



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 6, 2021

Thomas M. Armstrong
General Counsel
Government Accountability Office
Washington, D.C. 20548

RE: B-333110, Pause of Border Wall Funding

Dear Mr. Armstrong:

This letter responds to your April 7 letter regarding President Biden’s January 20 border-wall Proclamation. See Proclamation No. 10142, Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225 (Jan. 20, 2021) (Proclamation). You have requested information regarding whether the Proclamation violates the Impoundment Control Act of 1974, 2 U.S.C. § 681 *et seq.* (ICA). We are confident that both the Proclamation itself and the Administration’s implementation of it have complied with the statute. In this letter, I set forth the reasons for that conclusion. The answers to your specific factual questions appear in the attachment.

Introduction and Summary

Congress adopted the ICA to ensure that the Executive Branch could not “unilaterally set aside congressionally approved programs it deemed less worthy than others and nullif[y] national policies established by Congress.” H.R. Rep. No. 93-658, 1974 U.S.C.C.A.N. 3462, 3471 (1974). Defiance of Congress is thus the hallmark of an ICA violation.

President Biden’s January 20 Proclamation did not in any way defy Congress. To the contrary, the Proclamation represented an important step to align Executive Branch actions with the policies Congress established in its appropriations legislation. By terminating the national emergency that had provided the predicate for diverting military construction funds to the border wall, the Proclamation ensured that those funds would return to the purposes for which Congress had originally appropriated them. By requiring a plan for redirecting other funds away from wall construction “as appropriate and consistent with applicable law,” Proclamation § 2, the Proclamation demanded the return to their original purposes of money that had been diverted to the wall project—in particular, from Department of Defense counterdrug assistance and the Department of Treasury’s Forfeiture Fund—to the extent that funds remained available. And the Proclamation specifically required the Executive Branch to continue to “provid[e] for the

expenditure of any funds that Congress expressly appropriated for wall construction, consistent with their appropriated purpose.” *Id.*

Importantly, the House of Representatives itself sued to challenge the prior Administration’s diversions of funds as trampling on the congressional power of the purse. See *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 13 (D.C. Cir. 2020) (“To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys. The Executive Branch has, in a word, snatched the House’s key out of its hands. That is the injury over which the House is suing.”). And the Court of Appeals for the Ninth Circuit held that various transfers of Department of Defense money violated the relevant appropriations laws. *Sierra Club v. Trump*, 977 F.3d 853, 879 (9th Cir. 2020), pet. for cert. pending (No. 20-685); *California v. Trump*, 963 F.3d 926, 944 (9th Cir.), cert. granted, 141 S. Ct. 618 (2020). The Executive Branch, of course, has vigorously defended its prerogatives in these suits, and the litigation remains unresolved. But whether or not the legal claims against the prior Administration’s actions are ultimately deemed meritorious, for purposes of the ICA the crucial point is this: Far from defying Congress, President Biden’s Proclamation advanced the very interests the House itself asserted in litigation by returning the diverted money to its original purposes.

The Proclamation thus fully respected the congressional power of the purse. And any delay it required to create a plan was necessary to ensure the prudent obligation of the money Congress had specifically appropriated for barrier construction. Once the funds the prior Administration diverted to the wall were returned to their original congressional purposes, the Executive Branch could no longer proceed full speed ahead based on the assumption that diverted funds would remain available for wall construction. It had to make choices about how to prioritize the use of the specifically appropriated funds that remained. The Administration needed to identify the most urgent life and safety issues. It also needed to decide whether and to what extent to maintain waivers of the environmental laws for the wall project—waivers it was under no legal obligation to grant or continue. To the extent that it did not maintain those waivers, the Administration had to determine the best way of obligating and spending the wall-construction money in a manner consistent with the obligations imposed by environmental law. And to the extent that it did maintain those waivers, the Administration had to determine how to engage in the stakeholder consultation that Congress itself demanded. The delay was thus a “programmatic delay” of the sort that does not violate the ICA. See 2 U.S. GOV’T ACCOUNTABILITY OFF., PRINCIPLES OF FED. APPROPRIATIONS L. 2-50 (4th ed. 2016) (recognizing the “distinction between deferrals, which must be reported, and ‘programmatic’ delays, which are not impoundments and are not reportable under the Impoundment Control Act”). See also Letter from Thomas H. Armstrong, General Counsel, Gov’t Accountability Off., to Samuel R. Bagenstos, General Counsel, Off. of Management & Budget at 2 (Apr. 7, 2021) (noting that “a programmatic delay ... does not violate the ICA”).

To be sure, the Proclamation rests on Presidential policy determinations that the border wall “is a waste of money that diverts attention from genuine threats to our homeland security,” and that therefore “no more American taxpayer dollars” should “be diverted to construct a border

wall.” Proclamation, preamble. The Proclamation effectuates those determinations in a way that is entirely permissible under the relevant statutes—by ensuring that funds that had previously been “diverted” to wall construction are returned to their original congressional purposes, while also requiring a plan to “provid[e] for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose.” *Id.* § 2. Consistent with the Administration’s policy, the President has subsequently made clear that he [intends to ask](#) Congress to cancel any wall-construction appropriations for which money remains left over at the end of the current fiscal year. But, by the plain terms of the Proclamation, the Executive Branch will continue to obligate and spend money directly appropriated for wall construction unless and until Congress acts on that legislative proposal. That is exactly what the Department of Homeland Security is doing with its appropriations. DHS’s own response to your inquiry, which is being submitted under separate cover, details the Department’s actions in this regard. There is no violation of the ICA.

The Prior Administration’s Diversion of Funds to Wall Construction

The prior Administration’s wall project drew on four distinct sources of funds: money transferred from the Department of Treasury’s Forfeiture Fund under 31 U.S.C. § 9705(g)(4)(B); money transferred from the Department of Defense invoking its counterdrug authority under 10 U.S.C. § 284; money transferred from the Department of Defense invoking its emergency military construction authority under 10 U.S.C. § 2808; and money Congress specifically appropriated to the Department of Homeland Security for border barrier construction in its appropriations laws for each of Fiscal Years 2017 through 2021. Only the last of these sources involved funding that Congress had specifically appropriated for the purpose of constructing a wall. As for all of the others, the prior Administration purported to exercise transfer authority to divert those funds to the project.

Notably, some of those transfers were highly controversial legally. The Ninth Circuit Court of Appeals held that the diversion of military construction money violated the requirements for such transfers established by Congress in 10 U.S.C. § 2808, because, in the court’s view, the wall construction projects were “neither necessary to support the use of the armed forces, nor [we]re they military construction projects.” *Sierra Club*, 977 F.3d at 879. The same court also held that the prior Administration’s use of its authority under 10 U.S.C. § 284 relied on improper transfers of funds into the counterdrug appropriations account—funds that the Department of Defense then spent on the border wall project. See *California*, 963 F.3d at 944. The injunction affirmed by the Ninth Circuit is currently stayed pending Supreme Court review, see *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). Although the Executive Branch has defended against these claims—and the litigation remains unresolved—the legal controversy over these diversions provides important background to the Impoundment Control Act issues.

President Biden’s Proclamation Complied with the Impoundment Control Act

The only source of funds the Executive Branch is required to spend on the wall is the money specifically appropriated to DHS for border barrier construction. There is no legal responsibility to continue to divert other funds to wall construction when they were not appropriated for that

purpose. The Executive Branch has vigorously defended its prerogative to divert DOD and Treasury funds to the wall. But the new Administration was fully entitled to make the policy decision to end that diversion.

Even with regard to the funds specifically appropriated for the wall, the Executive Branch is not required to spend them heedlessly. Rather, as your Office has explained in the [Ukraine](#) opinion and elsewhere, the requirement of the ICA is one of *prudent obligation*: “[U]nless Congress has enacted a law providing otherwise, the President must take care to ensure that appropriations are prudently obligated during their period of availability.” *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564 at 5 (GAO, Jan. 16, 2020).

Congress adopted the ICA in 1974 based on the conclusion that the President had “unilaterally set aside congressionally approved programs it deemed less worthy than others and nullified national policies established by Congress.” H.R. Rep. No. 93-658, 1974 U.S.C.C.A.N. at 3471. But the same Congress recognized that “the President should be able to handle Federal funds with a reasonable degree of flexibility and economy” and “must have some authority to hold funds in reserve and to apportion their expenditure in appropriate ways for the purpose of sound financial and administrative management.” *Id.* This, of course, is an essential part of the President’s constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, § 3. And it is one that the 1974 Congress took as a given.

To ensure that the President complies with the policies Congress has enacted in its appropriations laws, the ICA bars the Executive Branch from “defer[ring] any budget authority” except in three circumstances: “to provide for contingencies”; “to achieve savings made possible by or through changes in requirements or greater efficiency of operations”; or “as specifically provided by law.” 2 U.S.C. § 684(b). As your Office explained in its *Ukraine* opinion (at 7), this provision bars the President from pausing funds “to substitute his own policy priorities for those that Congress has enacted into law.” See also *President’s Third Special Impoundment Message*, B-237297.3 at 2 (GAO, Mar. 6, 1990) (explaining that Congress enacted the ICA to bar the President from “defer[ring] budget authority for ‘policy’ reasons inimical to the purpose to be served by the appropriation being withheld”). Your Office has described the prohibition on “policy” deferrals as follows: “Deferrals intended to further executive branch policies or priorities in place of those policies established in the legislative process are, absent specific statutory authority, unauthorized deferrals.” *Id.* at 4.

But your Office has made equally clear that the ICA does not bar the Executive Branch from engaging in a “programmatically delay.” *Ukraine, supra*, at 7. Accord 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra*, at 2-50. A programmatic delay occurs when the administration will continue to carry out an appropriation according to the purpose set forth by Congress, but cannot prudently obligate or spend funds immediately “because of factors external to the program” created by that appropriation. *Ukraine, supra*, at 7. See also *id.* at 5 (explaining that “Congress was concerned about the failure to prudently obligate according to its Congressional prerogatives when it enacted and later amended the ICA”). As your Office explained in its [ARPA-E](#) opinion, “[l]egitimate programmatic delays may occur when the agency is taking reasonable and necessary steps to implement a program, even though funds temporarily go unobligated”; such delays do not

“constitute a reportable impoundment” under the statute. *Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President’s Budget Request for Fiscal Year 2018*, B-329092 at 3 n.6 (GAO, Dec. 12, 2017). Whether a delay constitutes an impermissible deferral or a permissible programmatic delay “requires a case-by-case evaluation of the agency’s justification in light of all of the surrounding circumstances.” 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra*, at 2-50.

Any Delay Occasioned by the Proclamation was a Permissible “Programmatic Delay”

Considering all of the surrounding circumstances here, any delay required by President Biden’s January 20 Proclamation was plainly a permissible “programmatic” one. That Proclamation was fully consistent with the prudent obligation principle. So were the actions the Administration has taken to carry it out.

The Proclamation terminated the declaration of emergency that had been the basis for transferring funds from DOD to border wall construction under Section 2808. Congress had never required the President to declare that emergency; both its original declaration and the termination of that declaration were pure matters of executive prerogative. See 50 U.S.C. § 1621(a) (authorizing the President to declare a national emergency); *id.* § 1622(a)(2) (authorizing the President to issue a proclamation terminating such an emergency).

The Proclamation also required a temporary delay in wall construction, and in the new obligation of funds for wall construction, but only “to the extent permitted by law.” Proclamation § 1(a)(i), (ii). It specifically provided an exception to that delay where necessary “to ensure that funds appropriated by the Congress fulfill their intended purpose.” *Id.* § 1(b). The Proclamation directed DHS and DOD to “develop a plan for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law.” *Id.* § 2. It required the plan to “provid[e] for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose.” *Id.*

The President had undoubted legal authority to terminate the declaration of emergency, thus requiring the cessation of the use of DOD Section 2808 funds in border wall construction. And his Administration also had undoubted legal authority to end the use of DOD Section 284 funds and Treasury Forfeiture Fund money for border wall construction. These decisions were not in any way constrained by Congress’s appropriation of a separate stream of money to DHS for border barrier construction; they were thus “external to the program” created by that DHS appropriation. *Cf. Ukraine* at 7.

In light of the President’s fully lawful decision to continue border barrier construction only to the extent required by appropriations specifically made for that purpose, the Administration had important programmatic choices to make regarding where and how to allocate the funds Congress appropriated to DHS for the wall project. For example, should those funds be used to complete aspects of the project that had previously been paid for with transfers from DOD or the Treasury Forfeiture Fund, or were the aspects of the project that DHS had previously planned to fund with its direct appropriations of higher priority? Did the termination of the declaration of emergency leave the aspects previously funded under Section 2808 in a state that required immediate action

to avert harms to life, safety, or the environment—action that should now be prudently be financed out of the direct DHS appropriations? More generally, in light of the serious allegations of environmental harms caused by (and lack of consultation with relevant communities attendant to) the wall-construction project, the new Administration was entitled to consider how to prudently avoid those harms when spending funds directly appropriated for the wall.

This course of action is closely analogous to situations your Office has considered to be permissible programmatic delays. See *Dep't of Veterans Affairs Construction Delays*, B-272207 at 3 (GAO, Aug. 9, 1996) (listing “changes in project scope or design” as “legitimate programmatic considerations” supporting delay); *President's Third Special Impoundment Message, supra*, at 10 (“Our Office does not normally consider such contract delays due to design modification, verification or changes in scope, as constituting impoundments of budget authority under the Impoundment Control Act.”); *Veterans Administration Contract Delays*, B-221412, 1986 WL 63142 at *3 (GAO, Feb. 12, 1986) (agency’s decision to make “changes in the project’s scope” rendered delay permissibly programmatic); *Port Canaveral West Turning Basin Project*, B-214687 at 3 (GAO, Apr. 26, 1984) (delay in construction was a programmatic delay where agency took the time to conduct economic studies of the construction project, even though Congress had not mandated those studies).

Given the changes the January 20 Proclamation made to the funding available to the wall project—changes the President was unquestionably entitled to make—it would not have been consistent with the responsibility of prudent obligation for the Administration to continue unthinkingly along the course set for the project when DOD and Treasury funds had still been available for it. To the contrary, doing so would have been the height of imprudence. For that reason, the Proclamation required the Administration to take the time to develop a plan that would reprioritize wall spending in light of the new fiscal reality. Such a delay served to promote prudence in obligation. It did not in any way “nullif[y] national policies established by Congress” in its appropriations laws. H.R. Rep. No. 93-658, 1974 U.S.C.C.A.N. at 3471. It merely ensured that the barrier construction policy established by Congress in its DHS appropriations would be carried out most efficiently once the money the prior Administration had diverted to the wall had been returned to its original congressional purposes. The Proclamation thus manifested a strong respect for Congress’s policy choices.

The Proclamation was a Proper Exercise of Executive Authority to Adapt to Changing Circumstances in Carrying Out Lump-Sum Appropriations

Congress’s appropriations to DHS for border-wall construction are properly regarded as lump-sum appropriations. Your Office has explained that “[a] lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items,” and that “[t]he number may be as small as two.” 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra*, at 6-5. The DHS border-barrier appropriations are phrased in broad terms that cover multiple discrete construction projects. That is particularly true of the appropriations covering Fiscal Years 2020 and 2021, which are the ones for which significant amounts of funds were unobligated at the time of President Biden’s Proclamation. Section 209(a)(1) of the Fiscal Year 2020 DHS Appropriations Act provides “\$1,375,000,000 for the construction of barrier system along the southwest border.” Section 210

of the Fiscal Year 2021 DHS Appropriations Act incorporates that appropriation by reference: “an amount equal to the amount made available in section 209(a)(1) of division D of the Consolidated Appropriations Act, 2020 (Public Law 116–93) shall be made available for the same purposes as the amount provided under such section in such Act.”

These appropriations, by their terms, could reach projects across nine distinct sectors on the Southwest border. See *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862 at 2 (GAO, Sept. 5, 2019) (noting that “Border Patrol divides responsibility for border security geographically among nine sectors along the southern border as follows: San Diego; El Centro; Yuma; Tucson; El Paso; Big Bend; Del Rio; Laredo; and Rio Grande Valley”) ([Border Fence opinion](#)).¹ By providing for the construction of “barrier system along the southwest border” in general terms, these appropriations necessarily left discretion to the Executive Branch in the first instance to decide where along the border to engage in that construction. See *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307, 325 (1975) (“If a statute clearly authorizes the use of funds for the procurement of ‘military aircraft’ without restriction, it must be construed to provide support for the validity of procuring any such aircraft.”).²

The Supreme Court has explained that “the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.” *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). The Court has recognized that “an agency’s allocation of funds from a lump-sum appropriation requires a complicated balancing of a number of factors”—including, notably, where “its resources are best spent.” *Id.* at 193 (internal quotation marks omitted). See also *Cnty. Action of Laramie Cty., Inc. v. Bowen*, 866 F.2d 347, 354 (10th Cir. 1989) (noting that agency decisions regarding how to allocate appropriated funds require “weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency’s limited budget”) (internal quotation marks omitted). The only legal constraint is that the agency must “allocate[] funds ... to meet permissible statutory objectives.” *Lincoln*, 508 U.S. at 193.

¹ The appropriations for Fiscal Years 2018 and 2019 did specify particular geographic sectors, and your Office has previously described the Fiscal Year 2018 appropriation that Congress specifically limited to the Rio Grande Valley Sector as a “line-item appropriation.” *Border Fence opinion* at 10. But even the 2018 and 2019 appropriations left substantial discretion to the Executive Branch regarding where within those sectors to construct the wall. See Fiscal Year 2019 DHS Appropriations Act § 230(a)(1) (stating that “\$1,375,000,000 is for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector”); Fiscal Year 2018 DHS Appropriations Act § 230(a) (appropriating “\$251,000,000 for approximately 14 miles of secondary fencing, all of which provides for cross-barrier visual situational awareness, along the southwest border in the San Diego Sector”; “\$445,000,000 for 25 miles of primary pedestrian levee fencing along the southwest border in the Rio Grande Valley Sector”; “\$196,000,000 for primary pedestrian fencing along the southwest border in the Rio Grande Valley Sector”; “\$445,000,000 for replacement of existing primary pedestrian fencing along the southwest border”; and “\$38,000,000 for border barrier planning and design”). See generally 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra*, at 6-15 (“The terms ‘lump-sum’ and ‘line-item’ are relative concepts.”). In any event, the Fiscal Year 2020 and 2021 appropriations were worded much more broadly, and the return of diverted money to its original purposes necessarily required a prudent executive to reexamine how to prioritize *those* appropriations—one of which had just been enacted weeks earlier—in the new fiscal environment.

² The appropriations did impose some limited geographic restrictions prohibiting construction in certain wildlife refuges and historic places, see, e.g., Fiscal Year 2021 DHS Appropriations Act § 211, but those restrictions still left the Executive Branch with very broad discretion.

Similarly, your Office has long endorsed the general principle that in making *any* sort of appropriation Congress “leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation.” *Acting Comptroller Gen. Elliott to the Sec’y of Agric.*, 18 Comp. Gen. 285, 285 (1938). The only limitation is “that administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation.” *Id.* See generally 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra*, at 2-30 to 2-31.

The President’s January 20 Proclamation set in motion precisely the process that the Supreme Court and your Office have endorsed—a process inherent in the President’s constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, § 3. When the President chose to end the diversion of DOD and Treasury funds to wall construction, the Executive Branch necessarily had to consider whether to reallocate DHS money to those sectors of the southwest border in which DOD and Treasury had formerly participated. Cf. *Border Fence* opinion at 5 (noting that in the projects financed under 10 U.S.C. § 284, DOD had taken responsibility, at DHS’s request, “for border fence construction for locations in the Yuma, El Paso, El Centro, and Tucson sectors”). After all, even when DOD engaged in the construction, “DHS maintain[ed] overall responsibility” for numerous aspects of the project. *Id.* at 16. See also *id.* (“With regard to border fences constructed by DOD in support of DHS within the scope of DHS’s February 2019 request [under Section 284], DHS defined the requirements, will take custody of completed fences and operate them going forward, retained responsibility for securing any real estate interest required for project execution, and remained responsible for applicable environmental planning and compliance.”).

The new Administration also had to consider whether to continue the prior Administration’s practice of waiving environmental and other laws to facilitate wall construction. See *id.* at 6 (noting that, under the prior Administration, “DHS also stated that it was waiving several laws in their entirety, including the National Environmental Policy Act (NEPA), to ensure expeditious construction of barriers in these sectors”). The Executive Branch had the statutory *power* to waive those laws, see Pub. L. No. 109-13, § 102(c)(1), 8 U.S.C. § 1103 note, but nothing in DHS’s appropriations or other federal statutes *required* the Administration to waive them. See *id.* (providing that any such waiver shall be “in the Secretary’s sole discretion”). And a decision to forego future waivers, or to revoke or rescope existing waivers, necessarily required using portions of the DHS appropriations to ensure compliance with the environmental and other laws that the prior Administration had formerly waived.

Even where DHS chose to retain the environmental waivers, it had the responsibility as a prudent manager to consider “the impacts of border barrier construction on sensitive lands and wildlife,” including on “national wildlife refuges, national forests, national monuments, wilderness areas, and imperiled species.” H.R. Rep. No. 116-180 at 18 (July 24, 2019). The House Appropriations Committee specifically “direct[ed]” DHS to conduct the following analysis of projects with environmental waivers:

- 1) assess[] the impacts of border barrier construction on sensitive lands, habitat, and wildlife;
- 2) identif[y] strategies to mitigate such impacts, including land acquisitions for

national wildlife refuges and other federal public land units; and 3) provide[] estimates of the cost to implement such strategies.

Id. Indeed, Congress has specifically required that, even where DHS grants environmental waivers, “the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.” Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Title V, § 564, 121 Stat. 1844, 2091 (Dec. 26, 2007) (amending Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note). To respect congressional preferences, the Executive Branch was thus required to assess the environmental impact of planned wall projects, even where waivers remained in place.

In the event, that is exactly the process in which the Administration has engaged in carrying out President Biden’s Proclamation. Although conducting the relevant planning and analysis has taken longer than anticipated at the outset, the Administration has determined that DOD and Treasury funds that were diverted to wall construction and remain available for obligation should be returned to their originally appropriated purposes. In spending its Fiscal Year 2021 appropriation, DHS is now prioritizing projects that address pressing life, safety, and environmental harms. It also is moving toward spending portions of that appropriation on projects on the Southwest border for which DOD formerly had responsibility. The Secretary of Homeland Security has decided not to issue new waivers of environmental laws, and he has decided to revoke or rescope prior waivers as appropriate. Accordingly, DHS is ensuring that any construction undertaken with its direct appropriations will comply with those laws, and it has committed to a robust environmental assessment and public consultation process where possible even where waivers remain in place.

Upon making these decisions, DHS has been able to prioritize the continuing obligation and liquidation of those appropriations that Congress specifically directed toward barrier construction. Indeed, even before the planning process has fully concluded, DHS has commenced rebuilding the levee in the Rio Grande Valley, specifically to address immediate flood-risk concerns, as well as performing erosion control work on the project in the San Diego sector. Beyond those projects, DHS has determined to prioritize spending its wall-specific appropriations on the following: conducting construction necessary for physical safety or environmental remediation on both its own projects and on former DOD projects; commencing public consultations and environmental assessments for future projects; and other construction-related purposes. Although President Biden has requested that Congress cancel any wall-specific appropriations that remain unobligated at the end of this Fiscal Year, his Administration will continue to prudently obligate and spend those appropriations unless and until Congress acts on that request.

Notably, the Proclamation explicitly required the Administration to follow the principles of appropriations law every step of the way—by delaying construction and obligation of funds only “to the extent permitted by law,” Proclamation § 1(a)(i), (ii), by making an exception to the

delay where needed “to ensure that funds appropriated by the Congress fulfill their intended purpose,” *id.* § 1(b), and by requiring that the ultimate plan “provid[e] for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose,” *id.* § 2. Because the funds specifically directed to wall construction came in multi-year appropriations, the comparatively brief period required to generate a plan for prioritizing use of those funds did not place them at risk of failing to be obligated for their congressionally-mandated purpose. And the President took his actions in the full light of day—in a public, and indeed highly publicized, Proclamation. The Proclamation can hardly be understood as a surreptitious effort to defy Congress’s power of the purse. To the contrary, the Proclamation supported that power by ensuring that diverted funds would be returned to the purposes for which Congress had originally appropriated them.

This Matter is Not Analogous to the Withholding of Ukraine Security Assistance Funds

In each of these respects, this matter is decisively unlike the *Ukraine* matter. There, the Executive Branch put a halt on funds Congress specifically appropriated for Ukraine security assistance, and it did not do so for any reason external to the program created by the appropriation. See *Ukraine* at 6. The halt involved repeated deferrals at the end of a single-year appropriation, thus putting the full obligation of Congress’s appropriation at risk and requiring Congress to rescind the appropriation and reenact it the following year. See *id.* at 2-4. And the halt took place through footnotes placed on OMB’s apportionments for the funds; there was no contemporaneous public acknowledgement that would alert Congress of the Executive Branch’s actions. See *id.* at 3-4. Here, OMB did not place any footnotes on the apportionments for DHS’s wall construction appropriations, as the attachment to this letter makes clear.

“[I]n light of all the surrounding circumstances,” 2 U.S. GOV’T ACCOUNTABILITY OFF., *supra* at 2-50, the President’s January 20 Proclamation is very different than the pause in funds your Office addressed in its *Ukraine* opinion. The Proclamation required nothing more than a permissible programmatic delay. Once the Executive Branch stopped diverting DOD and Treasury funds to the wall, it needed to take time to determine the best way of spending the money specifically appropriated to DHS consistent with its congressional purpose. Now that it has conducted that assessment, DHS will continue to obligate and liquidate its specific appropriations unless and until Congress cancels them.

Conclusion

For the reasons set forth above, neither President Biden’s border-wall Proclamation, nor the efforts the Administration has undertaken to implement that Proclamation, violated the ICA. Any delay occasioned by Section 1 of the Proclamation was a permissible programmatic one. Additional planning was essential to determine which uses of the funds specifically appropriated to the border barrier were the most prudent after the President returned diverted funds to the purposes for which Congress had originally appropriated them. The actions taken pursuant to the Proclamation were thus fully consistent with the ICA’s requirement of prudent obligation. The President explicitly directed his Administration to follow the principles of appropriations law every step of the way, and that is what his Administration has done.

Thank you for the opportunity to respond to your inquiry. If you have any further questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'SRB', with a stylized flourish at the end.

Samuel R. Bagenstos
General Counsel

Attachment

Attachment 1

1. Please provide the apportionment schedules for the DHS appropriations for fiscal years 2018, 2019, 2020, and 2021.

Please see enclosed.

2. The January 20, 2021, Proclamation directs officials to pause the obligation of funds “to the extent permitted by law,” and makes an exception to the pause “to ensure that funds appropriated by the Congress fulfill their intended purpose.” Please describe actions taken by OMB as a result of the language, including actions not taken by OMB, pursuant to the stated exception.

OMB worked with DOD, DHS, and the Department of the Treasury on their plans pursuant to Section 2 of the Proclamation to ensure that funds appropriated by Congress are obligated and expended consistent with the purposes for which they were appropriated.

3. In order to implement the January 20, 2021, Proclamation, has OMB directed the withholding of any of the DHS appropriations through the apportionment process or otherwise? If so, please provide:

OMB has not directed the withholding of DHS appropriations.

- a. Date(s) on which OMB made amounts unavailable; N/A
 - b. Amount and accounts that OMB made unavailable; N/A
 - c. Revised apportionment schedules making amounts unavailable; N/A and
 - d. If amounts have subsequently been made available, please provide the reapportionment schedules making amounts available. N/A
4. If OMB has directed the withholding of DHS appropriations through the apportionment process or otherwise in order to implement the January 20, 2021, Proclamation, please provide:
 - a. OMB’s legal rationale for why the withholding is consistent with the ICA, including the rationale for why the withholding does not constitute an impermissible deferral for policy reasons, given that the Proclamation states that it is the Administration’s “policy . . . that no more American taxpayer dollars be diverted to construct a border wall;” and
 - b. How, if at all, OMB’s legal rationale has considered that the Proclamation directs a pause in obligation of funds “to the extent permitted by law” and makes an exception to the pause “to ensure that funds appropriated by the Congress fulfill their intended purpose.”

As explained in OMB's letter, neither President Biden's border-wall Proclamation, nor the efforts the Administration has undertaken to implement that Proclamation, violated the ICA.