

Federal Court Hears Arguments on Funding for Trump's Border Wall

At least one member of the three-judge panel, a Trump appointee, seems likely to side with the President.

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A conservative judge of the Ninth Circuit Court of Appeals signaled on Tuesday, March 10, that he will probably vote to let President Donald Trump [use](#) \$3.6 billion in diverted military money to expand the border wall, even as construction crews blast legally protected indigenous burial grounds and natural resources on Arizona's border with Mexico.

Circuit Judge Daniel Collins, a Trump appointee who joined the liberal appeals court a year ago, dominated questioning by the three-judge panel during oral arguments in San Francisco, seemingly stunning one lawyer with his legal reasoning.

The exchange came as California Justice Department attorney Heather Leslie told the court that [diverting](#) military funds to build a border wall had cost Joint Base Andrews a \$13 million child development center and the state of Maryland the anticipated tax revenue.

"Does the deli that's next door to that child care center, do they have a claim, too, because their business will go down because the child care center isn't completed?" Collins shot back.

"Don't say th—" Leslie replied, apparently taken aback.

Collins interrupted, "How far do ripples of economic harm go out? Your tax revenue is the business next door that's adversely affected. How far does this go?"

Collins and Leslie also butted heads on the question of whether Trump violated the appropriations clause of the Constitution, which says Congress must affirmatively approve all uses of appropriated funds.

"I'm not seeing how the constitutional limit emerges from the appropriations clause. Congress can authorize spending how it wants," Collins said.

Leslie replied that a President may tap general funds in national emergencies or health crises, but not "where Congress has specifically limited, the very same day the President signs [an appropriations bill], into law."

"He can't modify it with billions of dollars and new locations," she said. "There is specific congressional intent, on the record, very clear, abundant, we had a record-breaking government shutdown over this."

Chief Judge Sidney Thomas and Circuit Judge Kim McLane Wardlaw, both Clinton appointees, also sat on Tuesday's panel. Neither indicated how they may rule.

In February 2019, the President [declared](#) a national emergency on the U.S.-Mexico border to divert billions in military and counter-narcotics funding for a wall, with the apparent goal of reducing illegal border crossings and cross-border flows of drugs and crime. This came after Congress [appropriated](#) only a fraction of the \$5.7 billion he had demanded for the project.

The Sierra Club and the Southern Border Communities Coalition, and a group of states led by California, [sued](#) Trump and his administration, alleging that they circumvented Congress's Constitutional appropriations power in order to free up extra money. U.S. District Judge Haywood Gilliam Jr. in Oakland, California, agreed, issuing a [ruling](#) that banned a string of proposed reallocated wall projects worth a combined \$6.1 billion, under identical permanent injunctions issued in May and December.

A different Ninth Circuit panel [all but upheld](#) the May injunction when it refused the federal government's request to pause it. But in July, the U.S. Supreme Court stepped in to [green-light](#) construction while the litigation plays out, a sign it might rule for the government if it were to take the case.

When it was asked to preserve a stay of the December injunction, the current Ninth Circuit panel obliged, [citing](#) the Supreme Court order as a basis for its own.

Both injunctions are now pending before the Ninth Circuit. Meanwhile, construction is progressing at [Organ Pipe Cactus National Monument](#), a protected wildlife reserve in Arizona's Sonoran Desert which shares a thirty-mile stretch of the border with Mexico. Laiken Jordahl, a borderlands campaigner with the nonprofit Center for Biological Diversity, says a wall there would block migrating wildlife, put more pressure on endangered species, and "be an eyesore on the land for decades to come."

"The border wall is ripping a hideous scar through the most spectacular Sonoran Desert ecosystem on the planet," Jordahl tells *The Progressive*. "There's already so much damage to grieve."

The case hinges on Section 2808 of the United States Code, a rarely used statute that allows the federal government, rather than Congress, to reallocate military construction funds to urgent military construction projects in connection with a national emergency. When Trump declared a national emergency on the border last year, he [invoked](#) Section 2808 to reallocate money for a wall.

Section 2808 has only ever been invoked to build things like airfield runways and to secure weapons of mass destruction. So to make the case that border wall construction qualified as "military construction," the Defense Department put all the lands slated for construction along the border (in Arizona, California, New Mexico, and Texas) under its jurisdiction for three years and administratively assigned it to U.S. Army Garrison Fort Bliss in Texas, near El Paso.

Judge Gilliam rejected the move when he blocked construction last December.

"Defendants' interpretation would grant them essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they

first obtain jurisdiction over the land where the construction will occur,” Gilliam [ruled](#). “Although defendants attempt to reassure the court that they ‘are not arguing that the entire southern U.S. border’ constitutes a military installation for purposes of Section 2808, there is nothing in their interpretation to preclude them from doing so.

“When asked during the hearing whether defendants’ reading of Section 2808 had a limiting principle, counsel could not articulate one,” Gilliam said.

In court on Tuesday, U.S. Justice Department attorney Thomas Byron said the national emergency declaration itself was the limiting principle, and Section 2808 lets the Defense Department bypass any federal or state law that would hinder it from reallocating money in a national emergency.

“Nothing in the terms or context of this statute would suggest that Congress intended to restrain the Defense Secretary in an emergency in the ways the District Court suggested,” Byron said.

The administration has since [waived](#) dozens of federal laws, including the Endangered Species Act, the Clean Water Act, and the Native American Graves Protection and Repatriation Act, to fast-track construction.

Last month, federal contractors began demolition work in Organ Pipe. The monument is part of the ancestral homelands of the Tohono O’odham indigenous peoples and is next to the Nation’s federally recognized reservation, which stretches into Mexico. The wall would end [less than two miles](#) from the western boundary of the reservation.

Construction at Organ Pipe has been [disastrous](#) for the O’odham. An O’odham burial site near Quitobaquito Springs was bulldozed, damaging the desert oasis used in the annual O’odham salt pilgrimage. Another burial site at Monument Hill was dynamited without notifying the O’odham beforehand. Ancient saguaro cacti were reportedly uprooted.

Ned Norris Jr., the O’odham Nation’s chairman, [testified](#) about the situation before the U.S. House of Representatives last month.

“Congress must withdraw or at least better limit [the administration’s] authority to unilaterally give itself waivers to circumvent every federal statute on the books,” Norris testified. “This kind of non-challengeable authority may be tolerated in a totalitarian state, but it does not sit well among the statutes that are supposed to protect our freedoms in the United States of America.”

By Trump’s logic, Section 2808 theoretically also authorizes him to take over native reservations for border wall projects. Congress hasn’t eliminated reservation lands since the Termination Era of the 1950s and 1960s, when the practice was used to break up reservations and assimilate indigenous peoples. University of Colorado Law School professor [Sarah Krakoff](#), who specializes in American Indian law, doesn’t believe Trump would embrace termination now, particularly in a military context.

“It would be an extraordinary, unprecedented, and highly suspect move, legally and politically, for the Trump Administration to take land out of trust without Congressional authorization and to put it to military purposes,” Krakoff tells *The Progressive*.

But the Trump Administration has floated proposals to privatize reservations. In

2017, Interior Secretary Ryan Zinke [called](#) for an “off-ramp” for taking reservations out of protected trust status by giving indigenous groups the “choice of leaving Indian trust lands and becoming a corporation.” Before Trump took office, his Native American Affairs Coalition chairman, Representative Markwayne Mullin, Republican of Oklahoma, also [pushed](#) for privatization.

Because privatization can eliminate powers of self-government and immunities from state and local jurisdiction, it represents a major threat to indigenous groups, [Robert Anderson](#), a visiting professor at Harvard Law School specializing in American Indian Law, tells *The Progressive*.

“These powers and immunities are critical parts of tribal existence protected by existing federal law,” he says.

The Ninth Circuit panel did not say Tuesday when it will rule.

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Featured image: Homeland Security Secretary Kirstjen Nielsen speaks during a visit to President Trump’s border wall in the El Centro Sector in Calexico, California. © Reuters / Earnie Grafton

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