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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES,)	
)	
Plaintiff)	Civil No. 19-969
)	
v.)	
)	Washington, D.C.
STEVEN T. MNUCHIN, et al.,)	
)	
Defendants.)	Thursday, May 23, 2019
)	

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE TREVOR N. McFADDEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Douglas N. Letter, Esq.
	Todd B. Tatelman, Esq.
	Megan Barbero, Esq.
	Kristin A. Shapiro, Esq.
	Brooks M. Hanner, Esq.
	Sally Clouse, Esq.
	U.S. HOUSE OF REPRESENTATIVES
	Office of General Counsel
	219 Cannon House Office Building
	Washington, DC 20515

For the Defendant:	James Mahoney Burnham, Esq.
	U.S. DEPARTMENT OF JUSTICE
	Civil Division
	950 Pennsylvania Avenue, NW
	Washington, DC 20530

-and-

(Appearances continued on next page)

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Michael J. Gerardi, Esq.
Leslie Cooper Vigen, Esq.
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs
Branch
1100 L Street NW
Washington, DC 20005

-and-

Kathryn Celia Davis, Esq.
Andrew I. Warden, Esq.
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs
Branch
1100 L Street, NW
Washington, DC 20530

Court Reporter:
PATRICIA A. KANESHIRO-MILLER, RMR, CRR
U.S. Courthouse, Room 4700A
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3243

1 MR. BURNHAM: Sorry, Your Honor.

2 I don't think so because I think what this provision
3 is generally about is moving money around the agency. But I
4 don't think saying that something is foreseen in the
5 budgeting process is a very broad requirement. I think it is
6 actually a pretty specific requirement.

7 I guess my answer has two components. The first is
8 we're not in the run-of-the-mill application of the transfer
9 provision because normally what Congress and DoD are talking
10 about in this provision is funding for different DoD internal
11 projects. So the vast majority of the universe where this
12 provision applies is not implicated here because it is kind
13 of an unusual circumstance.

14 My second point is that it still has some teeth.
15 Right? Imagine that, instead, the DoD budget was passed the
16 same time as the DHS budget, so we knew that DHS was going to
17 get 137.5 billion. And DHS said -- you know, Secretary
18 Nielsen had called up to Acting Secretary Shanahan and said,
19 I'm going to send over these requests for 284, they're
20 coming. That's a different sort of thing. Because then you
21 would have something that is concrete and specific and
22 foreseen, but we don't have that here. So I'm not saying it
23 doesn't have any meaning. I'm just saying it doesn't apply.
24 I also think, though, Your Honor, that one of the reasons why
25 this is such an odd case is that this is just not a statute

1 that anyone ever thought someone in your position would be
2 interpreting and applying because it is not -- the House
3 doesn't have the ability to sue for all the reasons we have
4 talked about, and this is not a statute that anyone really
5 has the authority to invoke. It's meant to regulate the
6 relationship between the agency and the appropriating
7 committees. That's why there are no cases on it because no
8 one has ever tried to bring a lawsuit over the use of this
9 transfer authority.

10 So Congress, of course, by the way, is not bound by
11 what I just said is the definition "foreseen." Right?
12 Congress can define "foreseen" for itself. It is an
13 independent branch of government. And I suspect that they
14 will do so and that they will curtail DoD's transfer
15 authority in the next appropriations bill because they will
16 be unhappy with how DoD used it here. And that's how the
17 political process works, and that's their right.

18 THE COURT: So can we talk about military
19 construction?

20 MR. BURNHAM: Of course.

21 THE COURT: Mr. Letter has a pretty convincing
22 argument that you're trying to have it both ways.

23 MR. BURNHAM: Right.

24 THE COURT: It's yes military construction for one,
25 and no military construction for the other.

1 MR. BURNHAM: Right. You would be surprised to hear
2 that I disagree with Mr. Letter.

3 First, I would say Mr. Letter agrees that the 284
4 projects that the transfers are for are not military
5 construction. So I think in assessing the transfer we win on
6 that issue because it is not disputed.

7 So let's move to 2808. Again, this is another level
8 of abstraction versus specific thing. What Mr. Letter wants
9 to do is conflate every project at the border as the same
10 project, they're all the border wall. So they're either all
11 military construction or they're not all military
12 construction. With all respect, that's just not how statutes
13 work. Okay.

14 So the only projects that have been approved and that
15 are outstanding that are in the world are the 284 projects.
16 We agree -- Mr. Letter and I -- that those are not military
17 construction.

18 On 2808, the secretary is right now actively
19 considering the issue, collecting information, and is going
20 to make a decision soon. I would suggest that Your Honor
21 wait until that decision is made and we have an actual
22 project that we'll tell you about as soon as it's made. The
23 Department is also required to notify Congress when the
24 decision is made. And I will be able to explain to you, I
25 think quite persuasively, why it is military construction

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller

PATRICIA A. KANESHIRO-MILLER

May 28, 2019

DATE