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Legal Sidebar

The Texas Border Barrier Litigation: Implications for Appropriations Law

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A little-noted rule of appropriations law and an obscure provision of Congress's annual appropriations acts have assumed prominent roles in the Trump Administration's effort to accelerate border-barrier construction using Department of Defense (DOD) funding. In December 2019, Judge David Briones, U.S. District Judge for the Western District of Texas at El Paso, entered an injunction in *El Paso County v. Trump*, barring DOD from using military construction appropriations "beyond the $1.375 billion" expressly appropriated to Customs and Border Protection (CBP) in the Fiscal Year (FY) 2019 Consolidated Appropriations Act (CAA) "for border wall construction." Judge Briones reasoned that Congress's specific limit on funds available to CBP for a border wall precluded use of more general DOD appropriations, and that an appropriations rider barred DOD from funding a border wall using authority outside of an appropriations act. While a divided panel of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) recently stayed the district court's injunction pending appeal on the ground that the plaintiffs may lack the constitutional standing required to sue, the Fifth Circuit has not yet resolved the appeal or grappled with the important and unsettled questions of appropriations law posed by Judge Briones' decision. This Sidebar compares Judge Briones' approach to determining appropriations availability with that of the Government Accountability Office (GAO), examines statutory interpretation questions posed by the rider, and notes considerations for Congress.

Background

As discussed in an earlier CRS Report, the Administration's effort to accelerate border barrier construction invokes several statutes. A central issue in *El Paso County* was the significance of the CAA's appropriation of funds to the CBP for border wall construction.

In February 2019, Congress enacted the CAA, expressly appropriating $1.375 billion to CBP "for the construction of primary pedestrian fencing" in the "Rio Grande Valley Sector" of south Texas. This amount was far less than the Administration's $5.7 billion request for CBP. Accordingly, the President declared a national emergency at the southern border requiring use of the armed forces and directed DOD to join in border barrier construction. In September 2019, DOD told Congress that to free up $3.6 billion for 11 border barrier projects at sites throughout the southwest, it would defer 127 previously authorized

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military construction projects set to be funded with amounts appropriated over the last four fiscal years. DOD justified this action by pointing to 10 U.S.C. § 2808 (Section 2808), which, upon declaration of a national emergency, allows DOD to "undertake military construction projects" that are "not otherwise authorized by law" up to "the total amount" of unobligated funds appropriated for military construction.

On October 11, 2019, Judge Briones ruled that the President's declaration was unlawful. On December 10, 2019, Judge Briones decided that the plaintiffs were entitled to an injunction barring DOD "from using [Section] 2808 funds beyond the $1.375 billion" in the CAA "for border wall construction."

Does The Declaration Violate The CAA?

Judge Briones first noted that "the CAA specifically appropriates $1.375 billion for border-wall expenditures" while DOD proposed to use "funds appropriated for other more *general* purposes," including military construction. "[DOD's] plan therefore flouts the cardinal principle that a specific statute controls a general one and violates the CAA." To support this ruling, Judge Briones chiefly relied on the D.C. Circuit's 2005 decision in *Nevada v. Department of Energy*. Nevada claimed a right to a Department of Energy (DOE) grant for the costs of certain licensing proceedings. Congress provided $190 million for DOE's FY 2004 "nuclear waste disposal" account and roughly $991 million for its "defense environmental services" account. Congress stipulated that of the funds in this latter account, "$1,000,000 shall be provided to the State of Nevada" to "participate in licensing activities." Given this structure, the D.C. Circuit reasoned that "the fact that Congress appropriated $1 million expressly for Nevada indicates that is all Congress intended Nevada to get in FY04 from whatever source."

In ruling that a specific appropriation for a given expense bars use of a more general appropriation, the D.C. Circuit's *Nevada* decision compared a single agency's different appropriation accounts. In the single-agency context, an agency is limited to the more specific of its appropriations because, in the words of the D.C. Circuit, the fact the agency received a specific account for a given purpose "indicates that is all Congress intended" the agency would get. Border barrier funding arguably presents a different question, though, which is whether one agency's appropriations are available for a given expense when a different agency receives a more specific appropriation for the same or similar purpose. No other court has examined this question, but the GAO has on three occasions. Courts usually view GAO as offering "an expert opinion," resulting from its duty to investigate the use of public money on behalf of Congress or the appropriations committees and advise agencies on whether the law allows a given expense.

GAO's three relevant decisions span a sixty-year period. In 1959, GAO opined that the Navy could not use its FY 1959 "shipbuilding and conversion" account to dredge a channel and harbor, even though the Navy asserted (without dispute) that it would need to dredge to access nuclear submarines then under construction. GAO held that the Army Corps of Engineers' (the Corps) role in channel dredging precluded the Navy proposal. By contrast, in 1976, GAO decided that the Immigration and Naturalization Service (INS) could use its salaries-and-expenses account to repair fences owned by other federal agencies, even though the other agencies also had appropriations that could be used for fence repair. In 2019, GAO concluded that DOD could use its drug interdiction and counter-drug activities account "for construction of fences at the border" despite CBP's express $1.375 billion appropriation for that purpose.

In these cases, GAO's analysis did not appear to turn on whether the appropriation of the agency proposing an expenditure used language that was more specific than the account of GAO's comparison agency. For example, Congress authorized the Corps to dredge the channel in 1954 but never appropriated funds for the Corps to do so. Thus, there was no Corps appropriation to which comparison could be made. Rather, GAO's decisions appear to turn on whether an expenditure would result in an agency engaging in an activity where express authorization had been conferred only on another agency. GAO approved of INS repairing fences as consistent with its "duty to control and guard the boundaries and borders against" unlawful entry. But GAO disapproved of Navy dredging because the Navy had no statutory authority like

the Corp's express 1954 authorization. Navy dredging would "unlawfully circumvent[]" the "legislative policy of the Congress in authorizing and appropriating funds to the Corps" for such works.

GAO's analysis appears to recognize that Congress may decide to authorize two or more agencies to pursue the same or similar function. In such cases, Congress's later decision to appropriate funds to different agencies in more or less specific terms may not, in and of itself, reflect an intent to deny appropriations for the agency receiving the more generally phrased account. On the other hand, under GAO's analysis an agency should not use its appropriations for a function that it not only lacks express authorization to perform but which has been specifically tasked to a different agency. If applied by the Fifth Circuit, GAO's method of comparing appropriations across agencies may require an answer to a question that Judge Briones did not reach: whether DOD's 11 border barrier projects fit the statutory definition of "military construction" (an issue explored in more detail in other CRS products).

Does Section 739 Prohibit Use of Section 2808 Authority?

Judge Briones next held that DOD's funding plan violated Section 739 of the CAA, which states that no appropriations "may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request." Judge Briones concluded that DOD's plan violated this prohibition, because it would increase funding for the "singular project" of building a "wall along the southern border." And while Section 739 allows funding changes "made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act," Judge Briones ruled that DOD's proposal did not fit this exception, because Section 2808 was not enacted in an appropriations act.

No other court or GAO has interpreted Section 739, but the provision is not a recent innovation. Congress has enacted such language in each appropriations cycle since FY 2014. It first appeared as Section 743 of the FY 2014 Financial Services and General Government (FSGG) Appropriations Act. In FY 2015, the provision assumed its current form, extending for the first time to funding increases as well as funding reductions. Congress reenacted Section 739 in the FY 2020 FSGG Appropriations Act.

Section 739 raises two important questions with which the Fifth Circuit may need to wrestle, should it reach the merits of the Government's appeal. First, the Fifth Circuit may have to decide how to interpret Section 739's use of the phrase "program, project, or activity." One approach would be to use ordinary meaning, which is how a court usually construes a statute's undefined terms. Judge Briones took this approach, referring to a dictionary to define the term "project" as a "specific plan or design." On this basis, Judge Briones concluded that there was only a "singular project," the "[c]onstruction of a wall along the southern border" by the "Executive Branch." However, courts do not always read a statute's undefined terms using ordinary meaning alone. The Government contends that the phrase "program, project, or activity" has a special meaning that cannot be discerned from dictionaries. As part of its duty to establish terms used in the appropriations process, GAO has defined the phrase to refer to an "element" of a "budget account" that is set forth in committee or conference reports and agency budget justifications.

Section 739's scope may be broad or narrow depending on which approach the Fifth Circuit takes. Because Judge Briones defined construction "of a wall along the southern border" by the executive branch as a "singular project," he found that CBP and DOD's efforts were pieces of a unified whole such that any funding from DOD would necessarily be a funding increase. By contrast, if the Fifth Circuit reads "program, project, or activity" to refer to the elements of a budget account, it may find that DOD's plan does not change the funding proposed for CBP's border-wall-related program, project, or activity.

Second, the Fifth Circuit may confront arguments requiring it to decide how Section 739 interacts with an agency's other funding authorities. Judge Briones read Section 739 to permit changes in funding for a program, project, or activity if the change "*is authorized by* the reprogramming or transfer provisions of an appropriations Act." Thus, Judge Briones read the statutory phrase "made *pursuant to*" as permitting only changes made under authority in an appropriations act. On this reading, even if Section 2808, itself,

would permit the funding change, Section 739 arguably would not because Section 2808 was not enacted in "an appropriations Act." This is one possible reading. Black's Law Dictionary defines "pursuant to" to mean, among other things, "as authorized by" or "under." However, the Government generally contends that Section 739 should not be read to effectively repeal DOD's Section 2808 authority (assuming Section 2808 would otherwise apply), because Congress did not provide a clear enough statement in the CAA that repeal was its intent. Courts regard it as a "cardinal rule" that "repeals by implication" are disfavored. If the Fifth Circuit decides that Section 2808, itself, would allow the funding change, it may ask whether Section 739 should be read to preserve this authority. Though the Government has not yet offered a textual analysis of Section 739's exception clause, Black's Law Dictionary recognizes that "pursuant to" may mean "in compliance with." On this reading, Section 739 may only require that an agency follow applicable transfer or reprogramming provisions when changing funding for a program, project, or activity.

Beyond fitting dictionary definitions, both of these approaches have support in broader legal context. On the one hand, reading the phrase "pursuant to" to mean "as authorized by" could clash with the CAA's reference to "reprogramming . . . provisions." The Supreme Court has explained that an agency's authority to reallocate funds within an account (i.e., to engage in reprogramming) derives from the *absence* of relevant limitations in an appropriations act. "[W]here Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." The reprogramming provisions of an appropriations act typically limit this authority to reallocate funds, such as by making reprogrammed funds available for obligation only after advance notice to Congress. Reading Section 739 to permit funding changes "authorized by" a type of provision that does not, itself, empower an agency to make funding changes may present an odd fit. On the other hand, reading the phrase "pursuant to" as meaning "in compliance with" could deprive Section 739 of independent effect. Courts presume that "each word Congress uses is there for a reason" and will read statutes to give "effect, if possible, to every clause and word." Regardless of whether Congress adopts language akin to Section 739, agencies are required to comply with the separate transfer or reprogramming provisions of an appropriations act. There arguably would be no reason for Congress to adopt Section 739 if all that it requires is compliance with other provisions of an appropriations act.

Considerations for Congress

On January 8, 2020, a divided panel of the Fifth Circuit stayed Judge Briones' injunction pending appeal, deciding it was substantially likely that the plaintiffs lack the constitutional standing required to litigate their case. (An order granting a stay is a panel's prediction of how the appellate court will ultimately decide the appeal, after full briefing and any oral argument.) The panel also denied a request to expedite the appeal. A recent press report states that, during FY 2020, the Administration will again invoke Section 2808 to devote another $3.7 billion in military construction funds to border wall construction, bringing the two-year total to $7.1 billion. The Fifth Circuit is unlikely to finally rule on the Government's appeal until Congress's review of FY 2021 appropriations is well underway. In the meantime, while Judge Briones' injunction no longer constrains DOD's Section 2808 authority, the decision raises unsettled questions that may affect—even if informally—how agencies determine the availability of an appropriation for a purpose that is also commonly performed by another agency. Judge Briones's framing of the specific-over-general rule is not limited to border barrier expenses. Similarly, Section 739 poses interpretation questions that, given its scope as a "government-wide" provision, potentially affect any agency with funding flexibilities that were not enacted in an

appropriations act. Congress may wish to draft its FY 2021 appropriations bills with these questions in mind by, for example, clarifying Section 739's relation to other funding flexibilities.

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