming process" and to "prevent the funding for programs which have been considered by Congress and for which funding has been denied." In the court's view, an interpretation of Section 8005 that would allow the Administration to transfer money for border wall construction despite Congress's refusal to appropriate the amount of money requested for that purpose would undermine Section 8005's objective.

The court also determined that Section 8005's transfer authority was unavailable because the Administration's proposed border wall construction was not an "*unforeseen* military requirement[]" for which funding could be reprogrammed under the statute. The Administration had argued that the proposed border barrier construction (*i.e.*, the "military requirement") was "unforeseen" because the need for DOD to provide support to DHS via 10 U.S.C. § 284 was not known until DHS had requested that assistance—which occurred after the President's budget request and after Congress had passed the DOD appropriations bill. The district court, however, rejected this effort to define the "unforeseen . . . requirement[]" with reference to the particular statutory authority relied on to fulfill that requirement (*e.g.*, Section 284). On this theory, the court explained, "*every* request for Section 284 support" would be unforeseen because the need to rely on that particular statutory authority would only ever arise at the time another agency requests DOD's assistance under that provision. Further, the district court reasoned that "[the Administration's] argument that the need for the requested border barrier construction funding was 'unforeseen' cannot logically be squared with the Administration's multiple requests for funding" for a border wall.

Finally, the court invoked the canon of constitutional avoidance to support its reading of Section 8005. Under this [rule of statutory interpretation](#), when there are two possible interpretations of a statute, one of which would raise serious constitutional concerns, courts should adopt the interpretation that avoids the constitutional difficulties. According to the district court, the Administration's proposed interpretation of Section 8005 would "pose serious problems under the Constitution's separation of powers principles" because it would allow the executive branch to "render meaningless Congress's constitutionally-mandated power" to control federal expenditures by "ceding essentially boundless appropriations judgment" to the executive branch. Avoiding these potential pitfalls was, in the court's view, an additional reason to reject the Administration's broader interpretation of Section 8005.

On these grounds, the court decided that the plaintiffs would likely succeed on their claim that the Administration could not lawfully use Section 8005 to transfer funds for border wall construction. Thus, after finding the remaining preliminary injunction requirements satisfied, the court entered an order temporarily prohibiting the Administration from using the \$1 billion of funds transferred under Section 8005 to construct the specific border barrier projects in New Mexico and Arizona at issue in the lawsuit.

Consideration of Other Funding Sources

While the district court's decision in *Sierra Club* addressed the lawfulness of the Administration's proposed use of Section 8005's transfer authority, its decision in that case and in the related case of *California v. Trump* did not resolve whether the Administration could lawfully use the Treasury Forfeiture Fund or Section 2808 to secure additional border barrier funding. The court viewed it as unnecessary to reach these legal questions at the preliminary injunction stage of the litigation because it concluded that the plaintiffs had not shown a likelihood of irreparable harm from the use of either funding source. Nonetheless, though declining to definitively rule on the scope of Section 2808, the court proceeded to analyze that provision's text and ultimately expressed doubts that border barrier construction "could reasonably constitute a 'military construction project' such that [the Administration's] invocation of Section 2808 would be lawful."

Based on these conclusions, the court declined to enter a preliminary injunction with respect to either of these additional sources of border wall funding, thus leaving the Administration free to use those funds for border barrier construction. However, because the dismissal of the plaintiffs' preliminary injunction motions as to these funding sources was without prejudice, the plaintiffs may reassert their motions if future developments enable them to show a likelihood of irreparable harm.

Considerations for Congress

Because Congress has plenary control over federal appropriations, it has the power, subject to presidential veto, to enact legislation appropriating additional funds for border barrier construction, limiting the extent to which the Administration’s proposed funding sources may be used for border wall construction, or prohibiting the Administration’s efforts to secure additional funding. Moreover, because Congress operates on an annual appropriations cycle, one or more of the Administration’s proposed sources of funding may become unavailable in the future if the House and Senate do not reach agreement on whether, or to what extent, to appropriate funds for these sources.

The House of Representatives is currently considering the DOD Appropriations Act for FY 2020, which would prohibit the Administration from using Section 8005 to fund border wall projects. (The Senate has not yet introduced a DOD appropriations bill for FY 2020.) On May 23, 2019, the House Committee on Appropriations reported [H.R. 2968](#), which includes similar transfer authority to that in Section 8005 of the 2019 Department of Defense Appropriations Act, **except that** the transfer authority in H.R. 2968 is subject to a \$1 billion (rather than \$4 billion) cap on the aggregate amount that may be transferred and can only be used if the Secretary of Defense and the head of any impacted entity “certifies in writing to the congressional defense committees” that “the funds will be used for higher priority items, based on unforeseen military requirements, than those for which originally appropriated.” However, H.R. 2968 also includes new provisions specifically addressing the use of DOD funds for border barrier construction. First, [Section 8127](#) of H.R. 2968 states that “None of the funds appropriated or otherwise made available by this Act *or any prior appropriations Acts* may be used to construct a wall, fence, border barriers, or border security infrastructure along the southern land border of the United States.” If enacted, this language would appear to prohibit the Administration from using any federal money—potentially including the three funding sources already discussed—to construct barriers of any kind along the southern border. Second, H.R. 2968 would **prohibit** the transfer authority in Section 8005 from applying to the DOD drug interdiction fund. Similar restrictions have also been included in the [Chairman’s mark](#) of H.R. 2500, the National Defense Authorization Act (NDAA) of 2020, ordered to be reported, as amended, by the House Armed Services Committee on June 13, 2019. The Senate’s version of the FY 2020 NDAA, S. 1790, does not contain similar restrictions.

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