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Legal Sidebar

Border Barrier Litigation: Open Questions for Department of Defense Transfer Authority

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The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) recently added to the growing body of case law on the Trump Administration's decision to fund border barrier construction using Department of Defense (DOD) appropriations. Over a dissent, the Ninth Circuit ruled in two appeals that DOD acted contrary to law when it used its transfer authority to shift $2.5 billion, previously appropriated for objects such as personnel expenses, to fund border barriers. DOD may transfer funds only for "unforeseen military requirements" and not where the "item for which funds are requested has been denied by the Congress." The Ninth Circuit held that DOD violated both limitations. (The Ninth Circuit has not yet decided separate appeals challenging trial court decisions that declared unlawful DOD's use of military construction appropriations to fund other border barrier projects.)

The Ninth Circuit's decisions cover broad ground, but one holding concerns the scope of DOD's transfer authority and in particular the limitations on that authority. The majority interpreted the limitations by giving primary weight to the statute's ordinary meaning, which it applied in the context of legislative and executive actions spanning several years. The dissent gave the limitations a more specialized meaning applied only in the context of the DOD's FY2019 appropriations process. Given a prior Supreme Court order entered in one of the two appeals, construction funded through the challenged transfers may continue for now despite the Ninth Circuit's decisions. But the decisions are significant all the same, as they raise important questions for future agency use of funding flexibilities. This Sidebar examines the Ninth Circuit's dueling interpretations of DOD's transfer authority and notes questions raised by the prevailing view, both for DOD's transfer authority and, perhaps, for other agencies' funding flexibilities.

Background

In September 2018, Congress enacted the Department of Defense Appropriations Act, 2019. Congress's funding decision followed DOD's submission, in March 2018, of budget justification materials explaining the particulars of the Administration's DOD funding request. As is typical, Congress provided DOD transfer authority, which is authority to shift budget authority from one appropriation to another. DOD received general transfer authority to shift funds between the "appropriations or funds" that form its base budget (generally covering regular DOD expenses other than military construction), and special transfer authority for overseas contingency operations funds (generally for particular military operations abroad).

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Congress attached "terms and conditions" to both authorities. DOD may not use general or special transfer authority unless for "higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Thus, the statute requires comparison between Congress's appropriations decision and DOD's later proposal to augment one appropriation at the expense of another. But it does not define any of the key terms used in this comparison, including "unforeseen," "item," or "denied."

For certain other agencies, including the Department of Homeland Security (DHS), Congress did not enact regular appropriations before the start of FY2019. Instead, Congress enacted continuing resolutions. This stopgap funding ended in December 2018, leading to a 35-day partial government shutdown.

In February 2019, the President signed into law the Consolidated Appropriations Act, 2019 (CAA), appropriating $1.375 billion for Customs and Border Protection (CBP) to build pedestrian fencing, far less than the President's $5.7 billion request. That same day, the White House issued a Fact Sheet explaining that up to $8.1 billion would be available for border barriers. DOD would transfer up to $2.5 billion to its "Drug Interdiction and Counter-drug Activities" account (Counterdrug Account). DOD uses this Account to help federal agencies combat drug trafficking, under authority granted in 10 U.S.C. § 284 (Section 284). When responding to another agency's Section 284 assistance request, DOD's support may include building "roads and fences . . . to block drug smuggling corridors." DOD made the transfers in March 2019 and May 2019 to assist DHS with border barrier construction.

Organizations and states filed separate suits in a California federal district court. In June 2019, in both cases, a district judge declared the transfers unlawful and, in one case, additionally enjoined use of transferred funds for continued construction. The government appealed. In July 2019, the Supreme Court stayed the trial court's injunction, a stay that will remain in effect until the Supreme Court decides whether to accept any appeal from the Ninth Circuit's decision.

Dueling Approaches to DOD Transfer Authority

In *State of California v. Trump*, the Ninth Circuit addressed whether DOD's transfers were for "*unforeseen* military requirements" and, separately, whether the transfers were for an "*item* for which funds are requested has been *denied* by the Congress." The majority answered both questions "yes," deciding that the transfers were unlawful. The dissent answered the same questions "no," deciding that the transfers were lawful. The same Ninth Circuit panel, with the same division between majority and dissenting judges, reached the same conclusions regarding transfer authority in *Sierra Club v. Trump*.

On whether the transfers were for "unforeseen" requirements, the majority began by determining the ordinary meaning of that term, settling on "not anticipated or expected." Thus, "an unforeseen requirement is one that [DOD] did not anticipate or expect." The transfers failed to meet this standard, the majority continued, because cross-border drug smuggling was a "longstanding problem" that President Trump emphasized since his first presidential campaign. DOD reserved a portion of its FY2018 Counterdrug funds "for possible use in supporting Southwest Border construction" during the last quarter of that fiscal year (i.e., the period between July 1 and September 30). Congress also did not pass bills proposing more funding for border barriers, putting "agencies on notice that they might be asked to finance construction."

The majority also decided that DOD's transfers were for an "item" for which Congress had "denied" funding. The majority considered the relevant "item" to be "funding for the border wall." While again noting that Congress did not pass bills proposing more funding for border barriers, the majority placed particular weight on Congress's relevant FY2019 appropriation for CBP, which was less than a quarter of the President's request. This was "a general denial" that "necessarily encompasse[d] narrower forms of denial—such as the denial of a Section 284 budgetary line item request."

For its part, the dissent insisted on reading the transfer limitations "against the backdrop of the appropriations process." The dissent identified "point[s] of reference" for use of transfer authority in documents generated during the congressional appropriations process: agency justification materials and congressional committee reports. These documents usually include discussion of how an agency will allocate funds of a given appropriation among the activities for which the appropriation is available. As the dissent noted, an agency uses these documents to determine, among other things, when an allocation constitutes reprogramming. Unlike a transfer, which shifts funds between accounts, an agency reprograms when it allocates funds within an account in a way that differs from the spending envisioned in justification materials or committee reports. (An agency often must give notice to Congress of a reprogramming. Absent statutory limitations, though, an agency has broad discretion to reprogram.)

Viewing reprogramming as relevant context, the dissent argued that justification materials and committee reports also inform use of transfer authority: "In evaluating a transfer from one appropriation to another," DOD "must justify the transfer, not at the broad level of each overall appropriation itself" but rather "at the same 'item' level at which [DOD] would have to justify a reprogramming within an appropriation."

From this premise, the dissent reasoned that DOD's transfers were for "unforeseen military requirements," because an item is "unforeseen" if DOD did not seek funding for that item in that fiscal year's justification materials. Likewise, to identify whether DOD had used its transfer authority for an "item" for which Congress had "denied" funding, the dissent looked to justification materials and committee reports. These "records" of the "appropriations process" identified the "original allocation" of funding among DOD items in the enacted appropriation. According to the dissent, no party claimed that these materials included a request for funds to cover DHS's Section 284 request. DHS did not make that request until February 2019, 11 months after publication of DOD's FY2019 justification materials. Thus, DOD did not foresee a requirement of helping DHS combat drug trafficking and Congress did not deny funding for that item.

Effects on DOD Transfer Authority and Beyond

The Ninth Circuit's decisions will likely not be the last word on litigation challenging the Trump Administration's border barrier funding plan. Next month a different federal appeals court is scheduled to hear argument in an appeal in which a Texas federal district court held that DOD could not use any of its appropriations to fund border barrier construction. Moreover, the government might ask the Ninth Circuit to reconsider its decisions. Further review before the Supreme Court is also possible.

Still, as the first appellate court decisions on the merits of the Administration's funding plan, the decisions raise important questions that are not necessarily confined to the type of extraordinary interbranch funding dispute that prompted the court's ruling. On the one hand, the majority emphasized the background fact of the 35-day partial government shutdown as important context for its decision. On the other hand, the majority's approach reflects choices in legal method (e.g., favoring ordinary over specialized meaning, judging whether a requirement was unforeseen by looking beyond an agency's budget request) that do not appear limited to transfers amid such extraordinary funding disputes.

One such question is how DOD is to identify the types of denials that render transfer authority unavailable. DOD has distinguished between those items "known to be of *special interest* to one or more of the congressional committees and those items *specifically denied* by the Congress." (The phrase special-interest item includes an item for which Congress "specifically reduced" funding from the President's request.) DOD's policies state that it does not invoke transfer authority for items specifically denied by Congress, and while DOD gives special treatment to reprogramming actions affecting special-interest items, DOD does not expressly bar use of transfer authority to augment funding-reduced items.

The majority's approach could require DOD to reevaluate its treatment of funding-reduced items. The majority held that Congress's decision to appropriate less funds ($1.375 billion) for CBP border barrier construction than the President's request ($5.7 billion) was a "general denial" of funding that necessarily encompassed "narrower forms of denial" (the $2.5 billion in DOD transfers for border barrier purposes). This same reasoning would seem to prevent transfers to augment programs for which, as frequently happens, Congress appropriates less than the President's request. Congress's appropriations decision could be viewed as a "general denial" encompassing a later attempt to increase funding for a program via a transfer. Transfer authority might then be available only for those items funded at, or above, the President's request. The Department of Veterans Affairs and the Director of National Intelligence receive transfer authority with nearly identical limiting language to that used for DOD, potentially raising similar questions for these agencies as well.

DOD might also consider the continued relevance of justification materials and committee reports when deciding whether transfer authority is available. In a provision of the statute not addressed by the majority, the dissent, or the government, Congress designated the information contained in these budget documents as forming the "baseline" for applying transfer authority. That is, since FY2008, Congress has conditioned DOD's use of transfer authority on DOD first submitting to Congress a report that establishes a "baseline for application of reprogramming and transfer authorities" (the "DD 1414 report"). (DOD submitted similar reports before FY2008, which Congress appears to have converted to a statutory requirement to correct prior report shortcomings.) The DD 1414 report includes a table for each appropriation. Each table delineates an appropriation "by budget activity and program, project, and activity as detailed in the Budget Appendix." Table columns list amounts requested by the President for that appropriation, any "adjustments made by Congress" (either adjustments in committee reports or enacted rescissions), and the enacted amount. DOD must also flag special-interest items.

There could be tension between the process apparently contemplated by this statutory directive and the majority's application of the transfer limitations. The DD 1414 report appears to envision comparison of requests and enacted funding at the justification or report line-item level. (This comparison method is similar to that urged by the dissent, but the two differ insofar as the dissent primarily rooted its approach in analogy to broader legal concepts and not in provisions of statute.) In deciding that "funding for the border wall" was the relevant "item," though, the majority did not rely on line-item information. If at the end of border barrier litigation the majority's analysis stands as the federal courts' interpretation, DOD may assess how these two processes intersect or seek clarification from Congress.

DOD's transfer authority may continue to spark congressional interest in the coming months. DOD most recently used this authority for border barriers purposes in February 2020, transferring $3.83 billion in FY2020 funds to its Counterdrug Account for further Section 284 assistance to DHS. The plaintiffs who prevailed in the Ninth Circuit have filed new lawsuits challenging the FY2020 transfer. The issues poised for resolution in the new cases are similar to the issues addressed by the Ninth Circuit.

Congress is also considering DOD's FY2021 appropriations request, which includes $9.5 billion in general and special transfer authority in FY2021 (up from $6 billion enacted in FY2020). H.R. 7617, the Department of Defense Appropriations Act, 2021, would largely preserve the transfer authority limitations discussed above and would provide $1.9 billion in total transfer authority. And the House Committee on

Appropriations would direct DOD to report on its use of transfer authority over the last 10 fiscal years, suggesting congressional interest in transfer authority reform.

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