



President Trump at Border Wall in
Yuma, AZ (June 2020) photo:
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Late last week, the U.S. Court of Appeals for the Ninth Circuit struck down the Trump Administration's attempted diversion of \$2.5 billion in federal funds Congress had appropriated for the Department of Defense. The Trump Administration did so in order to finance President Trump's proposed, controversial border wall at a level Congress had expressly declined to approve. That diversion, ruled the appellate court, violates the Appropriations Clause of the U.S. Constitution and is therefore invalid.

The Ninth Circuit reached this result in two related decisions issued on June 26th: [*Sierra Club v. Trump*](#) and [*State of California v. Trump*](#).

The Court of Appeals decisions are the latest chapter in a long-running political and legal battle involving all three branches of the federal government. The litigation seems destined ultimately to be resolved by the U.S. Supreme Court.

The origins of the *Sierra Club* and *State of California* litigation date back to 18 months ago and can be briefly summarized as follows:

- In late 2018, President Trump asked Congress to appropriate over \$7 billion to underwrite his 2016 campaign pledge to build a 400-mile wall along the U.S.-Mexican border designed to reduce illegal immigration;
- In February 2019, Congress declined to fund anywhere near the full amount sought by the Trump Administration, instead appropriating \$1.4 billion for that purpose.
- Declaring himself "not happy" with the \$1.4 billion appropriation, President Trump a day later declared a national emergency to address what he deemed to be an immigration crisis. Relying on that declaration, Trump announced plans to divert \$2.5 billion in previously-appropriated Department of Defense program funds, and an

additional \$3.6 billion in congressionally-approved Pentagon construction funds—thus assembling the full requested level of funding for border wall construction that Congress had expressly refused to authorize.

- Numerous private and public parties including environmental organizations, states and the U.S. House of Representatives immediately responded by filing a flurry of lawsuits against the Trump Administration, challenging the legality of the Administration's attempted diversion of the congressionally-appropriated DOD funds on separation-of-powers grounds. In California, a coalition of environmental organizations including the Sierra Club and a group of 20 "blue" states led by California launched parallel lawsuits against the Trump Administration, arguing that the \$2.5 billion in diverted Pentagon program funds was unconstitutional.
- In early July 2019, a federal district court judge agreed that the attempted diversion of those DOD funds was illegal, and issued an injunction barring the Trump Administration's use of the \$2.5 billion for border wall construction. The Trump Administration immediately appealed the cases to the Ninth Circuit Court of Appeals.
- On July 26, 2019, [the U.S. Supreme Court by a 5-4 vote lifted the district court injunction and allowed the Administration to spend the diverted funds for border wall construction while the litigation proceeded through the appellate courts.](#)



Ninth Circuit Court of Appeals Courthouse, San
Francisco, CA

Fast forward to last week, when the Ninth Circuit issued its parallel decisions on the merits in the *Sierra Club* and *State of California* cases. The Court of Appeals panel upheld the district court ruling that the Trump Administration's unilateral diversion of the \$2.5 billion was unconstitutional. Writing for the panel's 2-1 majority, Chief Circuit Judge Sidney Thomas stressed that "the straightforward and explicit command" of the Constitution's

Appropriations Clause “means simply that no money can be paid out of the [U.S.] Treasury unless it has been appropriated by an act of Congress.” The Appropriations Clause, noted Chief Judge Thomas, is a key component of separation of powers principles embedded in the Constitution. Reviewing Congress’ February 2019 DOD appropriations legislation, the Court of Appeals concluded the Trump Administration’s attempted diversion of DOD funds for border wall construction was unconstitutional:

The Executive Branch lacked independent constitutional authority to authorize the transfer of funds. These funds were appropriated for other purposes, and the transfer amounted to drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause.

So what happens now?

The Trump Administration will undoubtedly seek U.S. Supreme Court review of the adverse Ninth Circuit rulings in the *Sierra Club* and *State of California* cases. And it may very well be successful in that effort. That’s because, in a separate case challenging the Administration’s related diversion of \$3.6 billion in appropriated DOD *construction* funds, [the U.S. Court of Appeals for the Fifth Circuit in January 2020 lifted a district court injunction that had barred the use of those funds for border wall purposes](#). So there now exists a split between the Fifth and Ninth Circuits. Circuit splits are the most common reason the Supreme Court grants review. And the justices already signaled their interest in the Ninth Circuit cases last summer, when they lifted the earlier district court injunction barring diversion of the \$2.5 billion in DOD program funds.

Meanwhile, the Trump Administration will doubtless continue spending the \$2.5 billion in contested DOD appropriated funds in an effort to fulfill its longstanding campaign pledge to build 400 miles of new border wall before the November 2020 general election. That’s because the Supreme Court’s July 2019 order expressly permits the Trump Administration to do just that until the case is finally concluded either in the Ninth Circuit or (more likely) in the Supreme Court.

Finally, of course, the future course of this litigation could—and likely will—change dramatically if President Trump loses his reelection bid in November and Joe Biden becomes president in January 2021.

Stay tuned.

