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Legal Authority to Repurpose Funds for Border Barrier Construction

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SUMMARY

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Legal Authority to Repurpose Funds for Border Barrier Construction

President Trump has prioritized the construction of border barriers along the U.S.-Mexico border. Over the course of negotiations for FY2019 appropriations, the Administration asked Congress to appropriate $5.7 billion to the Department of Homeland Security (DHS) for that purpose. When Congress appropriated $1.375 billion to DHS for border fencing, the President announced that his Administration would fund the construction of border barriers by repurposing funds appropriated to the Department of Defense (DOD) and transferring funds from the Department of the Treasury. The Administration asserted that these funding transfers were authorized by a combination of the following federal laws:

- **National Emergencies Act (NEA).** The NEA establishes a framework for the President to declare national emergencies. The NEA does not itself appropriate or authorize the transfer of funds, but the declaration of a national emergency triggers other statutory provisions that allow certain executive departments to repurpose existing appropriations.
- **10 U.S.C. § 2808.** Section 2808 becomes available upon the President's declaration of a national emergency under the NEA. This provision authorizes the Secretary of Defense to use unobligated military construction funds for the construction of otherwise unauthorized military construction projects.
- **Sections 8005 and 9002 of the 2019 DOD Appropriations Act.** Sections 8005 and 9002 of the 2019 DOD Appropriations Act authorize the transfer of up to $6 billion appropriated in that act for "military functions" arising from "unforeseen military requirements." Funds may be transferred under these authorities only for "unforeseen military requirements" where the item for which funds will be transferred "has [not] been denied by the Congress."
- **10 U.S.C. § 284.** The 2019 DOD Appropriations Act also appropriated funds to a Drug Interdiction Account. Pursuant to 10 U.S.C. § 284, money in this fund may be spent by DOD in support of other agencies' counterdrug activities, including by constructing "roads and fencing . . . to block drug smuggling corridors across international borders of the United States." The Trump Administration proposed to use Sections 8005 and 9002 of the 2019 DOD Appropriations Act to transfer additional funds into the Drug Interdiction Account, which would then be used to construct border barriers.
- **31 U.S.C. § 9705.** This provision establishes a Treasury Forfeiture Fund (TFF) in the Department of the Treasury and authorizes the Secretary of the Treasury to make payments from unobligated sums in the TFF to federal, state, and local law enforcement agencies for various law enforcement purposes.

Several plaintiffs filed lawsuits in federal courts in California, the District of Columbia, and Texas to prevent the Administration from using these authorities to repurpose appropriations for border barrier construction, arguing that none of the Administration's funding initiatives were authorized by Congress. Some of these plaintiffs also argued that the construction of border barriers was subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA).

Though a federal court in California initially entered an injunction prohibiting the Trump Administration from using the funds to initiate construction of border fencing, the U.S. Supreme Court ultimately stayed that injunction. The California federal district court's injunction would have prohibited the Administration from using Sections 8005 and 9002 to transfer funds for border barrier construction. The court did not rule on the lawfulness of the Administration's other proposed funding sources, though it did determine that waivers issued by DHS under Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act rendered NEPA inapplicable to the proposed border projects. But following the Supreme Court's stay of the district court's injunction, DOD was able to use funds transferred under Sections 8005 and 9002 for barrier construction purposes while litigation in the case continues. Other lawsuits challenging the Trump Administration's funding initiatives are ongoing in federal courts in the District of Columbia and Texas, though neither court has ruled on the merits of the Administration's initiatives.

Meanwhile, both houses of Congress have continued to move through the annual appropriations process. The House of Representatives has passed its version of the DOD Appropriations Act for FY2020 and is considering the National Defense Authorization Act (NDAA) for FY2020. The House version of the FY2020 Defense Appropriations Act prohibits the use of funds for the construction of border barriers, as does the House committee version of the NDAA. The Senate has also passed its version of the NDAA for FY2020, which does not include such a prohibition.

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Introduction

President Trump has long advocated for the construction of additional fencing, walls, and other barriers along the U.S.-Mexico border to deter unlawful border crossings. Less than a week after taking office, the President issued an executive order directing the Secretary of Homeland Security to "take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border."[1] This policy has engendered a robust debate in the public sphere, and a conflict has also made its way to federal court, with various plaintiffs challenging the lawfulness of the Trump Administration's initiatives to pay for the construction of border barriers by reprogramming funds from existing appropriations. At their core, these lawsuits concern whether the Administration's funding initiatives exceed existing statutory authorization and conflict with Congress's constitutionally conferred power over federal funds.

Article I of the Constitution provides that "[n]o money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."[2] As Justice Joseph Story noted in his *Commentaries on the Constitution*, the appropriations power was given to Congress to guard against arbitrary and unchecked expenditures by the executive branch and to "secure regularity, punctuality, and fidelity, in the disbursement of the public money."[3] "In arbitrary governments," he expounded, "the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, and is beyond responsibility or reproof."[4] To avoid giving the President such "unbounded power over the public purse of the nation,"[5] the Framers designated Congress "the guardian of [the national] treasure"—giving to it "the power to decide, how and when any money should be applied[.]"[6] This "power to control, and direct the appropriations," Justice Story explained, serves as "a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation."[7] Justice Story's sentiments echoed those of James Madison, who in *The Federalist No. 58* described the legislature's "power over the purse" as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[8]

The Trump Administration's early efforts to secure funding for border barriers focused on negotiating with Congress to secure appropriations specifically designated for that task.[9] In his FY2018 budget proposal, President Trump requested that Congress appropriate $1.57 billion for

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[1] Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017) (stating that it "is the policy of the executive branch to . . . secure the southern border of the United States through the immediate construction of a physical wall on the southern border").

[2] U.S. CONST. art. I, § 9, cl. 7.

[3] Joseph Story, *Commentaries on the Constitution of the United States* 486 (Carolina Academic Press 1987).

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] THE FEDERALIST No. 58 (James Madison). The importance to the Framers of legislative control over the purse had roots in the English tradition. Roughly a century before the U.S. Constitution was drafted, the English Bill of Rights declared "[t]hat levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner that the same is or shall be granted, is illegal." *See* ENGLISH BILL OF RIGHTS, art. I, cl. 17 (Feb. 13, 1689).

[9] For more detail on these efforts, *see* CRS Report R45888, *DHS Border Barrier Funding*, by William L. Painter and Audrey Singer.

border barrier construction.[10] Similarly, President Trump's FY2019 budget request sought $1.6 billion "to construct approximately 65 miles of border wall in south Texas."[11]

Congress did not appropriate the amounts requested for either fiscal year. For FY2018, Congress appropriated $1.375 billion for new or repaired fencing and other forms of barriers along the U.S.-Mexico border, as well as $196 million for border monitoring technology.[12] As FY2019 began, Congress and the President negotiated, *inter alia*, the amount of funding to provide the Department of Homeland Security (DHS) for border barrier construction for FY2019.[13] Ultimately, Congress and the President did not agree on funding levels, leading to a 35-day lapse of appropriations for DHS and other portions of the federal government. During the partial government shutdown, President Trump increased his request for border barrier funding from $1.6 billion to $5.7 billion.[14] Congress did not grant this request. Instead, in the Consolidated Appropriations Act of 2019 (CAA), Congress appropriated $1.375 billion—$4.325 billion less than was ultimately requested—for "the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector."[15]

President Trump signed the CAA on February 15, 2019,[16] that same day announcing that his Administration would "take Executive action" to "secure additional resources" to construct barriers along the southern border.[17] In particular, President Trump announced that his Administration had identified "up to $8.1 billion" from three additional funding sources "to build the border wall."[18]

Several plaintiffs filed lawsuits in federal courts in California,[19] the District of Columbia,[20] and Texas[21] to prevent the Trump Administration from taking this action. These plaintiffs assert that

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[10] DEP'T OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION BUDGET OVERVIEW 9 (2017), available at https://www.dhs.gov/sites/default/files/publications/CBP%20FY18%20Budget.pdf. An additional $49.738 million was also requested for "border wall road construction." *Id.*

[11] OFFICE OF MGMT. & BUDGET, EFFICIENT, EFFECTIVE, ACCOUNTABLE: AN AMERICAN BUDGET 58 (2018).

[12] *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F. tit. II, § 230(a), 132 Stat. 348 (2018); *see also* U.S. Customs and Border Protection, Border Wall Status 1 (May 23, 2019), https://cdn.factcheck.org/UploadedFiles/CBP-Border-Wall-Status-Paper-May-23-2019.pdf [*hereinafter* CBP Fact Sheet] (estimating that Congress funded roughly 85 miles of updated or new fencing in FY2018).

[13] Congress and the President had agreed to fund DHS—and the other portions of the federal government lacking FY2019 appropriations—under a continuing resolution through December 21, 2018. *See* Continuing Appropriations for Fiscal Year 2019, Pub. L. No. 115-298, 132 Stat. 4382 (2018). Prior to the close of FY2018, Congress had passed (and the President signed) several FY2019 appropriations bills funding portions of the federal government other than DHS. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018); Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019, Pub. L. No. 115-244, 132 Stat. 2897 (2018).

[14] Letter from Russell T. Vought, Acting Director, to The Honorable Richard Shelby, Chairman, Committee on Appropriations U.S. Senate (Jan. 6, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/01/Final-Shelby-1-6-19.pdf.

[15] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6 § 230(a)(1), 133 Stat. 13, 28 (Feb. 15, 2019).

[16] *See* Statement by the President on Consolidated Appropriations Act, 2019, https://www.whitehouse.gov/briefings-statements/statement-by-the-president-28/.

[17] *See* The White House, *Fact Sheets: President Donald J. Trump's Border Security Victory* (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/

[18] *Id*.

[19] Sierra Club v. Trump, No. 4:19-cv-892 (N.D. Cal.); California v. Trump, No. 4:19-cv-872 (N.D. Cal.).

[20] U.S. House of Representatives v. Mnuchin, No. 1:19-cv-969 (D.D.C.).

[21] El Paso Cty., Tex. v. Trump, No. 3:19-cv-66 (W.D. Tex.).

the Administration's funding initiatives are not authorized under existing law and thus violate the constitutional and statutory provisions requiring that federal money be spent only for the purposes, and in the amounts, specified by Congress.[22] In May 2019, a federal district court in California concluded that one of the Administration's funding initiatives was unlawful and prohibited the Administration from using that authority to repurpose funds for border barrier construction.[23] Though the U.S. Court of Appeals for the Ninth Circuit denied the Administration's request to stay the injunction,[24] the Supreme Court granted that request, thus allowing the Administration to begin contracting for construction of border barriers while litigation in the case continues.[25] Meanwhile, the federal district court in the District of Columbia ruled that the plaintiff in that case—the U.S. House of Representatives—did not have standing to sue and dismissed the suit.[26] The U.S. House of Representatives has appealed the decision.[27]

According to DHS's U.S. Customs and Border Protection (CBP), there had been roughly 654 miles of primary barriers deployed along the U.S.-Mexico border as of January 2017.[28] In May 2019, CBP declared that "approximately 205 miles of new and updated border barriers" had been funded (though not necessarily constructed[29]) "through the traditional appropriations process and via Treasury Forfeiture Funding" since January 2017. In addition to this mileage, CBP described DOD as funding in FY2019 "up to approximately 131 miles of new border barriers in place of dilapidated or outdated designs, in addition to road construction and lighting installation."[30] In total, CBP stated that some 336 total miles of barriers (including both replacement barriers and barriers deployed in new locations) would be deployed using funds from FY2017 through FY2019.[31]

This report addresses the litigation surrounding the Trump Administration's initiatives to repurpose existing appropriations for the construction of border barriers along the U.S.-Mexico border. It begins by providing an overview of the authorities cited by the Trump Administration to obtain border barrier funding and the steps the Administration has taken to utilize those authorities.[32] It then discusses DHS's existing authority to construct border barriers and the various authorities on which the Trump Administration has relied to secure additional border barrier funding.[33] Finally, this report discusses the ongoing litigation regarding the

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[22] *See supra* notes 2-8 and accompanying text. *See also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); *id.* § 1532 ("An amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law.").

[23] Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019). *See also infra* notes 146-156, 163-187 and accompanying text.

[24] Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019). *See also infra* notes 157-59, 188-195 and accompanying text.

[25] Trump v. Sierra Club, ---S. Ct.---, 2019 WL 3369425 (July 26, 2019). *See infra* notes 160, 309-320 and accompanying text.

[26] U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019). *See also infra* notes 284-299 and accompanying text. The federal court in Texas had not issued a ruling at the time this report was published.

[27] U.S. House of Representatives v. Trump, No. 19-5176 (D.C. Cir.).

[28] CBP Fact Sheet, *supra* note 12.

[29] In July 2019, CBP indicated that roughly 50 miles of barriers had been deployed since January 2017. CBP, *CBP Completes Construction of 50 miles of New Border Wall*, https://www.cbp.gov/newsroom/national-media-release/cbp-completes-construction-50-miles-new-border-wall (last modified July 12, 2019).

[30] CBP Fact Sheet, *supra* note 12.

[31] *Id.*

[32] *See infra* notes 35-53 and accompanying text.

[33] *See infra* notes 54-140 and accompanying text.

Administration's funding initiatives, with a focus on the parties' arguments and judicial decisions.[34]

Legal Authorities Cited by the Trump Administration

The Trump Administration has cited several statutory authorities as giving it both the power and the necessary funds to construct additional border barriers. Some of these authorities belong to DHS, the agency with primary responsibility for securing the U.S. borders. Other authorities permit the Department of Defense (DOD) or the Department of the Treasury to transfer funds for specified military, law enforcement, or other emergency purposes. These authorities are described in more detail below.

- *First*, Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) as amended generally authorizes DHS to construct barriers and roads along the international borders in order to deter illegal crossings at locations of high illegal entry, and further directs the agency to construct fencing along no less than 700 miles of the U.S.-Mexico border.[35] This law also authorizes the Secretary of Homeland Security to waive "all legal requirements . . . necessary to ensure expeditious construction of . . . [the] barriers."[36]
- *Second*, the Secretary of Defense is authorized by 10 U.S.C. § 2808 to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."[37] President Trump stated that he would invoke his authority under this provision to repurpose $3.6 billion allocated to "military construction projects" for border barrier construction.[38] This authority becomes available upon a "declaration by the President of a national emergency"[39] as authorized by the National Emergencies Act (NEA).[40]
- *Third*, DOD has authority under 10 U.S.C. § 284 ("Section 284") to support other departments' or agencies' counterdrug activities, including through the construction of fencing to block drug smuggling corridors.[41] President Trump proposed to direct the DOD to use its authority under Section 284 to support DHS's "counterdrug activities" through the construction of fencing across drug trafficking corridors at the southern

[34] *See infra* notes 141-320 and accompanying text.

[35] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, div. C, tit. I, § 102, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 102; Secure Fence Act of 2006, Pub. L. No. 109-367 § 3; and the Consolidated Appropriations Act, 2008 Pub. L. No. 110-161, div. E, §564(a). These requirements are codified at 8 U.S.C. § 1103 note. Unless otherwise indicated in this report, references in footnote citations to "IIRIRA §102" refer to the current version of the statute.

[36] *Id*. *See also infra* notes 54-67 and accompanying text.

[37] 10 U.S.C. § 2808(a). *See also infra* notes 92-101 and accompanying text.

[38] *Fact Sheets: President Donald J. Trump's Border Security Victory*, *supra* note 17.

[39] 10 U.S.C. § 2808(a).

[40] Pub. L. No. 94–412, 90 Stat. 1255 (1976), codified as amended at 50 U.S.C. §§ 1601-51. *See also infra* notes 72-91 and accompanying text.

[41] 10 U.S.C. § 284(a), (b)(7). *See also infra* notes 102-115 and accompanying text.

border.[42] These support activities would be funded by $2.5 billion in DOD's Drug Interdiction and Counter-Drug Activities Account (Drug Interdiction Account), which would be transferred to that account using the transfer authority in Sections 8005 and 9002 of the 2019 DOD Appropriations Act.[43] These authorities authorize the transfer of up to $6 billion of DOD funds for "unforeseen military requirements" but only "where the item for which funds are requested has been denied by Congress."[44]

- *Fourth*, the Treasury Forfeiture Fund contains funds that are confiscated by, or forfeited to, the federal government pursuant to laws enforced or administered by certain law enforcement agencies and unobligated money in this fund may be used for obligation or expenditure in connection with "law enforcement activities of any Federal agency."[45] The President proposed to withdraw $601 million in unobligated funds from the Treasury Forfeiture Fund (TFF) to pay for border barrier construction.[46]

The Trump Administration has taken steps to make these funds available to construct border barriers along the U.S.-Mexico border. On February 15, the President declared a national emergency under the NEA and subsequently vetoed a congressional resolution disapproving that declaration (which Congress did not override).[47] On September 3, 2019, the Secretary of Defense directed the Acting Secretary of the Army to "expeditiously undertake" 11 border barrier military construction projects pursuant to Section 2808.[48]

In addition, on February 25, DHS requested that DOD use its authority under 10 U.S.C. § 284 to assist in constructing border barriers.[49] DOD granted this request on March 25 and invoked the transfer authority in Section 8005 of the FY2019 DOD Appropriations Act to move $1 billion of Army personnel funds into DOD's Drug Interdiction Account for DOD to help DHS construct border barriers.[50] A few months later, DOD again invoked Section 8005 (along with the related transfer authority in Section 9002 of the FY2019 DOD Appropriations Act) to transfer another $1.5 billion of personnel, procurement, and overseas contingency operation funds into the Drug Interdiction Account for use in constructing border barriers.[51] The Trump Administration proposed to construct "approximately 131 miles of new border barriers . . . in addition to road construction and lighting installation" with these funds.[52]

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[42] *Fact Sheets: President Donald J. Trump's Border Security Victory*, *supra* note 17.

[43] *See* Department of Defense & Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII §§ 8005, 9002, 132 Stat. 2981, 2999, 3042 (2018). *See also infra* notes 116-131 and accompanying text.

[44] Pub. L. No. 115-245, §§ 8005, 9002.

[45] 31 U.S.C. § 9705(g)(4)(B). *See infra* notes 132-140 and accompanying text.

[46] *Fact Sheets: President Donald J. Trump's Border Security Victory*, *supra* note 17.

[47] Pres. Proc. 9844, Presidential Proclamation on Declaring a Nat'l Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019); H.J. Res. 46 (116th Cong.) (presented to the President on March 14, 2019); *Veto Message to the House of Representatives for H.J. Res. 46*, THE WHITE HOUSE, https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/ (Mar. 15, 2019).

[48] Secretary of Defense Mark Esper, *Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code* (Sept. 3, 2019).

[49] Sierra Club. v. Trump, 379 F. Supp. 3d 883, 896 (N.D. Cal. 2019).

[50] *Id*.

[51] *Id*. at 898. *See also* Dep't of Def., Reprogramming Action FY19-02 RA (May 9, 2019), https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2019/reprogramming_action/19-02_RA_Support_for_DHS_Counter_Drug_Activity.pdf.

[52] CBP Fact Sheet, *supra* note 12 at 2-3.

For each of the proposed projects, the Acting Secretary of Homeland Security utilized IIRIRA § 102's waiver authority to waive the application of several federal environmental, conservation, and historic preservation statutes, including the National Environmental Policy Act (NEPA), the Endangered Species Act, the Safe Drinking Water Act, and the Antiquities Act, to the "fence[s], roads, and lighting" that DOD will be "assist[ing]" in "constructing" under Section 284.[53]

Table 1. Key Legal Authorities Cited by the Trump Administration

Statutory Provision	Summary
Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 102, 8 U.S.C. § 1103 note	IIRIRIA § 102 authorizes the Secretary of Homeland Security to deploy fencing and other barriers along the international border to deter illegal crossings at locations of high illegal entry, and further directs the Secretary to construct barriers along not less than 700 miles of the U.S.-Mexico border. Section 102 grants the Secretary discretion to "waive all legal requirements" that the Secretary "determines necessary to ensure expeditious construction of the[se] barriers."
National Emergencies Act (NEA), 50 U.S.C. §§ 1601-51	The NEA authorizes the President to declare a national emergency and establishes procedures and limitations governing that authority.
10 U.S.C. § 2808	Section 2808 provides that, upon the President's declaration of a national emergency requiring the use of the armed forces, the Secretary of Defense may "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."
Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII §§ 8005, 9002, 132 Stat. 2981, 2999, 3042 (2018)	Sections 8005 and 9002 of the 2019 DOD Appropriations Act authorizes the DOD to transfer up to $6 billion in DOD funds for "military functions (except military construction)." Funds may be transferred only for "unforeseen military requirements" and may not be transferred "where the item for which funds are requested has been denied by Congress."
10 U.S.C. § 284	Section 284 authorizes the Secretary of Defense to support other departments' or agencies' counterdrug activities, including through the construction of fencing to block drug smuggling corridors.
Treasury Forfeiture Fund (TFF), 31 U.S.C. § 9705	The TFF holds funds that are confiscated by, or forfeited to, the federal government pursuant to laws enforced or administered by certain law enforcement agencies. The Secretary of the Treasury may expend unobligated funds within the TFF "in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization."

Source: Prepared by CRS.

[53] *See* 84 Fed. Reg. 21800 (May 15, 2019) (El Centro Sector); 84 Fed. Reg. 21798 (May 15, 2019) (Tucson Sector); 84 Fed. Reg. 17187 (Apr. 24, 2019) (Yuma Sector); 84 Fed. Reg. 17185 (Apr. 24, 2019) (El Paso Sector).

Department of Homeland Security Authority

DHS's authority to construct barriers along the southern border derives from IIRIRA § 102, as amended.[54] This law provides that "[t]he Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States."[55] IIRIRA § 102 directs that "the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border,"[56] while also "identify[ing] the 370 miles . . . along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States."[57] Finally, IIRIRA § 102 gives the Secretary of Homeland Security flexibility on where to construct barriers, allowing the Secretary to decline to build a border barrier in a particular location if "[the Secretary] determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border. . . ."[58]

To expedite the construction of border barriers, IIRIRA § 102 authorizes the Secretary of Homeland Security to, "in [the] Secretary's sole discretion," "waive all legal requirements" that the Secretary "determines necessary to ensure expeditious construction of the barriers and roads under this section."[59] And to limit potential legal challenges to this waiver authority, IIRIRA § 102 cabins the jurisdiction of federal district courts to claims "alleging a violation of the Constitution" and forecloses appellate review of district court decisions, except by seeking discretionary review in the U.S. Supreme Court.[60]

IIRIRA § 102's waiver authority has been challenged on constitutional grounds in cases involving waivers of NEPA[61] and other federal environmental statutes.[62] Those challenging the waiver authority have contended that it violates the nondelegation doctrine,[63] the Presentment Clause,[64] and the Take Care Clause.[65] Courts, however, have uniformly rejected these challenges[66] and

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[54] IIRIRA § 102. For a more in-depth discussion of DHS's authority under IIRIRA § 102, see CRS Report R43975, *Barriers Along the U.S. Borders: Key Authorities and Requirements*, by Michael John Garcia.

[55] IIRIRA § 102(a).

[56] *Id*. § 102(b)(1)(A).

[57] *Id*. § 102(b)(1)(B)(i).

[58] *Id*. § 102(b)(1)(D).

[59] *Id*. § 102(c)(1).

[60] *Id*. § 102(c)(2).

[61] 42 U.S.C. §§ 4321-4370b.

[62] *See, e.g.*, In re Border Infrastructure Envtl. Litigation, 915 F.3d 1213 (9th Cir. 2019); N. Am. Butterfly Ass'n v. Nielsen, 368 F. Supp. 3d 1 (D.D.C. 2019); In re Border Infrastructure Envtl. Litigation, 284 F. Supp. 3d 1092 (S.D. Cal. 2018); Save Our Heritage Org. v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. Feb. 4, 2008); Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007); Sierra Club v. Ashcroft, No. 04-cv-272, 2005 WL 8153059 (Dec. 13, 2005).

[63] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.").

[64] U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.").

[65] *Id*. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed").

[66] *See In re Border Infrastructure Envtl. Litigation*, 284 F. Supp. 3d at 1130-42 (rejecting, *inter alia*, nondelegation, Presentment Clause, and Take Care Clause challenges), *aff'd in part* 915 F.3d 1213 (9th Cir. 2019), *cert. denied* 139 S. Ct. 594 (2018); *Save Our Heritage Organization*, 533 F. Supp. 2d at 62-64 (rejecting nondelegation challenge);

concluded that "a valid waiver of the . . . laws under [IIRIRA § 102] is an affirmative defense" to all claims arising from the waived laws.[67]

The National Emergencies Act and Military Construction Funds

The President invoked 10 U.S.C. § 2808 and announced that his Administration would seek to reallocate $3.6 billion from DOD's military construction budget for border barrier construction.[68] The authority to take this action hinges on the President declaring a national emergency under the NEA,[69] which President Trump did on February 15.[70] On September 3, 2019, DOD identified 127 military construction projects that it would delay or suspend in order to reallocate $3.6 billion toward 11 barrier construction projects using this authority.[71] The NEA provides general requirements governing the declaration of a national emergency, while Section 2808 contains additional requirements for its exercise.

The National Emergencies Act

The Supreme Court has explained that the President's authority "must stem either from an act of Congress or from the Constitution itself."[72] Because Article II of the Constitution does not grant the Executive general emergency powers, the President generally must rely on Congress for such authority. Congress has historically given the President robust powers to act in times of crisis. By 1973, Congress had enacted more than 470 statutes granting the President special authorities upon the declaration of a "national emergency," but these statutes imposed no limitations on either the President's discretion to declare an emergency or the duration of such an emergency.[73] The Senate Special Committee on National Emergencies and Delegated Emergency Powers (previously named the Senate Special Committee on the Termination of the National Emergency) ("Special Committee") was apparently concerned that four presidentially declared national emergencies remained extant in the mid-1970s, the earliest dating to 1933.[74]

Defenders of Wildlife, 527 F. Supp. 2d at 123-29 (rejecting Presentment Clause and nondelegation challenge), *cert. denied* 554 U.S. 918 (2008); *Ashcroft*, 2005 WL 8153059, at *4-7 (rejecting nondelegation challenge).

[67] *In re Border Infrastructure Envtl. Litigation*, 915 F.3d at 1221.

[68] *Fact Sheets: President Donald J. Trump's Border Security Victory*, *supra* note 17.

[69] Pub. L. No. 94–412, 90 Stat. 1255 (1976), codified as amended at 50 U.S.C. §§ 1601-51.

[70] *See* Pres. Proc. 9844, Presidential Proclamation on Declaring a Nat'l Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019).

[71] Helene Cooper and Emily Cochrane, *Pentagon Will Divert Billions from Projects to Pay for Wall*, WASH. POST, Sept. 4, 2019, at A17; Secretary of Defense Mark Esper, *Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code* (Sept. 3, 2019).

[72] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[73] Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency, Report of the Special Committee on the Termination of the National Emergency, S. REP. NO. 93-49, at 6-7 (1973).

[74] Final Report of the Special Committee on National Emergencies and Delegated Emergency Powers, S. REP. NO. 94-922, at 3 (1976). For a list of pre-NEA national emergencies, see CRS Legal Sidebar LSB10267, *Definition of National Emergency under the National Emergencies Act*, by Jennifer K. Elsea.

In 1973, the Special Committee concluded that the President's crisis powers "confer[red] enough authority to rule the country without reference to normal constitutional process,"[75] and so Congress enacted the NEA in 1976 to pare back the President's emergency authorities.[76]

The NEA does not define "national emergency."[77] Rather, the NEA established a framework to provide enhanced congressional oversight and prevent emergency declarations from continuing in perpetuity. To accomplish these goals, the NEA terminated all then-existing presidentially declared emergencies.[78] The NEA also established procedures for future declarations of national emergencies, requiring the President to

- specify which statutory emergency authorities he intends to invoke upon a declaration of a national emergency[79] (unlike the pre-NEA regime, under which the declaration of an emergency operated as an invocation of all of the President's emergency authorities);
- publish the proclamation of a national emergency in the *Federal Register* and transmit it to Congress;[80]
- maintain records and transmit to Congress all rules and regulations promulgated to carry out such authorities;[81] and
- provide an accounting of expenditures directly attributable to the exercise of such authorities for every six-month period following the declaration.[82]

The NEA further provides that a national emergency will end (1) automatically after one year unless the President publishes a notice of renewal in the *Federal Register*, (2) upon a presidential declaration ending the national emergency, or (3) if Congress enacts a joint resolution terminating the emergency (which would likely require the votes of two-thirds majorities in each house of Congress to override a presidential veto).[83] While the NEA directs each house of Congress to meet every six months to consider whether to end a national emergency by joint resolution,[84] Congress has never met to consider such a vote under that deadline. The statute does not appear to prevent Congress from considering a resolution to terminate a national emergency at any time before or after a six-month interval.

[75] S. REP. NO. 93-49, at iii.

[76] For more information on the NEA's enactment, see CRS Report 98-505, *National Emergency Powers*, by L. Elaine Halchin.

[77] For a discussion of possible means of interpreting the meaning of "national emergency" as Congress intended it, see CRS Legal Sidebar LSB10267, *Definition of National Emergency under the National Emergencies Act*, by Jennifer K. Elsea.

[78] 50 U.S.C. § 1601.

[79] *Id.* § 1621.

[80] *Id.*

[81] *Id.* § 1641.

[82] *Id.*

[83] *Id.* § 1622. Although the original NEA authorized termination through a concurrent resolution, which does not require the President's signature, Congress amended the provision in 1985 to require a joint resolution as a response to a 1983 Supreme Court decision holding that legislative vetoes were unconstitutional. *See* INS v. Chadha, 462 U.S. 919 (1983).

[84] 50 U.S.C § 1622.

Although a purpose of the NEA was to end perpetual states of emergency, the law does grant the President authority to renew an emergency declaration.[85] As a result, there are currently 31 national emergency declarations in effect,[86] some of which have been renewed for decades.[87]

The declaration of a national emergency under the NEA enables the President to invoke a wide array of emergency authorities conferred by statute.[88] The most often invoked is the International Emergency Economic Powers Act (IEEPA),[89] which gives the President broad authority to impose sanctions on foreign countries and entities.[90] Besides Section 2808, another authority that could provide for the reprogramming of funds for construction purposes is 33 U.S.C. § 2293, which, in the event of a national emergency or declaration of war, authorizes the Secretary of the Army to end or defer Army Corps of Engineers civil works projects that are "not essential to the national defense." The Secretary of the Army can then use the funds otherwise allocated to those projects for "authorized civil works, military construction, and civil defense projects that are essential to the national defense."[91] No President has ever invoked this authority, but it could potentially be used in connection with President Trump's declaration of a national emergency at the southern border.

Military Construction Funds

A declaration of a national emergency triggers Section 2808, which provides emergency authority for unauthorized military construction in the event of a declaration of war or national emergency. President Trump invoked this statutory authority to reallocate $3.6 billion from DOD military construction funds to border barrier construction,[92] stating in his emergency declaration that "this emergency requires use of the Armed Forces and . . . that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments."[93] The President did not describe in his proclamation the tasks the Armed Forces would undertake with respect to the emergency at the southern border.

Originally enacted in 1982,[94] Section 2808 provides that upon the President's declaration of a national emergency "that requires use of the armed forces," the Secretary of Defense may "without regard to any other provision of law . . . undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."[95] The

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[85] *Id.* § 1622(d).

[86] CRS Legal Sidebar LSB10252, *Declarations under the National Emergencies Act, Part 1: Declarations Currently in Effect*, by Emily E. Roberts.

[87] *See id*.

[88] According to a recent study by the Brennan Center for Justice, 136 statutes provide the President with emergency authorities that he can invoke under the NEA. Brennan Center for Justice, *Guide to Emergency Powers and their Use*, https://www.brennancenter.org/analysis/emergency-powers (last accessed Aug. 9, 2019).

[89] Pub. L. No. 95-223, 91 Stat. 1626 (1977) codified as amended at 50 U.S.C. §§ 1701-08.

[90] For background and history of IEEPA, see CRS Report R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, coordinated by Christopher A. Casey.

[91] 33 U.S.C. § 2293. For more information on this authority, see CRS In Focus IF11084, *Redirecting Army Corps of Engineers Civil Works Resources During National Emergencies*, by Nicole T. Carter.

[92] *Fact Sheets: President Donald J. Trump's Border Security Victory*, *supra* note 17.

[93] *See* Pres. Proc. 9844, Presidential Proclamation on Declaring a Nat'l Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019).

[94] Pub. L. No. 97–214, § 2(a), 96 Stat. 157 (1982).

[95] 10 U.S.C. § 2808.

term "military construction project" is defined to include "military construction work,"[96] and "military construction" is, in turn, defined to "include any construction, development, conversion, or extension of any kind carried out with respect to a military installation . . . or any acquisition of land or construction of a defense access road."[97] The term "military installation" means a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department."[98] Finally, Section 2808 limits the funds available for emergency military construction to "the total amount of funds that have been appropriated for military construction" but which have not been obligated.[99]

Section 2808's legislative history provides limited guidance on the types of emergencies and military construction projects envisioned. A House Armed Services Committee report accompanying the original 1982 legislation indicated that while "[i]t is impossible to provide in advance for all conceivable emergency situations," Section 2808 was intended to address contingencies "ranging from relocation of forces to meet geographical threats to continuity of efforts after a direct attack on the United States during which the Congress may be unable to convene."[100] With certain limited exceptions, prior Presidents have generally invoked this authority for construction at military bases in foreign countries.[101]

Department of Defense Authorities

To obtain additional funds to construct border barriers, the Trump Administration has invoked DOD's authority under 10 U.S.C. § 284 to support DHS in constructing border fencing. This support would be funded by money transferred to DOD's Drug Interdiction Account pursuant to Sections 8005 and 9002 of the 2019 DOD Appropriations Act. These authorities are *not* contingent on the declaration of a national emergency.

Section 284

In general, U.S. military involvement in civilian law enforcement is permitted only when specifically authorized by Congress.[102] For example, the Secretary of Defense can "make available any equipment . . . base facility, or research facility" to any "civilian law enforcement official . . . for law enforcement purposes."[103] Section 284 is another of these authorities. It authorizes the Secretary of Defense to "provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency."[104]

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[96] *Id.* § 2801.

[97] *Id.*

[98] *Id.*

[99] *Id*. § 2808(a).

[100] H. REPT. NO. 97-44, at 72 (1981).

[101] *See* CRS Insight IN11017, *Military Construction Funding in the Event of a National Emergency*, by Michael J. Vassalotti and Brendan W. McGarry.

[102] See generally 10 U.S.C. §§ 271-284. See also CRS Report R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, by Jennifer K. Elsea.

[103] 10 U.S.C. § 272. Section 284 was originally enacted as § 1004 of Pub. L. No. 101-510, 104 Stat. 1485, 1629 (1990). It was made permanent law in 2016, Pub. L. No. 114-328, § 1011, 130 Stat. 2381 (2016).

[104] 10 U.S.C. § 284.

DOD may provide support under Section 284 only after it has been "requested" by the appropriate official from the governmental agency or department,[105] and then only for "the purposes set forth" in Section 284.[106] Those purposes include "the maintenance and repair" of certain equipment,[107] the "training of law enforcement personnel" related to "[c]ounterdrug or counter-transnational organized crime,"[108] and "[a]erial and ground reconnaissance."[109] Section 284 also authorizes DOD to provide support for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States."[110] And to ensure that DOD can provide this support expeditiously, support under Section 284 is generally not subject to the requirements that govern DOD's other authority to support civil law enforcement agencies.[111]

Section 284 also provides for congressional oversight of DOD's support activities. At least 15 days prior to providing support to another agency under Section 284, the Secretary of Defense must submit "a description of any small scale construction project for which support is provided"[112] to the appropriate congressional committees.[113] "Small scale construction project" is, in turn, defined to encompass projects that cost no more than $750,000.[114] Section 284 does not include a reporting requirement for any projects exceeding $750,000.

Historically, DOD's activities under Section 284 have been funded by the "Drug Interdiction and Counter-Drug Activities" line item in its annual appropriations bill. For FY2019 Congress appropriated $1,034,625,000 to this line item, with $517,171,000 of that amount being allocated for "counter-narcotics support."[115]

Sections 8005 and 9002 of the 2019 DOD Appropriations Act

On February 25, 2019, DHS submitted a request to DOD to provide assistance pursuant to Section 284 in constructing border barriers in three locations along the U.S.-Mexico border, and DOD then approved the use of funds from the Drug Interdiction Account for these projects.[116] However, much of the FY2019 funds appropriated for "counter-narcotics support" had been obligated by the time DOD made its request.[117] As a result, DOD sought to use its authority under

[105] *Id.* § 284(a)(1).

[106] *Id.* § 284(b).

[107] *Id.* § 284(b)(1)-(2).

[108] *Id.* § 284(b)(5).

[109] *Id.* § 284(b)(10). Section 284 also authorizes DOD to provide support to foreign law enforcement agencies. *Id.* § 284(c).

[110] *Id.* § 284(b)(7).

[111] *Id.* § 284(g)(2). The two exceptions are (1) a prohibition on support activities including "direct participation by a member of [the armed forces] in a search, seizure, arrest, or other similar activity unless otherwise authorized by law," *id*. § 275; and (2) a prohibition on providing support that "will adversely affect the military preparedness of the United States," *id*. § 276.

[112] *Id.* § 284(h).

[113] These are defined as the Committee on Armed Services in the Senate and House, the Committee on Appropriations in the Senate and House, and the Committee on Foreign Relations in the Senate and Committee on Foreign Affairs in the House. *Id.* § 284(i)(1).

[114] *Id.* § 284(i)(3).

[115] *See* Pub. L. No. 115-245, Titles VI, IX, 132 Stat. 2981, 2997, 3042 (2018).

[116] Sierra Club v. Trump, 379 F. Supp. 3d 883, 896 (N.D. 2019).

[117] *Id*. at 901.

Section 8005 of the 2019 DOD Appropriations Act to transfer other funds into the Drug Interdiction Account.

Section 8005 authorizes the Secretary of Defense—"[u]pon a determination by the Secretary of Defense that such action is necessary in the national interest" and with "approval of the Office of Management and Budget"—to "transfer not to exceed [$4 billion] of working capital funds of the [DOD] or funds made available in [the 2019 DOD Appropriations Act] for military functions (except military construction)."[118] Section 8005 further provides that funds may be transferred only "for higher priority items, based on unforeseen military requirements, than those for which originally appropriated," and may not be transferred "where the item for which funds are requested has been denied by Congress."[119] Finally, Section 8005 requires the Secretary of Defense to "notify the Congress promptly of all transfers made pursuant to this authority."[120]

This transfer authority, in its current form, originated with the FY1974 DOD Appropriations Act.[121] The 1974 act appears to be the first instance when Congress expressly prohibited the transfer of DOD funds for purposes for which Congress had denied funding.[122] The House committee report for this legislation explained that this language was added "to tighten congressional control of the reprogramming process."[123] Before that time, DOD had "on . . . occasion[]" reprogrammed funds "which ha[d] been specifically deleted in the legislative process" after obtaining the consent of the authorizing and appropriations committees in the House and Senate.[124] The House committee report explained that this practice "place[d] committees in the position of undoing the work of the Congress."[125] Characterizing this practice as "untenable," the House report declared that "henceforth no such requests will be entertained."[126]

Invoking Section 8005's transfer authority, DOD in February 2019 authorized the transfer of an initial $1 billion of Army personnel funds to the Drug Interdiction Account.[127] And on May 9, DOD authorized the transfer of an additional $1.5 billion to that fund using Sections 8005 and 9002 of the 2019 DOD Appropriations Act.[128] Section 9002 authorizes the Secretary of Defense to "transfer up to [$2 billion] between the appropriations or funds made available to [DOD] in this title."[129] This authority is "in addition to any other transfer authority available to [DOD]"—including Section 8005—and is also "subject to the same terms and conditions as the authority

[118] Department of Defense & Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII § 8005, 132 Stat. 2981, 2999 (2018).

[119] *Id*. (emphasis added).

[120] *Id*.

[121] *See* An Act Making Appropriations for the Department of Defense for the Fiscal Year Ending June 30, 1974 and for other purposes, Pub. L. No. 93-238 § 735, 87 Stat. 1076 (1974).

[122] H.R. REPT. NO. 93-662, at 16 (1973).

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *See* Sierra Club v. Trump, 379 F. Supp. 3d 883, 896 (N.D. Cal. 2019).

[128] *Id.* at 898. One of these projects is located in California while the others three located in Arizona. *Id*.

[129] Pub. L. No. 115-245, § 9002, 132 Stat. at 3042 (2018).

provided in section 8005."[130] The Acting Secretary of Defense informed Congress of these transfers.[131]

Treasury Forfeiture Fund

In various federal statutes, Congress has authorized the confiscation, or forfeiture to the federal government, of any property used to facilitate a crime as well as the profits and proceeds of such crimes.[132] None of these statutes is contingent on the declaration of a national emergency. Congress established the TFF to hold proceeds of property forfeited under most laws enforced or administered by a law enforcement organization within the Department of the Treasury or by the Coast Guard. Funds in the TFF may be used by the Secretary of the Treasury for a variety of law enforcement purposes.[133] Some of these purposes are mandatory, such as making "equitable sharing payments" to other federal, state, and local law enforcement agencies that participate in the seizure or forfeiture of property.[134] Others, such as awards for information leading to forfeited property covered by the TFF, are subject to the discretion of the Secretary of the Treasury.[135]

At the end of each fiscal year, the Secretary of the Treasury must reserve a sufficient amount in the TFF to cover mandatory and discretionary expenditures.[136] Unobligated balances in the fund over the reserved amount may be used "for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization."[137] This unobligated amount is known as "Strategic Support."[138]

At the end of 2018, DHS requested $681 million of Strategic Support from the TFF for "border security."[139] In response to that request, the Secretary of Treasury allocated $601 million to CBP for "border barrier construction."[140]

The Border Barrier Litigation

Following the Trump Administration's announcement of its initiatives to fund border barrier construction, citizens groups, states, and the U.S. House of Representatives filed lawsuits in federal district courts in California,[141] the District of Columbia,[142] and Texas.[143] The plaintiffs in these lawsuits have argued that the Trump Administration's funding initiatives are not authorized

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[130] *Id*.

[131] *Sierra Club*, 379 F. Supp. 3d at 896.

[132] For an overview of federal forfeiture law, see CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

[133] 31 U.S.C. § 9705(a).

[134] *Id.* § 9705(a)(1)(G). Such equitable sharing payments may not exceed the value of property that was seized or forfeited with the assistance of the equitable sharing payment recipient. *Id.* § 9705(b)(2).

[135] *Id.* § 9705(a)(2)(A).

[136] *Id.* § 9705(g)(3)(C).

[137] *Id.* § 9705(g)(4)(B).

[138] *See* Sierra Club v. Trump, 379 F. Supp. 3d 883, 903 (N.D. Cal. 2019).

[139] *Id.*

[140] California v. Trump, 379 F. Supp. 3d 928, 952 (N.D. Cal. 2019).

[141] Sierra Club v. Trump, No. 4:19-cv-892 (N.D. Cal.); California v. Trump, No. 4:19-cv-872 (N.D. Cal.).

[142] U.S. House of Representatives v. Mnuchin, 1:19-cv-969 (D.D.C.).

[143] El Paso Cty., Tex. v. Trump, No. 3:19-cv-66 (W.D. Tex.).

by (or are inconsistent with) the relevant statutory authorities.[144] As a result, they have also contended that the Administration's funding initiatives violate constitutional separation of powers principles and the Appropriations Clause's directive that money may be withdrawn from the Treasury only "in Consequence of Appropriations made by Law."[145] Finally, some plaintiffs have asserted that IIRIRA § 102 does not empower DHS to waive the requirements of NEPA for the border barrier projects being constructed with DOD's assistance because IIRIRA § 102's waiver authority extends only to projects undertaken by DHS.[146]

After bringing suit, certain plaintiffs filed motions for a preliminary injunction, asking the courts to prohibit DOD from implementing its funding initiatives while the litigation was ongoing.[147] On May 24, 2019, a judge on the U.S. District Court for the Northern District of California issued decisions in the two cases pending in that court—*Sierra Club v. Trump*[148] and *California v. Trump*[149]—resolving one of the issues presented by the plaintiffs' motion: whether Sections 8005 and 9002 of the 2019 DOD Appropriations Act authorized the transfer of funds for border barrier construction.

The district court determined that it did not for two reasons. It first concluded that this would violate Section 8005's prohibition on transferring funds where "the item for which funds [were] requested ha[d] been denied by Congress."[150] The court also ruled that the Administration's proposed use of Section 8005 was unlawful because DOD's purported need for additional border barrier funding was not an "unforeseen military requirement," as required by Section 8005.[151] Based on this ruling, the court in *Sierra Club* issued a preliminary injunction barring the Administration from using Section 8005 to transfer funds for border barrier construction while litigation proceeded.[152] The court declined to also issue a preliminary injunction in the *California* case because (with the *Sierra Club* injunction in place) the plaintiffs in *California* could not establish that they would be irreparably harmed by the denial of an injunction.[153]

Because the plaintiffs' lawsuit preceded DOD's May 9 decision to transfer $1.5 billion to the Drug Interdiction Account, the preliminary injunction applied only to the initial, February 25 transfer of $1 billion to fund projects in New Mexico and Arizona.[154] But in a later decision, the district court applied the reasoning from its initial ruling to conclude that the $1.5 billion transfer, like the first, was not authorized by Section 8005 or Section 9002.[155] The court then issued an

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[144] *See, e.g.*, Plaintiffs' Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof at 6-8, 12-20, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-892), ECF 29 [hereinafter, Sierra Club Preliminary Injunction Br.].

[145] U.S. CONST. art. I, § 9, cl. 7.

[146] Sierra Club Preliminary Injunction Br., *supra* note 144, at 8-12.

[147] *E.g.*, Sierra Club Preliminary Injunction Br., *supra* note 144; Plaintiffs' Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof, California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (No. 19-cv-872), ECF 59 [hereinafter, California Preliminary Injunction Br.].

[148] 379 F. Supp. 3d 883 (N.D. Cal. 2019).

[149] 379 F. Supp. 3d 928 (N.D. Cal. 2019).

[150] Pub. L. No. 115-245 § 8005; *Sierra Club*, 379 F. Supp. 3d at 911-13; *California*, 379 F. Supp. 3d at 944-46.

[151] *Sierra Club*, 379 F. Supp. 3d at 913-15; *California*, 379 F. Supp. 3d at 946-47.

[152] *Sierra Club*, 379 F. Supp. 3d at 928.

[153] *California*, 379 F. Supp. 3d at 957, 960.

[154] *Sierra Club*, 379 F. Supp. 3d at 913-15.

[155] Sierra Club. v. Trump, No. 4:19-cv-892, 2019 WL 2715422, at *2-3 (N.D. Cal. June 28, 2019). The Administration relied exclusively on Section 8005 for its authority to make the initial $1 billion transfer, but invoked both Section 8005 and Section 9002 for the subsequent $1.5 billion transfer. *See supra* notes 51-52, 127-131 and accompanying text.

order permanently prohibiting the Administration from using either of these provisions to transfer any of the $2.5 billion for border barrier construction.[156]

The Trump Administration 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.[157] The Ninth Circuit denied that request,[158] agreeing with the district court that Section 8005 does not authorize the transfer of funds for border barrier construction.[159] However, the Supreme Court subsequently issued an order staying the injunction during the pendency of the litigation.[160] As a result of the Supreme Court's order, the Trump Administration may use Section 8005 to transfer funds for border barrier construction.

This section discusses the various arguments raised in these lawsuits regarding the lawfulness of the Trump Administration's initiatives for funding border barrier construction. It also discusses the judicial decisions that have resolved, or otherwise opined on, the lawfulness of the Administration's funding initiatives. As of the publication of this report, only the federal court in California had issued a decision on the merits of the plaintiffs' claims. The federal court in the District of Columbia presiding over the U.S. House of Representatives' case dismissed that suit for lack of standing, and that decision is currently being appealed.[161] The federal court in Texas has yet to issue a decision in the case before it.[162] Accordingly, when discussing the lawfulness of the Trump Administration's proposed funding sources, this report will focus on the arguments and judicial decisions arising from the California cases—*Sierra Club v. Trump* and *California v. Trump*—except to the extent a claim or argument raised in the District of Columbia or Texas lawsuits was not raised in the California litigation.

Legal Arguments and Judicial Decisions Regarding the Trump Administration's Efforts to Fund Additional Barrier Deployments

Section 8005

The Northern District of California's Sierra Club *Decision*[163]

As discussed earlier, Section 8005 authorizes the transfer of funds for "military functions," but provides that funds may be transferred only "for higher priority items, based on unforeseen

However, because Section 9002 is "subject to the same terms and conditions" as Section 8005, the district court's decision on the $1.5 billion transfer discussed these provisions "collectively by reference to Section 8005." *Id*. at *2 (quoting Pub. L. No. 115-245 § 9002).

[156] *Id*. at *4. Consistent with its preliminary injunction ruling, the district court in *California* declined to award a permanent injunction in that case because it had already issued a permanent injunction in *Sierra Club*. *See* California v. Trump, No. 4:19-cv-872, 2019 WL 2715421, at *5 (N.D. Cal. June 28, 2019).

[157] *See* Sierra Club. v. Trump, 929 F.3d. 670, 684-85 (9th Cir. 2019).

[158] *Id*. at 707.

[159] *Id*. at 688-94.

[160] Application for a Stay Pending Appeal, Trump v. Sierra Club, No. 19A60, 2019 WL 3369425 (July 26, 2019).

[161] U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 23 (D.D.C. 2019), *appeal docketed* No. 19-5176 (D.C. Cir).

[162] The plaintiffs in the Texas litigation—El Paso County, Texas and Border Network for Human Rights—have filed a motion for a preliminary injunction or, alternatively, summary judgment.

[163] Because the court's opinions in *Sierra Club* and *California* are substantively identical and because the district court entered injunctive relief in *Sierra Club* and not *California*, this report will cite to the court's opinion in *Sierra Club* to

military requirements, than those for which originally appropriated."[164] Further, funds may not be transferred "where the item for which funds are requested has been denied by Congress."[165] The district court in *Sierra Club v. Trump* 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, in any event, because the asserted need for the construction of border barriers was not "unforeseen."[166]

The district court first addressed whether the proposed transfer was for an "item" for which Congress had denied funds.[167] In its briefs, the Trump Administration had argued that the relevant "item for which funds [were] requested" was DOD's assistance to DHS under 10 U.S.C. § 284 for "counterdrug activities," not (as the plaintiffs urged) the construction of border barriers generally.[168] Thus, the Administration urged, because Congress had not "denied" a request for appropriations for DOD "counterdrug" assistance under Section 284, transferring funds for that purpose was not prohibited by Section 8005.[169]

The district court rejected that argument, concluding instead that the historical context leading up to the transfer—including the previous disagreement between the Administration and Congress on the appropriate funding for border barriers that led to an extended lapse in appropriations—showed that the "item for which funds [were] requested" was the construction of border barriers generally, regardless of which agency would undertake construction or the statutory authority on which it might rely.[170] "[T]he reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction," the court explained.[171] 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."[172]

The court also 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, which explained that Congress originally adopted the "denied by Congress" language 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.'"[173] In the court's view, an interpretation of Section 8005 that would allow the Administration to transfer money for border barrier construction, despite Congress's refusal to appropriate the amount of money requested for that purpose, would undermine Section 8005's objective.[174]

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explain the court's reasoning.

[164] Department of Defense & Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VIII § 8005, 132 Stat. 2981, 2999 (2018).

[165] *Id.*

[166] *See Sierra Club,* 379 F. Supp. 3d at 911-15.

[167] *Id*. at 911-13.

[168] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 16, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-892), ECF 64 [hereinafter, Gov't Opp. Br. (*Sierra Club*)].

[169] *Id*.

[170] *See* Sierra Club v. Trump, 379 F. Supp. 3d 883, 912-13 (N.D. Cal. 2019).

[171] *Id*. at 913.

[172] *Id*.

[173] *Id*. (citing H.R. REPT. NO. 93-662, at 16 (1973)).

[174] *Id*. at 912-13 ("It thus would be inconsistent with the purpose of these provisions, and would subvert the difficult judgments reached by Congress to allow Defendants to circumvent Congress's clear decision to deny the border barriers funding sought here when it appropriated a dramatically lower amount in the [Consolidated Appropriations

The court also determined that Section 8005's transfer authority was unavailable because the Administration's proposed border barrier construction was not an "*unforeseen* military requirement[]."[175] 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 through Section 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 with less funding for barrier construction than the Administration had requested.[176]

The district court rejected this interpretation of Section 8005.[177] 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 when another agency requests DOD's assistance under that provision.[178] The district court also asserted 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.[179]

Finally, the court invoked the canon of constitutional avoidance to support its reading of Section 8005.[180] 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.[181] According to the district court, the Administration's 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.[182] Avoiding these potential pitfalls was, in the court's view, another reason to reject the Administration's broader interpretation of Section 8005.[183]

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 barrier construction. Thus, after finding the remaining preliminary injunction requirements satisfied,[184] the court entered an order temporarily prohibiting the Administration from using the $1 billion of funds transferred under Section 8005 to construct the specified border barriers in New Mexico and Arizona.[185]

After issuing this decision, the parties submitted additional briefing on the lawfulness of the Administration's May 9 decision to use Sections 8005 and 9002 to transfer another $1.5 billion to

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Act]." (citation and quotation marks omitted)).

[175] *Id*. at 913-15 (emphasis added).

[176] Gov't Opp. Br. (*Sierra Club*), *supra* note 168 at 16-17.

[177] *Sierra Club*, 379 F. Supp. 3d at 914-15.

[178] *Id*.

[179] *Id*. at 914.

[180] *Id*. at 915-18.

[181] Nat'l Fed'n of Indep. Business v. Sebelius, 567 U.S. 519, 562 (2012).

[182] *Sierra Club*, 379 F. Supp. 3d at 915-17.

[183] *Id*. at 915.

[184] *Id*. at 918.

[185] *Id*. at 923-27, 928.

the Drug Interdiction Account for the construction of border barriers in four additional locations in California and Arizona. On June 28, the district court issued a decision adopting the same reasoning as its earlier opinion.[186] And having found both of the Administration's proposed uses of Section 8005's transfer authority unlawful, the court entered an injunction permanently prohibiting the Administration "from taking any action to construct a border barrier" using Section 8005.[187]

The Ninth Circuit's Sierra Club *Decision*

The Trump Administration 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.[188]

On July 3, a divided panel of the Ninth Circuit denied the Administration's request for a stay, concluding that the Administration had not shown a likelihood of success on the merits.[189] In reaching that conclusion, the Ninth Circuit first agreed with the district court that the construction of a border barrier was not an "*unforeseen* military requirement," as required by Section 8005.[190] Like the district court, the Ninth Circuit declared that the relevant "requirement" was the construction of border barriers—not, as the Administration contended, the need for DHS to request support from DOD under Section 284.[191] The Ninth Circuit also concluded that Congress had "denied" funds for construction of the border barrier.[192] The Administration had argued to that court that the "item for which funds [were] requested" referred to "'a particular budget item' for section 8005 purposes"—which Congress had not denied—and did not encompass other requests for DHS funding for border barriers.[193] The court of appeals rejected this reading, concluding that the "item for which funds [were] requested" was "a wall along the southern border," and that Congress had denied the Administration's request to fund that "item."[194] "In sum," the court reasoned, "Congress considered the 'item' at issue here—a physical barrier along the entire southern border"—and it "decided in a transparent process subject to great public scrutiny to appropriate less than the total amount the President had sought for that item. To call that anything but a 'denial' is not credible."[195]

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[186] Sierra Club v. Trump, No. 4:19-cv-892, 2019 WL 2715422, at *3 (N.D. Cal. June 28, 2019) ("The Court thus stands by its prior finding that Defendants' proposed interpretation of the statute is unreasonable, and agrees with Plaintiffs that Defendants' intended reprogramming of funds under Section 8005 . . . to the Section 284 account for border barrier construction is unlawful.").

[187] *Id*. at *4.

[188] The Administration had initially appealed the district court's May 24 preliminary injunction and sought an emergency stay of the injunction. *See* Sierra Club. v. Trump, 929 F.3d. 670, 684 (9th Cir. 2019). After the district court entered a permanent injunction, the Ninth Circuit consolidated the Administration's appeal from the permanent injunction with its initial appeal from the preliminary injunction, and the Trump Administration requested that the Ninth Circuit stay the permanent injunction pending resolution of its appeal. *Id*. at 684-85.

[189] *Id*. at 707.

[190] Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).

[191] *Sierra Club*, 929 F.3d at 690 ("The long history of the President's efforts to build a border barrier and of Congress's refusing to appropriate the funds he requested makes it implausible that this need was unforeseen.").

[192] *Id*. at 691-92.

[193] *Id*. at 691.

[194] *Id*.

[195] *Id*. at 692.

However, as discussed in more detail below,[196] the Supreme Court ultimately stayed the district court's injunction.[197] The Court's stay order did not rule on the merits of Section 8005 or any of the other statutory authorities on which the Administration has relied to secure additional border barrier funding.[198] Instead, the Court stayed the injunction because it concluded that "the Government had made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting [Secretary of Defense's] compliance with Section 8005."[199]

Section 284

The plaintiffs in *Sierra Club* and *California* also argued that even if Section 8005 authorized the transfer of funds to the Drug Interdiction Account, Section 284 does not empower DOD to assist another agency in constructing border barriers.[200] The plaintiffs in these cases raised several points to support this conclusion.

First, they observed that Section 284 requires DOD to provide to Congress "a description of the *small scale construction project* for which support is provided,"[201] and defines "small scale construction" to mean "construction at a cost not to exceed $75,000 for any project."[202] That Section 284 requires DOD to report to Congress on "small scale construction projects" and not larger projects, the plaintiffs argued, suggests that Section 284 should not be read to authorize assistance with larger-scale projects.[203] "Congress would not have required a description of 'any small scale construction' projects if it was, at the same time, authorizing massive, multibillion-dollar expenditures under this provision," the plaintiffs argued.[204] But even if Section 284 could be read otherwise, the plaintiffs contended that it should not be read broadly here given "the more specific and recent judgment by Congress" to appropriate only $1.375 billion for DHS border barrier construction.[205] If there is a "specific policy embodied in a later statute," they argued, that later statute "should control judicial construction of the earlier broad statute, even though [the latter statute] has not been expressly amended."[206]

Second, the plaintiffs argued that Section 284 does not authorize DOD's proposed border barrier projects because the portion of Section 284 relied on by DOD applies solely to "block[ing] drug

[196] *See infra* notes 309-320 and accompanying text.

[197] Application for a Stay Pending Appeal, Trump v. Sierra Club, No. 19A60, 2019 WL 3369425 (Mem.) (U.S. July 26, 2019).

[198] *Id*.

[199] *Id*.

[200] Sierra Club Preliminary Injunction Br., *supra* note 144, at 16-20.

[201] 10 U.S.C. § 284(h)(1)(B).

[202] *Id.* § 284(h)(2), (i)(3).

[203] Sierra Club Preliminary Injunction Br., *supra* note 144, at 17; *see also* California Preliminary Injunction Br., *supra* note 147 at 25 ("[I]t strains logic that Congress would have required DOD to provide more notice for 'small scale construction' of $750,000 or less than it would have for the $1 billion construction project of the type proposed by Defendants here.").

[204] Sierra Club Preliminary Injunction Br., *supra* note 144, at 17.

[205] *Id*. ("Here, the [Consolidated Appropriation Act's] specific policy limitation on border barrier construction must control, and bar, Defendants' attempt to use Section 284 to evade Congress's funding restrictions.").

[206] *Id*. (alterations and quotation marks omitted).

smuggling corridors."[207] By contrast, the plaintiffs argued that DOD intended to use "Section 284 . . . as a tool to create a contiguous border wall, not to address specific corridors."[208]

Third, the plaintiffs pointed to a neighboring statutory provision requiring an agency receiving DOD support "to reimburse [DOD] for that support," though DOD may waive this requirement if its support (1) "is provided in the normal course of military training or operation," or (2) "results in a benefit . . . that is substantially equivalent to that which would otherwise obtain from military operations or training."[209] The plaintiffs argued that DOD has breached this requirement—thus rendering Section 284 unavailable—because DHS had "requested support on a 'non-reimbursable basis,'" but neither of the two exceptions to the reimbursement requirement was met.[210]

Finally, the plaintiffs argued that DOD's reliance on Section 284 "violates the core principle that executive branch agencies may not mix and match funds from different accounts to exceed the funding limits Congress imposed."[211] In particular, the plaintiffs noted the general rule of appropriations law that "specific appropriations preclude the use of general ones even when the two appropriations come from different accounts."[212] Here, the plaintiffs contended, "Congress ha[d] allocated a *specific* amount of funding" for border barrier construction, precluding "the government [from] cobbl[ing] together other, *more general* sources of money to increase funding levels for that same goal."[213]

The Administration responded that the plaintiffs in *Sierra Club* and *California* had misconstrued Section 284.[214] The Administration first argued that Section 284 contemplates that DOD may assist with projects other than "small scale construction," as certain provisions in Section 284 "refer to—but are not limited to—'small scale' or 'minor' construction."[215] As to the reimbursement requirement, the Administration asserted that Section 284 itself makes the reimbursement requirement inapplicable to DOD's counterdrug activities, providing that "[t]he authority provided in this [S]ection [284] for the support of counterdrug activities . . . by [DOD] is . . . not subject to the other requirements of this chapter."[216] Next, the Administration contended that its proposed border barrier projects satisfied Section 284's "drug smuggling corridor" requirement,[217] as the proposed project areas were "known to have high rates of drug smuggling between the ports of entry."[218] Finally, the Administration rejected as "without merit" the plaintiffs' argument that its use of Section 284 violated the principle that agencies "must use the [most] specific appropriation to the exclusion of [a] general appropriation."[219] This principle, the

[207] 10 U.S.C. § 284(b)(7) (authorizing DOD to assist with "Construction of roads and fences and installations of lighting to block drug smuggling corridors across international boundaries of the United States").

[208] Sierra Club Preliminary Injunction Br., *supra* note 144, at 18.

[209] 10 U.S.C. § 277(a), (c).

[210] Sierra Club Preliminary Injunction Br., *supra* note 144, at 18.

[211] *Id*. at 19.

[212] *Id*. (quoting Nevada v. Dep't of Energy, 400 F.3d 9, 16 (D.C. Cir. 2005)).

[213] *Id*. at 20 (emphasis added). Other plaintiffs argued that Section 284 was not available to assist DHS in border barrier construction because while that provision authorizes DOD to provide "support" to another agency, DOD in this case was "completely funding the construction of fencing." California Preliminary Injunction Br., *supra* note 147 at 25.

[214] Gov't Opp. Br. (*Sierra Club*), *supra* note 168 at 17-21.

[215] *Id*. at 18 (citing 10 U.S.C. § 284(b)(4), (c)(1)(B)) (emphasis omitted).

[216] 10 U.S.C. § 284(g).

[217] *Id.* § 284(b)(7).

[218] Gov't Opp. Br. (*Sierra Club*), *supra* note 168 at 19.

[219] *Id*. at 20.

Administration contended, applies only when both sources of funding belong to a *single* agency, not where the appropriations at issue are to different agencies—that is, Section 8005 and Section 284 to DOD and $1.375 billion to DHS in its appropriations bill.[220]

However, the district court in *Sierra Club* and *California* ultimately did not resolve this issue because it concluded that Section 8005 does not authorize the transfer of funds to be used by DOD under its Section 284 authority.[221] And, with no district court ruling to review, the Ninth Circuit in *Sierra Club* also did not address this authority.[222]

Department of Homeland Security Waiver Authority

The plaintiffs in *Sierra Club* and *California* also argued that the Administration's proposed construction of a border barrier was subject to the environmental assessment requirements of NEPA,[223] and that DHS's waiver authority under IIRIRA § 102 is ineffective to waive NEPA's application for projects funded and undertaken by any other department or agency.[224] The plaintiffs noted that IIRIRA § 102's waiver authority may be used only for the "construction of the barriers and roads *under this section*."[225] Because the Administration was relying on DOD authority and appropriations (i.e., Section 284 and the Drug Interdiction Account) to construct the border barriers, the plaintiffs contended that those projects did not meet the statutory requirement and thus were not covered by an IIRIRA § 102 waiver.[226] By contrast, the Administration argued that by requiring DHS to take "such actions as may be necessary" to construct additional border barriers, IIRIRA § 102 authorized DHS to request DOD's assistance, and thus the waiver authority applied.[227]

Ruling for the Administration, the district court in *Sierra Club* and *California* held that IIRIRA § 102's waiver authority extends to border projects undertaken by another agency on behalf of DHS, and thus DHS's waivers rendered NEPA inapplicable to the challenged border barrier projects.[228] "DOD's authority under Section 284 is derivative," the court explained, as it may invoke "its authority [under Section 284] only in response to a request from [another] agency."[229] "Plaintiffs' argument would require the court to conclude that even though it is undisputed that DHS could waive NEPA's requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DOD provides support in response to a request from DHS."[230] The court rejected this approach because it found it "unlikely that Congress intended to impose

[220] *Id*.

[221] *See* Sierra Club v. Trump, 379 F. Supp. 3d 883, 927-28 (N.D. Cal. 2019).

[222] Sierra Club v. Trump, 929 F.3d 670, 686 (9th Cir. 2019).

[223] Sierra Club Preliminary Injunction Br., *supra* note 144, at 20; California Preliminary Injunction Br., *supra* note 147 at 28-29.

[224] Plaintiffs' Reply Memorandum in Support of Preliminary Injunction at 18-19Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-892), ECF 91 [hereinafter, Sierra Club Reply Br.]; Plaintiff States' Reply in Support of their Motion for Preliminary Injunction at 16-17, California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (No. 19-cv-872), ECF 112 [hereinafter, California Reply Br.].

[225] Sierra Club Reply Br., *supra* note 224 at 19 (citing IIRIRA § 102(c)) (emphasis added); California Reply Br., *supra* note 224 at 16.

[226] Sierra Club Reply Br., *supra* note 224 at 19; California Reply Br., *supra* note 224 at 16-17.

[227] Gov't Opp. Br. (*Sierra Club*), *supra* note 168 at 26.

[228] Sierra Club v. Trump, 379 F. Supp. 3d 883, 922-23 (N.D. Cal. 2019).

[229] *Id.* at 922-23.

[230] *Id*. at 923.

different NEPA requirements on DOD when it acts in support of DHS's IIRIRA § 102 authority in response to a direct request under Section 284 than would apply to DHS itself."[231] The court thus ruled that DHS's waivers applied to the challenged border projects—and all parties agreed that "the waivers, if applicable, would be dispositive of the NEPA claims."[232]

Treasury Forfeiture Fund

The state plaintiffs in *California v. Trump* also argued that the Administration's allocation of $601 million from the TFF was not authorized by 31 U.S.C. § 9705, specifically because the construction of border barriers is not an expenditure for "law enforcement activities."[233] In response, the Administration argued that the allocation of payments from the TFF is not reviewable, citing Supreme Court and Ninth Circuit decisions establishing that an agency's determination of how to allocate funds from a lump-sum appropriation is committed to the agency's discretion.[234]

The district court determined that, while the statute provided some discretion for the Secretary of the Treasury to decide what payments should be made from the TFF, the statute provided a "comprehensive list of payments for which TFF" payments must be made.[235] There were therefore sufficient standards for determining whether the Administration had transferred funds in a "statutorily *impermissible* manner."[236]

Despite finding that the use of the TFF was reviewable, the district court declined to address the merits of the state plaintiffs' arguments because the plaintiffs did not meet the other requirements for a preliminary injunction.[237] Specifically, a preliminary injunction requires the court to find that the moving party will suffer irreparable injury if the injunction is not issued.[238] But the TFF statute requires equitable sharing payments for the current and next fiscal years to be reserved before any unobligated balances were available for Strategic Support expenditures. Because the Secretary of the Treasury had reserved such amounts before the requested transfer to DHS, there was no justification for the "extraordinary" remedy of a preliminary injunction against the TFF transfer.[239]

Subsequently, on August 2, the parties in *California* stipulated to the voluntary dismissal of the plaintiffs' TFF claim.[240] According to the parties, this dismissal was based on representations by

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[231] *Id*.

[232] *Id*. The plaintiffs in *Sierra Club* and *California* did not appeal the district court's dismissal of their NEPA claims.

[233] California v. Trump, 379 F. Supp. 3d 928, 952 (N.D. Cal. 2019). The plaintiffs in *Sierra Club* did not move for a preliminary injunction on the Trump Administration's proposed use of TFF funds for border barrier construction.

[234] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 14-15, California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (No. 19-cv-872), ECF 89 (citing Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way") and Serrato v. Clark, 486 F.3d 560, 568 (9th Cir. 2007) (holding that agency allocation of funds from a lump-sum appropriation to meet permissible statutory objectives is committed to agency discretion by law)).

[235] *California*, 379 F. Supp. 3d at 953.

[236] *Id.* (emphasis in original).

[237] *Id.*

[238] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[239] *California*, 379 F. Supp. 3d at 959.

[240] Stipulated Request for Order Dismissing Without Prejudice Plaintiffs' Claims Relating to the Treasury Forfeiture Fund, California v. Trump, No. 4:19-cv-872 (N.D. Cal. Aug. 2, 2019), ECF 202 [hereinafter, TFF Stipulation]; Order Dismissing Without Prejudice Plaintiffs' Claims Relating to Treasury Forfeiture Fund, California v. Trump, No. 4:19-

the Administration that (1) its proposed use of $601 million from the TFF would not cause state and local law enforcement agencies to lose any funds they would otherwise receive from the TFF, and (2) "funds from the TFF will not be used to fund or support the construction of border barriers in any areas other than within the Rio Grande Valley and/or Laredo Sectors"—that is, areas within Texas.[241] The plaintiffs in *Sierra Club* have not dismissed their TFF claim.

Reprogramming of Funds During National Emergency

Two types of challenges have arisen to the reprogramming of military construction funds for use in border barrier construction. The first challenges the declaration of the national emergency itself, while the second challenges the invocation of authority pursuant to Section 2808.

The El Paso County *Challenge to the President's Declaration of a National Emergency*

Though the plaintiffs in *Sierra Club* and *California* did not challenge the lawfulness of President Trump's declaration of a national emergency under the NEA, the plaintiffs in *El Paso County v. Trump* did. They have charged that the President's declaration of a national emergency to make use of military construction funds for border barrier construction is unlawful because the situation at the border does not constitute an emergency within the meaning of the NEA.[242] They argue that "emergency" in the NEA must be construed in accordance with its ordinary meaning—"an unforeseen combination of circumstances requiring immediate action"—or the NEA is an unconstitutional violation of the nondelegation doctrine.[243] Under the nondelegation doctrine, they argue, Congress cannot delegate legislative authority to the executive branch without providing an intelligible principle to guide implementation of a law.[244] Plaintiffs assert that an interpretation of the NEA that leaves unfettered discretion to the President to decide what constitutes a national emergency would be an unconstitutional delegation of congressional authority.[245]

The government has responded with its own interpretation of the NEA, one that views Congress's failure to provide a definition for "national emergency" as an indication that Congress intended to avoid constricting presidential power.[246] The government also cites historical examples to demonstrate that national emergency declarations need not address circumstances that are unforeseen.[247] Moreover, it argues that courts have uniformly concluded that presidential declarations of national emergencies present a nonjusticiable political question.[248]

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cv-872 (N.D. Cal. Aug. 5, 2019), ECF 203.

[241] TFF Stipulation, *supra* note 240, at 1. Texas is not one of the plaintiff states in the *California* litigation.

[242] Plaintiffs' Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction at 19, El Paso Cty., Tex. v. Trump, No. 3:19-cv-66 (W.D. Tex. Apr. 25, 2019), ECF No. 54.

[243] *Id.*

[244] *Id.* at 26 (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[245] *Id.* at 28.

[246] Memorandum in Support of the Government's Cross-Motion to Dismiss or Summary Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction at 11-12, El Paso Cty., Tex. v. Trump, No. 3:19-cv-66 (W.D. Tex. Jun. 10, 2019) [hereinafter Gov't Mot. to Dismiss (*El Paso*)], ECF No. 95 (citing legislative history).

[247] *Id.* at 14.

[248] *Id.* at 23 (citing, among other cases, Soudavar v. Bush, 46 F. App'x 731 (5th Cir. 2002) (per curiam); Chichakli v. Szubin, 2007 WL 9711515, at *4 (N.D. Tex. June 4, 2007), *aff'd in part, vacated in part*, 546 F.3d 315 (5th Cir. 2008); United States v. Amirnazmi, 645 F.3d 564, 581 (3d Cir. 2011); United States v. Spawr Optical Research, Inc., 685 F.2d

The Supreme Court set forth the factors courts must consider in determining whether a matter raises nonjusticiable political questions in *Baker v. Carr*.[249] These factors are

- a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- a lack of judicially discoverable and manageable standards for resolving it;
- the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- an unusual need for unquestioning adherence to a political decision already made; or
- the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[250]

The Administration argues that the President's national emergency declaration fulfills "most, if not all of these factors."[251] First, the executive branch claims that Congress intentionally chose to leave the determination of a national emergency to the President with oversight by Congress, without setting forth criteria from which a court could judge the President's action.[252] Second, the Administration contends that how to combat illegal immigration is quintessentially "the sort of policy determination of a kind clearly for nonjudicial discretion."[253] Third, it argues that the policy questions regarding the exclusion of aliens are entrusted to the political branches.[254]

The district court has not yet issued a ruling in this case.

The Challenge to the Use of Section 2808 Considered in Sierra Club

The *Sierra Club* plaintiffs did not challenge the lawfulness of President Trump's declaration of a national emergency under the NEA, but they did argue that the Administration's plan to reallocate $3.6 billion in military construction funds was unlawful because 10 U.S.C. § 2808 does not authorize the construction of border barriers.[255] Though the district court declined to grant a preliminary injunction because the plaintiffs had not demonstrated irreparable harm from the Administration's as-yet undetermined plans to divert the funds,[256] the court did express doubt that the definition of "military construction" in Section 2808 encompassed border barriers.[257]

1076, 1081 (9th Cir. 1982); United States v. Yoshida Int'l, Inc., 526 F.2d 560, 573 (Cust. & Pat. App. 1975); Sardino v. Fed. Reserve Bank of N.Y., 361 F.2d 106, 109 (2d Cir. 1966); Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, Region II, 459 F.2d 676, 679 (3d Cir. 1972); Chang v. United States, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988)).

[249] 369 U.S. 186, 217 (1962).

[250] *Id.* at 217.

[251] Gov't Mot. to Dismiss (*El Paso*), *supra* note 246, at 25.

[252] *Id.*

[253] *Id.* at 26 (citing *Baker*, 369 U.S. at 217).

[254] *Id.* at 27.

[255] The state plaintiffs in *California* did not address the Trump Administration's proposed use of Section 2808 in their preliminary injunction motion.

[256] Sierra Club v. Trump, 379 F. Supp. 3d 883, 921-22 (N.D. Cal. 2019).

[257] *Id.* at 919 ("Under the circumstances, it is unclear how border barrier construction could reasonably constitute a

As noted previously, Section 2808 permits reprogramming of funds for "military construction" necessary to support the use of the Armed Forces in a national emergency. Military construction is defined to "include any construction, development, conversion, or extension of any kind carried out with respect to a military installation," which means a "base, camp, post, station, yard, center, *or other activity*" under the jurisdiction of the Secretary of a military department.[258] The Administration relied on the term "other activity" and the inexhaustive word "includes" in the definitions related to "military construction" to argue that Congress had meant the term "military construction" in Section 2808 to be construed broadly.[259] In other words, the government interpreted the definition of military construction to include any sort of construction related to a military installation. This would include any "other activity under the jurisdiction of the Secretary of a military department," which could conceivably include border barriers constructed by DOD.[260]

The court in *Sierra Club* rejected that view, explaining that "the critical language of Section 2801(a) is not the word 'includes,' it is the condition 'with respect to a military installation.'"[261] Further, the court rebuffed the Administration's reliance on the term "other activity."[262] That language, the court explained, is not unbounded but should be interpreted in context of the words that immediately precede it—"a base, camp, post, station, yard, [and] center."[263] Applying the rule of statutory interpretation that "a word is known by the company it keeps,"[264] the court concluded that "other activity" refers to similar discrete and traditional military locations.[265] The court did "not readily see how the U.S.-Mexico border could fit this bill."[266]

The court likewise employed the rule of interpretation that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[267] The court explained that if Congress "had . . . intended for 'other activity' . . . to be so broad as to transform literally any activity conducted by a Secretary of a military department into a 'military installation,' there would have been no reason to include a list of specific, discrete military locations."[268]

Thus, viewing the term "in context and with an eye toward the overall statutory scheme," the court could not conclude that "Congress ever contemplated that 'other activity' has such an unbounded reading that it would authorize Defendants to invoke Section 2808 to build a barrier on the southern border."[269] However, because the issue was not yet ripe for decision, the district

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'military construction project' such that Defendants' invocation of Section 2808 would be lawful.").

[258] 10 U.S.C. § 2801.

[259] *Sierra Club*, 379 F. Supp. 3d at 919.

[260] *See id.* (explaining the interaction between 10 U.S.C. § 2801(a) (military construction) and § 2801(c)(4) (military installation)).

[261] *Id.* at 920.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.* at 921.

[266] *Id.*

[267] *Id.* (citing Wash. State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003)).

[268] *Id.*

[269] *Id.*

court did not enjoin the use of military construction funds for border barrier construction. And because the district court did not rule on this issue the Ninth Circuit did not address it either.[270]

Procedural Barriers to Lawsuits Challenging Border Barrier Funding

Aside from the merits of the Trump Administration's funding initiatives, the various legal challenges brought by states, private individuals, and the House of Representatives also involve two threshold requirements that must be satisfied by any party seeking to maintain a lawsuit in federal court. A plaintiff must first show that he has suffered a "concrete" and "particularized" injury that was caused by the challenged government action—the so-called "standing" requirement.[271] A plaintiff must also have a legal right (i.e., a "cause of action") to enforce whatever provision of federal law is at issue, and he must also fall within the "zone of interests" meant to be protected by that law.[272]

These procedural requirements have presented obstacles to those opposing the Trump Administration's funding initiatives. In *U.S. House of Representatives v. Mnuchin*, the U.S. District Court for the District of Columbia held that the House of Representatives lacked standing to challenge the Trump Administration's actions.[273] And though the district court in *Sierra Club* and *California* (and the Ninth Circuit in *Sierra Club*) concluded that the plaintiffs in those cases—nonprofit organizations and state plaintiffs—satisfied these procedural requirements, the Supreme Court ultimately stayed the district court's injunction because "the Government ha[d] made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting [Secretary of Defense's] compliance with Section 8005."[274]

In staying the permanent injunction in the *Sierra Club* litigation, the Supreme Court cleared the way for the Trump Administration to use funds transferred under Section 8005 to construct border barriers while the Ninth Circuit considers the Administration's appeal of the permanent injunction. However, the Court's order did not address the merits of Section 8005 or any of the other statutory authorities at issue in that litigation.[275]

Standing

Article III of the U.S. Constitution "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'"[276] This limitation has been interpreted to require that every person or entity bringing a claim in federal court must establish "standing" to sue—that is, establish that he has suffered an injury that (1) is "concrete, particularized, and actual or imminent"; (2) "fairly traceable to the challenged action"; and (3) would be "redressable by a favorable ruling."[277] The Supreme Court has explained that this standing requirement "is built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the

[270] Sierra Club v. Trump, 929 F.3d 670, 686 (9th Cir. 2019).

[271] *See infra* notes 276-280 and accompanying text.

[272] *See infra* notes 297-303 and accompanying text.

[273] U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 23 (D.D.C. 2019).

[274] Order on Application for Stay, Trump v. Sierra Club, No. 19A60, 2019 WL 3369425 (Mem.) (U.S. July 26, 2019).

[275] *Id*.

[276] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (quoting U.S. CONST. art. III, § 2).

[277] *Id*. at 409.

political branches."[278] Separation-of-powers concerns are heightened where a court is being asked to deem the actions of one of the other two branches of government unconstitutional,[279] and especially so when a suit involves a dispute between the other two branches of the federal government.[280]

The plaintiffs challenging the Trump Administration's funding initiatives argued that they satisfied Article III's standing requirement. In *Sierra Club* and *California*, the Trump Administration conceded that constructing border barriers would cause a sufficient injury for Article III purposes, but it argued that this injury did not confer standing to challenge the Administration's use of Section 8005 to transfer funds.[281] Rejecting that argument, the district court in *Sierra Club* and *California* held that the plaintiffs had established an "actual or imminent" injury[282] that was "fairly traceable" to the Trump Administration's proposed transfer of money.[283] The court explained that the supposedly distinct actions of (1) transferring funds and (2) using those transferred funds to construct border barriers were both part of a single objective—the construction of border barriers.[284] And because a sufficiently concrete injury followed from the attainment of that objective, the plaintiffs had standing to challenge government action that was part of the chain of events leading to the injury.[285]

By contrast, the federal district court presiding over the U.S. House of Representatives' lawsuit held that the House of Representatives lacks standing because the House's asserted injury—"an institutional injury to [Congress's] Appropriations power"[286]—was not the kind of injury that supports Article III standing.[287] The district court relied on the Supreme Court's decision in *Raines v. Byrd*,[288] which held that Members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act.[289] While Article III requires a "particularized" injury—that is, an injury that "affect[s] the plaintiff in a personal . . . way"[290]—the Court in *Raines* determined that the Members of Congress had asserted "a type of *institutional* injury (the diminution of legislative power)" that did not belong to the Members individually.[291] As a result,

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[278] *Id*. at 408.

[279] *Id*.

[280] See CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Wilson C. Freeman and Kevin M. Lewis.

[281] Sierra Club v. Trump, 379 F. Supp. 3d 883, 906 (N.D. Cal. 2019).

[282] The plaintiffs in *Sierra Club* alleged that the construction of border barriers would (among other things) interfere with their recreational, aesthetic, and environmental-safety interests. Complaint for Declaratory and Injunctive Relief ¶¶ 11-19, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 19-cv-892-HSG). The state plaintiffs in *California* asserted that the Administration's funding initiatives would divert funds that would otherwise flow to state law enforcement and other state entities and otherwise harm the state economies and environments. Complaint for Declaratory and Injunctive Relief ¶¶ 47-193, California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019) (No. 19-cv-872).

[283] *Sierra Club*, 379 F. Supp. 3d at 905-07.

[284] *Id.* at 906 ("[I]t is not credible to suggest that the 'object' of the Section 8005 reprogramming is anything but border barrier construction, even if the reprogrammed funds make a pit stop in the drug interdiction fund.").

[285] *Id.* (citing Mendia v. Garcia, 768 F.3d 1009, 1012 (9th Cir. 2014)).

[286] U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 13 (D.D.C. 2019).

[287] *Id*. at 23.

[288] 521 U.S. 811 (1997).

[289] *Id*. at 813-14, 829-30.

[290] *Id*. at 819.

[291] *Id*. at 821 (emphasis added); *id*. at 829.

those Members were unable to show "a sufficient[ly] 'personal stake' in th[e] dispute."[292] Similarly, the district court in *Mnuchin* noted that the appropriations power is held by Congress *as a whole*, not by each chamber of Congress separately.[293] Moreover, as had the Court in *Raines*,[294] the *Mnuchin* court supported its conclusion by noting the absence of historical examples of federal courts being asked to adjudicate lawsuits "brought on the basis of claimed injury of official authority or power."[295]

The U.S. House of Representatives appealed the district court's decision to the D.C. Circuit, but the court of appeals has not yet issued a decision.[296]

Cause of Action and Zone of Interests

Even if a plaintiff establishes standing, the party must also be able to identify a source of law that authorizes the party to sue—also known as a "cause of action."[297] In some instances, Congress has included a cause of action within a federal law to enable those injured by a violation of that law to obtain judicial relief.[298] Separately, the Administrative Procedure Act contains a more general cause of action, authorizing "person[s] suffering legal wrong because of agency action" to challenge that action in federal court.[299] Finally, even absent a statutory cause of action, a plaintiff may still be authorized to sue based on "[t]he power of federal courts of equity to enjoin unlawful executive action."[300] Moreover, in order to show that a particular cause of action applies to him, a plaintiff must (generally) show that "[t]he interest he asserts [is] 'arguably within the zone of

[292] *Id*. at 830.

[293] U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 16-17 (D.D.C. 2019).

[294] 521 U.S. at 826-28.

[295] *Mnuchin*, 379 F. Supp. 3d at 15-16. The court also concluded that the Supreme Court's decision in Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015) did not support the House's standing. *Id*. at 14, 19-20, 22. In particular, the district court noted that the Supreme Court in *Arizona State Legislature* stated that its decision "does not touch or concern the question whether Congress has standing to bring a suit against the President." *Id*. at 14, 15 n.3 (quoting *Arizona State Legislature*, 135 S. Ct. at 2665 n.12). The district court also noted that while the Supreme Court in *Arizona State Legislature* relied on the fact that the voter initiative there would "completely nullify any vote by the legislature, now or in the future," the House of Representatives still possesses "institutional remedies" that it can use to "combat the Administration's planned spending." *Id*. at 20 (quoting *Arizona State Legislature*, 135 S. Ct. at 2665).

[296] No. 19-5176 (D.C. Cir.). After the district court issued its decision, the Supreme Court decided Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019). In that case, the Supreme Court held that the Virginia House of Delegates—as opposed to the Commonwealth of Virginia itself or the legislature as a whole (House and Senate)—did not have standing to challenge a district court ruling that certain legislative maps constituted an unconstitutional racial gerrymander. *Id*. at 1951-56. The Court emphasized that in *Arizona State Legislature* the Arizona House and Senate were determined to have standing because *both* chambers were seeking to defend the legislature's interest in redistricting, whereas only the Virginia House of Delegates sought to defend the challenged legislative map. *Id*. at 1953-54. This decision may further limit the ability of a single chamber of a legislature to vindicate an interest held by the legislature as a whole.

[297] Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.").

[298] *See, e.g.*, 15 U.S.C. § 1125(a)(1) (authorizing "any person who believes that he or she is or is likely to be damaged" to sue to prevent certain trademark-related conduct).

[299] 5 U.S.C. § 702.

[300] Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384-85 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action").

interests to be protected or regulated by the statute' that he says was violated."[301] This "zone of interests" requirement "applies to all statutorily created causes of action,"[302] and its purpose is to "foreclose[] suit . . . when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit within the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"[303]

Before concluding that the Trump Administration cannot use Section 8005 to transfer funds for border barrier construction, the district court in *Sierra Club* and *California* (and the Ninth Circuit on appeal in *Sierra Club*) concluded that the plaintiffs in these cases had satisfied these threshold procedural requirements. The court ruled that the plaintiffs' ability to bring their suits was based on the federal courts' equitable power to enjoin unlawful executive action.[304] In so doing, the district court also determined that the "zone of interests" requirement does not apply to claims resting on an equitable (as opposed to a statutory) cause of action.[305] Reviewing the district court's ruling in *Sierra Club*, the Ninth Circuit agreed that the plaintiffs had an equitable cause of action to challenge the lawfulness of executive action,[306] and determined that they also had a cause of action under the Administrative Procedure Act.[307] The Ninth Circuit expressed "doubt[s]" that the zone-of-interests test applied to equity-based claims, but determined that the plaintiffs satisfied any zone-of-interest requirement that might apply to either of these causes of action.[308]

The Supreme Court's Order

Though the district court and the Ninth Circuit concluded that the plaintiffs in *Sierra Club* and *California* were proper parties to challenge the Trump Administration's intended use of Section 8005, the Supreme Court issued an order staying the district court's injunction.[309]

After the Ninth Circuit declined to stay the district court's permanent injunction, the Trump Administration asked the Supreme Court to do so,[310] and on July 26, 2019, the Supreme Court issued an order staying the permanent injunction.[311] Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh voted to grant the stay in full, while Justice Breyer indicated that he would have granted the stay in part.[312] The Court's order stated that "[a]mong the reasons" for staying the injunction, "the Government ha[d] made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting [Secretary of Defense's]

[301] Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

[302] Lexmark Int'l Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014).

[303] *Patchak*, 567 U.S. at 225 (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

[304] Sierra Club v. Trump, 379 F. Supp. 3d 883, 909 (N.D. Cal. 2019) ("Once a case or controversy is properly before a court, in most instances that court may grant injunctive relief against executive officers to enjoin *ultra vires* acts—that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts.").

[305] *Id*. at 910 ("But where a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite.").

[306] Sierra Club v. Trump, 929 F.3d 670, 694-98 (9th Cir. 2019).

[307] *Id*. at 698-99.

[308] *Id*. at 700-04.

[309] Order on Application for Stay, Trump v. Sierra Club, No. 19A60, 2019 WL 3369425 (Mem.) (U.S. July 26, 2019).

[310] *See* Application for a Stay Pending Appeal, Trump v. Sierra Club, No. 19A60 (U.S. July 12, 2019).

[311] *Sierra Club*, 2019 WL 3369425, at *1.

[312] *Id*.

compliance with Section 8005."[313] The Court's order further stated that the stay would continue "pending disposition of the [Administration's] appeal in the [Ninth Circuit] and disposition of the Government's petition for a writ of certiorari,"[314] and will "terminate automatically" upon the Court's denial of a petition for certiorari submitted by the Administration.[315]

Justices Ginsburg, Sotomayor, and Kagan voted to deny the request for a stay.[316] Justice Breyer explained that he would have "grant[ed] the Government's application to stay the injunction only to the extent that the injunction prevents the Government from finalizing the contracts [for border barrier construction] or taking other preparatory administrative action," but would have left the injunction "in place insofar as it precludes the Government from disbursing funds or beginning construction."[317] Justice Breyer explained that granting a stay of the injunction in full would irreparably harm the plaintiffs, while denying a stay of the injunction would irreparably harm the government because all funds not obligated by the end of the fiscal year would become unavailable.[318] According to Justice Breyer, staying the injunction to allow the Trump Administration to "finaliz[e] contracts or tak[e] other preparatory administration action" for constructing border barriers would "avoid harm to both the Government and [the plaintiffs] while allowing the litigation to proceed."[319]

By staying the district court's permanent injunction, the Supreme Court enabled the Trump Administration to use funds transferred under Section 8005 to construct border barriers, at least during the pendency of the litigation in the *Sierra Club* and *California* cases. However, the Court's order did not address the merits of Section 8005 or any of the other statutory authorities at issue in that litigation. Moreover, the Court's order makes clear that it applies only at "this stage" of the litigation and therefore is not binding on the Ninth Circuit as it considers the Administration's appeal of the permanent injunction.[320] As a result, the Court's order does not prevent the Ninth Circuit in *Sierra Club*—which is currently considering the Trump Administration's appeal from the permanent injunction—from concluding that the *Sierra Club* plaintiffs have a cause of action to enforce Section 8005. Nor does it prevent the district court in *Sierra Club* and *California* from ruling on the other funding authorities (including Section 284) and, perhaps, enjoining the Trump Administration from using those authorities to construct border barriers.

Considerations for Congress

Pending Legislation

The Supreme Court has said that the Appropriation Clause's "fundamental and comprehensive purpose . . . is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants."[321] Consequently, Congress has the

[313] *Id*.

[314] *Id*.

[315] *Id*.

[316] *Id*. (Ginsburg, Sotomayor, and Kagan, JJ, voting to deny the application).

[317] *Id*. at *1-2 (Breyer, J. concurring in part and dissenting in part).

[318] *Id*. at *1.

[319] *Id*. at *2.

[320] *Id*. at *1 (opinion of the Court).

[321] OPM v. Richmond, 496 U.S. 414, 427–28 (1990).

power, subject to presidential veto, to enact legislation either appropriating more funds for border barrier construction, to limit the extent that the Administration's proposed funding sources may be used for border barrier construction, or to prohibit the Administration from obtaining additional funding through existing mechanisms.

As part of the FY2020 appropriations process, the 116th Congress has considered examples of provisions limiting the expenditure of annually appropriated funds for border barrier construction, though none have yet been enacted. Section 8127 of Division C of H.R. 2740, the DOD Appropriations Act for FY2020, as passed by the House on June 19, 2019, would generally provide that "None of the funds appropriated or otherwise made available by this Act or any prior Department of Defense 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 this provision were enacted it would likely render the litigation over the Northern District of California's injunction moot, as the use of FY2019 funds for the purposes sought by the Administration would be expressly prohibited. On September 10, 2019, a Senate version of the DOD Appropriations Act for FY2020 was reported out of the Senate Appropriations Committee Subcommittee on Defense without similar restrictions.[322]

Separately, House-passed H.R. 2740 would also limit the use of general transfer authority under either Sections 8005 or 9002 from being used to transfer funds into or out of the DOD Drug Interdiction Account, and the bill would reduce the overall amount of general transfer authority available under Section 8005 from $4 billion to $1 billion. The House-passed National Defense Authorization Act for FY2020 includes similar limitations.[323] Given their prospective nature, these types of provisions may effectively bar the Administration from making a similar transfer using FY2020 funds, but would not appear to have any impact on the pending litigation. The Senate's version of the FY2020 NDAA, S. 1790, does not contain similar restrictions. However, Section 2906 of that bill would authorize $3.6 billion for military construction for overseas contingency operations to be used to replenish military construction accounts that were diminished to fund border barrier construction pursuant to an NEA declaration and Section 2808.

In February 2019, The Administration requested $5 billion in border barrier funding for FY2020 to support the construction of approximately 206 miles of border barrier system. The House Appropriations Committee has responded to this by providing no funding for border barriers in H.R. 3931—its FY2020 DHS Appropriations bill.[324] In addition, the House Appropriations Committee-reported bill restricts the ability to transfer or reprogram funds for border barrier construction.[325] That bill states in Section 227 that, aside from appropriations provided for such purpose in the last three fiscal years, "no Federal funds may be used for the construction of physical barriers along the southern land border of the United States during fiscal year 2020."[326] Furthermore, Section 536 of that bill proposes to rescind $601 million from funding appropriated for border barriers in FY2019[327]—thus reducing the FY2019 funding available by the amount

[322] *SUMMARY: Defense Appropriations Subcommittee Advances FY2020 Bill*, SENATE APPROPRIATIONS COMMITTEE (MINORITY) (Sept. 10, 2019), https://www.appropriations.senate.gov/news/minority/summary-defense-appropriations-subcommittee-advances-fy2020-bill.

[323] H.R. 2500, §§ 1001, 1046. The Senate's version of the FY2020 NDAA, S. 1790, does not contain similar restrictions.

[324] H.R. 3931 (116th Cong.).

[325] *Id.* § 227.

[326] *Id*.

[327] *Id*. § 536.

pledged from the Treasury Forfeiture Fund. The Senate Appropriations Committee has yet to mark up its annual appropriations act for DHS for FY2020 as of this date.

Comptroller General Opinion

Committees and Members of Congress have also requested legal opinions from the Comptroller General of the United States, head of the Government Accountability Office (GAO), regarding questions of appropriations law and executive agencies' compliance with such laws.[328] Though GAO's decisions are not binding on federal courts,[329] those decisions are sometimes given consideration by reviewing courts because of GAO's expertise in appropriations law and its role as the "auditing agent of Congress."[330]

On September 5, 2019, in response to such a request from Senate Appropriations Committee Vice Chairman Leahy, Subcommittee on Defense Vice Chairman Durbin, and Subcommittee on Military Construction, Veterans Affairs, and Related Agencies Ranking Member Schatz, the Comptroller General issued a legal opinion concluding that the Administration's use of Section 8005 of the 2019 DOD Appropriations Act and 10 U.S.C. § 284 to fund border barrier construction is lawful.[331] Like the Northern District of California and the Ninth Circuit decisions, GAO's analysis of the transfer authority focused primarily on (1) whether the use of the funds for border barrier construction was an unforeseen military requirement, and (2) whether Congress had denied funds for the item to which funds were being transferred.[332]

GAO agreed with the Administration's argument that the relevant "military requirement" for purposes of Section 8005 was the construction of border barriers by DOD pursuant to its Section 284 authority, not the construction of border barriers generally.[333] According to GAO, this military requirement was "unforeseen" because it was not until DHS requested assistance from DOD to construct border barriers—well after the President's budget requests—that the need for DOD assistance became known. Consequently, GAO concluded that DHS's request for assistance constituted an unforeseen military requirement that made available the transfer authority under Section 8005.[334]

GAO next addressed whether the construction of border fencing had been "denied by the Congress."[335] GAO began by noting that this language was not defined by Section 8005 or

[328] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1064SP Procedures and Practices for Legal Decisions and Opinions at 6 (Sept. 2006), https://www.gao.gov/assets/210/203101.pdf.

[329] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-463SP PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-13 (2016) ("A decision regarding an account of the government . . . is not binding on a private party who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had.").

[330] *E.g.*, Pacific Legal Foundation v. Goyan, 664 F.2d 1221, 1227 (4th Cir. 1981) ("The opinion of the Comptroller General is, of course, entitled to weight as he is the auditing agent of Congress. However, when his opinion collides with that of the courts, the latter must govern.").

[331] U.S. GOV'T ACCOUNTABILITY OFFICE, *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862 at 1 (Sept. 5, 2019), https://www.gao.gov/products/B-330862. In the same opinion, GAO also concluded that the waiver of environmental statutes by DHS pursuant to IIRIRA § 102 was lawful. *Id*. at 15-16.

[332] *Id.* at 7.

[333] *Id.*

[334] *Id.* at 8 ("While border fencing in general was foreseen, it was not foreseen that DOD would fund and construct border fencing pursuant to DOD's authority in section 284.").

[335] *Id*. at 9-11.

elsewhere in the FY2019 DOD Appropriations Act.[336] Relying on the "ordinary meaning" of the term "deny" as well as previous decisions by the Comptroller General, GAO concluded that a denial of funds for purposes of Section 8005 required that Congress "actively refuse" funds for an item, rather than merely fail to appropriate the full amount requested for that item.[337] Applying this standard, GAO asserted that it could not identify any statutory provision that prohibited DOD from using funds to build border barriers pursuant to its Section 284 authority. Accordingly, GAO agreed with the Administration that Congress had not denied funds for that purpose, within the meaning of Section 8005.[338]

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[336] *Id.* at 9.

[337] *Id.* (citing In the Matter of LTV Aerospace Corp., 55 Comp. Gen. 307, 318 (1975) (noting that "when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language").

[338] *Id*. at 11.