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# **DHS Border Barrier Funding Developments: FY2021-FY2024**

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## **DHS Border Barrier Funding Developments: FY2021-FY2024**

Appropriations law states that when budget authority is provided for a given purpose, the Administration must use it for that purpose. This can present a challenge when a new administration's priorities deviate significantly from its predecessor, especially as it pertains to major procurement and construction investments. The policy transition on border security infrastructure in the early 2020s is an example of how this can play out.

The Donald J. Trump Administration came into office using campaign rhetoric of a “big beautiful wall” on the U.S.-Mexico border as a hallmark of his immigration policy. The Joseph R. Biden Administration came into office using contrasting campaign rhetoric of “not one more mile” of border barrier construction as part of a change in approach.

However, when the Biden Administration came into office in January 2021, the rhetoric of the campaign met the reality of the development process for border infrastructure. This process had taken unprecedented turns under the Trump Administration, but was incomplete, with key priorities unmet, and more than a billion dollars of unobligated budget authority specifically appropriated by Congress for construction of border barriers.

On its first day in office, the Biden Administration announced Department of Defense and military construction funding would no longer be redirected to construction of border walls. New obligations would be paused until a plan was developed to address incomplete projects and to reprioritize the work on existing infrastructure, since the redirected funds were no longer available.

DOD proceeded with cancellation of its projects and turning over the infrastructure it had developed to DHS for completion, operation, and maintenance. DHS proceeded with two emergency projects in the San Diego and Rio Grande Valley Sectors while the Administration developed its plan for how to proceed more broadly.

The Biden Administration sought rescission of the unobligated DHS appropriations in FY2022, to no avail, and likewise was turned down by Congress when it sought additional flexibility in use of unobligated funds through appropriations language in FY2023.

DHS released an initial plan for use of its border barrier funding in June 2021. This involved major changes to planned border barrier improvements, which precipitated a reassessment of the associated contracts. Most contracts signed by the previous administration were cancelled, and DHS proceeded with environmental planning and stakeholder engagement for a new slate of remediation and wall system completion projects. The Biden Administration revised its border barrier plan in July 2022, providing more details on how it would proceed with reprioritizing available funds.

In June 2023, the Biden Administration announced plans to move ahead with an additional 20 miles of new border barrier construction in the Rio Grande Valley Sector, and in October 2023, DHS exercised special waiver authorities to expedite its construction.

This report describes how the Biden Administration has sought to make changes in policy regarding border barriers, with a particular focus on how the existing appropriations for construction of those barriers have affected that process.

The legal and administrative handling of the border wall project by the two administrations can serve as a case study to highlight the power of appropriations law and practice, if properly overseen, and the limitations that a new administration may face in trying to influence ongoing programs set in place by a prior administration and Congress.

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## Introduction

Appropriations law establishes that appropriations made by Congress “shall be applied only to the objects for which the appropriations were made except as otherwise provided by law” (31 U.S.C. §1301(a), commonly referred to as the Purpose Statute).<sup>1</sup> Congress also exerts control over appropriated funds by limiting the ability of agencies to reallocate funds both within an account (reprogramming) and between accounts (transfers).<sup>2</sup> These limitations on agencies can present a challenge for a new Administration when major investments by their predecessor, funded by Congress, are contrary to their policy approach.

The Donald J. Trump Administration came into office using campaign rhetoric of a “big beautiful wall” on the U.S.-Mexico border as a hallmark of his immigration policy. The Joseph R. Biden Administration came into office using contrasting campaign rhetoric of “not one more mile” of border barrier construction to signal a change in approach.

However, when the Biden Administration came into office in January 2021, the rhetorical position of no further construction of border walls met the reality of the development process for border infrastructure. This process had taken unprecedented turns under the Trump Administration, but was incomplete, with key priorities unmet, and more than a billion dollars of unobligated budget authority specifically appropriated by Congress for construction of border barriers.

## Background

On January 25, 2017, the Trump Administration issued Executive Order (EO) 13767, “Border Security and Immigration Enforcement Improvements.” Section 2(a) of the EO indicated that it was the policy of the executive branch to “secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”<sup>3</sup>

President Trump pursued historically large amounts of appropriations for border wall construction, requesting \$8.3 billion from FY2017 to FY2019. Congress provided \$3.1 billion over those three fiscal years. On February 15, 2019, President Trump declared a national emergency on the southern border of the United States. A fact sheet accompanying the declaration indicated the President’s intent to make additional funding available for border barriers beyond congressional appropriations to DHS, primarily through redirecting Department of Defense (DOD) funds appropriated for other purposes using a combination of existing counterdrug, national emergency, and transfer authorities. By the end of his term, President Trump had received \$5.84 billion in appropriations through DHS for border barrier construction, but had diverted more than \$10.6 billion to border barrier construction, almost \$10.1 billion of which was from DOD sources. These diversions provoked controversy and were challenged in court.

For a fuller discussion of barriers on the U.S.-Mexico border, see the following:

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<sup>1</sup> For more on the Purpose Statute, see CRS Report R46417, *Congress’s Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean M. Stiff.

<sup>2</sup> For more on transfers and reprogrammings, see CRS Report R47600, *Transfer and Reprogramming of Appropriations: An Overview*, by Taylor N. Riccard and Dominick A. Fiorentino.

<sup>3</sup> Executive Order 13767, “Border Security and Immigration Enforcement Improvements,” 82 *Federal Register* 8793, January 30, 2017.

- CRS Report R45888, *DHS Border Barrier Funding Through FY2021*, by William L. Painter and Audrey Singer;
- CRS Report R46002, *Military Funding for Border Barriers: Catalogue of Interagency Decisionmaking*, by Christopher T. Mann and Sofia Plagakis;
- CRS Legal Sidebar LSB11059, *Barriers Along the U.S. Border: Key Authorities and Recent Developments*, by Michael John Garcia and Sean M. Stiff; and
- CRS In Focus IF11224, *Army Corps of Engineers and U.S. Southern Border Barriers*, by Nicole T. Carter.

For a clearer understanding of the border sectors referenced in this report, a map of the sectors and key locations is included as an **Appendix**.

### How to Follow the Money

Understanding the interplay of policymaking and appropriations requires an understanding of how the federal government spends money.

Article I, Section 9, Clause 7 of the U.S. Constitution says: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”

An enacted appropriations measure provides **budget authority** (the authority to enter into financial obligations) to the executive branch and direction on how it is (or is not) to be used.

That budget authority is not provided directly to the executive branch agencies or departments all at once. It is distributed to them for use by the Office of Management and Budget (OMB) by a process known as **apportionment**.

Once budget authority is apportioned to an agency, it is available for **obligation**—which takes place when an agency enters into a legal obligation to pay for something—a grant, a battleship, a contract for services, etc.

Budget authority provided through appropriations measures are only available for obligation in the fiscal year for which it is provided, unless specified otherwise for certain accounts. Congress may specify that budget authority for certain accounts or activities are available for obligation for a longer **period of availability**, such as multiple fiscal years (multi-year availability) or indefinitely (no-year or “x”-year availability). Within DHS, the period of availability for appropriations accounts has varied:

Operations and Support—available for one to two fiscal years;

Procurement Construction and Improvement appropriations—available for three to five years;

Federal Assistance—available for one year;

Research and Development—available for two years.

Once obligated, the budget authority is available to make payments from the Treasury (called **outlays** or **expenditures**). Obligated budget authority can be **de-obligated** if the funds are no longer required, such as when a contract is cancelled. Such de-obligated funds can be re-obligated over their original period of availability.

If budget authority remains unobligated past its term of availability, it **expires**, and is no longer available for new obligations. Five years after an appropriation’s period of availability for obligation ends, the account is closed and the budget authority is no longer available for obligation or expenditure.

The Government Accountability Office (GAO) points out that

When Congress enacts appropriations, it has provided budget authority that agencies must obligate in a manner consistent with law. The Constitution vests lawmaking power with the Congress.... The President and officers in an Administration of course may consider their own policy objectives as they craft policy proposals for inclusion in the President’s budget submission.... However, once enacted, the President must “take care that the laws be faithfully executed.”... Enacted statutes, and not the President’s policy priorities, necessarily provide the animating framework for all actions agencies take to carry out government programs.<sup>4</sup>

<sup>4</sup> U.S. Government Accountability Office, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564, January 16, 2020, p. 6, <https://www.gao.gov/products/b-331564>.

Therefore, when the Administration receives an appropriation for a particular purpose outlined in statute, it is required to make a good-faith effort to responsibly execute the funded task with that appropriation, obligating the funds within their period of availability, or seeking to have that **budget authority** rescinded, or cancelled.<sup>5</sup> For more on this topic, see CRS In Focus IFI2329, *Expiration and Cancellation of Unobligated Funds*, by Taylor N. Riccard.

## Border Wall and Funding Status at Inauguration

The Trump Administration used the appropriated and redirected funding to construct border barriers in multiple places, often replacing existing vehicle barriers and older pedestrian barriers. When the Trump Administration left office, U.S. Customs and Border Protection (CBP) and the U.S. Army Corps of Engineers (USACE) reported that “[about] 403 miles of new primary and [about] 55 miles of new secondary border wall system” had been constructed since January 2017, including 52 miles of “new primary wall” where no barriers had previously existed.<sup>6</sup>

However, the Government Accountability Office (GAO) noted later that year that this was not the case. GAO noted a distinction between the construction of *border barriers* (placement of wall panels) and the *completion of border wall system*, which would include the requisite sensors, lighting, and roads. GAO agreed that roughly 458 miles of wall panels had been installed, mostly using DOD counterdrug and military construction funding, but also stated that only 69 miles of contracted border wall system was completed. **Table 1** provides GAO’s breakdown of border wall contracts, mileage, and funding by budget source.

**Table 1. Completion Status for Selected USACE Construction Contracts, as of January 2021**

Funding Source	Contracts Awarded	Miles of Wall System Under Contract	Wall Panels Complete (miles)	Wall System Complete (contract complete)	Funds Obligated	Funds Disbursed
DOD Counterdrug	7	295	258	0	\$6.3 billion	\$4.0 billion
DOD Military Construction	6	96	87	0	\$1.2 billion	\$0.9 billion
DHS	18	240	112	69	\$3.0 billion	\$1.8 billion
<b>Total</b>	<b>31</b>	<b>631 miles</b>	<b>458 miles</b>	<b>69 miles</b>	<b>\$10.5 billion</b>	<b>\$6.6 billion</b>

<sup>5</sup> However, the requirement does not mean all the available budget authority must be obligated. GAO notes that “Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities. Viewed another way, agencies obligating 100 percent of their available funds leave little to no room for obligations to be adjusted upward, and if unforeseen costs arise, those agencies run the risk of exceeding amounts available and violating the Antideficiency Act.” (U.S. Government Accountability Office, *Department of Commerce—Application of the Impoundment Control Act to Appropriations Enacted in Fiscal Years 2018 and 2019*, B-331298, December 23, 2020, p. 10, <https://www.gao.gov/assets/b-331298.pdf>.)

<sup>6</sup> U.S. Customs and Border Protection, U.S. Army Corps of Engineers, “Border Wall Status—January 22, 2021,” fact sheet, <https://www.crs.gov/Products/Documents/CBPPBorderWall01222021/pdf/CBPPBorderWall01222021.pdf>.

**Source:** GAO-21-372, p. 34, citing U.S. Army Corps of Engineers documentation and Federal Procurement Data System data.

**Notes:** Numbers do not sum due to rounding.

- a. This includes 31 of the 39 contracts GAO reviewed. Six of the remaining contracts were exclusively for roads or gates, so do not count toward the total miles of border wall constructed. The two remaining contracts were terminated shortly after award.

GAO went on to note this about the status of construction activity as of January, 2021:

All 13 DOD-funded contracts were expected to complete at least some wall panels by the end of 2020. Prior to the direction to pause work, 12 of these contracts were expected to be finished by the end of fiscal year 2021—i.e., the wall system was expected to be completed for most of the 391 miles awarded. While seven of the 18 contracts for border wall construction that were funded by DHS appropriations were completed, the completion timelines and construction status for the remaining DHS-funded contracts varied. Several were pushed back until fiscal year 2022 or suspended prior to the direction to pause work, and the completion status of the remaining miles is uncertain. According to CBP officials, these suspensions were related to difficulties they experienced in certifying real estate availability, which led USACE to pause construction activities, although design activities continued until the work stoppage.<sup>7</sup>

**Table 2** shows that roughly two-thirds of the funding identified for border barrier construction under the Trump Administration had been obligated. This included budget authority appropriated to CBP, transferred from the Treasury Forfeiture Fund, redirected within DOD, and repurposed from military construction projects to border barrier construction.

**Table 2. Obligation of Border Barrier Funding as of January 20, 2021**

Fiscal Year	Budget Authority	Obligated
<b>Department of Homeland Security</b>		
<b>Appropriated to CBP</b>		
FY2017	\$341 million	\$341 million (est.) <sup>a</sup>
FY2018	\$1,375 million	\$1,306 million (est.) <sup>b</sup>
FY2019	\$1,375 million	\$1,348 million (est.) <sup>b</sup>
FY2020	\$1,375 million	\$1,320 million (est.) <sup>b</sup>
FY2021	\$1,375 million	\$0
<b>Treasury Forfeiture Fund</b>		
<b>Transferred to DHS</b>		
FY2019	\$601 million	\$146 million
<b>Department of Defense Counterdrug Program</b>		
<b>Reprogrammed and transferred to USACE</b>		
FY2019	\$2,629 million	\$2,560 million
FY2020	\$3,831 million	\$3,776 million
<b>Military Construction under Emergency Authority</b>		
<b>Deferred from other Military Construction projects</b>		
FY2019	\$3,600 million	\$1,515 million

**Source:** CRS analysis of FY2019 and FY2020 DOD reprogramming actions for “Support of DHS Counter-Drug Activity”; U.S. Government Accountability Office, *Office of Management and Budget and U.S. Department of*

<sup>7</sup> U.S. Government Accountability Office, *Southwest Border: Schedule Considerations Drove Army Corps of Engineers’ Approaches to Awarding Construction Contracts Through 2020*, GAO-21-372, June 17, 2021, p. 34, <https://www.gao.gov/products/gao-21-372>.



*Homeland Security—Pause of Border Barrier Construction and Obligations*, B-333110, June 15, 2021; and USACE, “Status of Funds for Southwest Border Requirements,” as of January 20-22, 2021. Documents available upon request.

**Notes:**

- a. While neither CBP nor GAO indicated in their reporting a precise amount of FY2017 obligations, CBP noted in their border barrier updates that the specific projects funded by the FY2017 appropriations had been completed. Any remaining budget authority in this appropriation ceased to be available for new obligations after September 30, 2021.
- b. GAO did not provide a precise breakdown of obligations in B-333110, but instead provided a percentage of funds obligated, converted here for ease of comparison.

## January 20, 2021, Proclamation

On January 20, 2021, President Joseph R. Biden issued a proclamation that represented the first step of implementing his own border security and immigration policies. The proclamation did several things:

1. It **terminated the Trump Administration’s national emergency** with respect to the southern border that had been declared in February 2019.
2. It indicated the President’s opposition to diverting DOD resources to border wall construction in the current circumstance and stated that **emergency military construction and DOD authorities would no longer be used for border wall construction**.
3. It **paused work on construction projects** on the border wall, to the extent permitted by law, for the stated purpose of:
  - a. assessment of the funding and contracting methods used to construct the wall;
  - b. assessment of the administrative and contractual consequences of ceasing each project; and
  - c. completion and implementation of a plan for redirecting funding and repurposing construction contracts.
4. It **paused further obligation of funds** related to the construction of the southern border wall, to the extent permitted by law.
5. It **directed DOD and DHS to compile detailed information** on all southern border wall construction contracts, projects, and funding undertaken since the declaration of the border emergency.<sup>8</sup>

Under the terms of the proclamation, the Secretary of Defense and the Secretary of Homeland Security, in consultation with a range of executive departments and agencies, were to

develop a plan for redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law. The process of developing the plan shall include consideration of terminating or repurposing contracts with private contractors engaged in wall construction, while providing for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose.<sup>9</sup>

This proclamation represented two significant departures in policy from the prior Administration:

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<sup>8</sup> Proclamation 10142, “Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction,” 86 *Federal Register* 7225-7227, January 27, 2021.

<sup>9</sup> Proclamation 10142, Section 2.

- Rather than viewing the border wall as the linchpin of border security and homeland security policy, the Biden Administration took the position that “building a massive wall that spans the entire southern border is not a serious policy solution. It is a waste of money that diverts attention from genuine threats to our homeland security.”<sup>10</sup>
- Rather than redirecting funds from other purposes to construct border walls, the Biden Administration took the position “that no more American taxpayer dollars be diverted to construct a border wall.”<sup>11</sup>

## Immediate Effect

Points 1 and 2 above were statements of policy: by canceling the national emergency that made diversion of military construction funds possible, and ceasing to redirect funds from DOD operational accounts, the Administration closed those funding avenues for border wall construction.

The third and fourth points directly affected the border barrier construction process: pausing work on existing contracts, and pausing further awarding of contracts. USACE and CBP suspended all wall construction projects in the days after the Proclamation, with the exception of projects related to safety,<sup>12</sup> and new obligations stopped. Payments to fulfil existing obligations to contractors continued.<sup>13</sup>

The fifth point directed the assembly of information to allow the assessment and planning outlined as justifications for the pause in construction.

The proclamation directed DHS to develop a new plan for border barrier construction funding within 60 days, after which the Secretary of Defense and the Secretary of Homeland Security were to “take all appropriate steps to resume, modify, or terminate projects and to otherwise implement the plan.”

## Biden Administration Pre-Plan Actions

On April 9, 2021, in a letter to the bipartisan leadership of the House and Senate Appropriations and Budget committees, respectively, the Biden Administration released its request for FY2022 discretionary funding. While not a formal budget submission (which would ultimately come on May 28, 2021), it outlined a number of budgetary proposals and policy priorities of the new Administration. The Administration indicated that they sought no further funding for border wall construction in FY2022, and sought the rescission, or cancellation, of prior-year balances of all such funding that remained unobligated at the end of FY2021.<sup>14</sup>

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<sup>10</sup> Proclamation 10142, preamble.

<sup>11</sup> Proclamation 10142, preamble.

<sup>12</sup> U.S. Customs and Border Protection, U.S. Army Corps of Engineers, “Border Wall Status—January 22, 2021,” fact sheet.

<sup>13</sup> U.S. Department of Homeland Security, *Department of Homeland Security Border Wall Plan Pursuant to Presidential Proclamation 10142*, June 9, 2021, (hereinafter “June 2021 Plan”), p. 2, fn. 1, [https://www.dhs.gov/sites/default/files/publications/21\\_0611\\_dhs\\_security\\_border\\_wall\\_plan.pdf](https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_plan.pdf); and U.S. Government Accountability Office, *Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations*, B-333110, June 15, 2021 (hereinafter “B-333110”), p. 10, <https://www.gao.gov/products/b-333110-0>.

<sup>14</sup> Letter from Shalanda D. Young, Acting Director, Office of Management and Budget, to the Honorable Patrick Leahy, Chairman, U.S. Senate Committee on Appropriations, April 9, 2021, Enclosure 2, “2022 Discretionary Request Summaries for Major Agencies,” p. 15, <https://www.whitehouse.gov/omb/legislative/fy-2022-discretionary-request/>.

On April 30, 2021, DHS announced two border barrier projects that would proceed in spite of the pause, under an exception in the proclamation “for urgent measures needed to avert immediate physical dangers.”<sup>15</sup> One was a project to repair 13 miles of the levee system near Hidalgo County, TX, in the Rio Grande Valley Sector, which had been degraded by an incomplete border barrier construction project; and the other was remediation of a 14-mile stretch of soil erosion related to border barrier and road construction in San Diego. The Administration indicated at the time that neither project would “involve expanding the border barrier.”<sup>16</sup>

The same day, DOD announced it would cancel “all border barrier construction projects paid for with funds originally intended for other military missions and functions.”<sup>17</sup> Internal DOD documents (later included in Supreme Court records) indicated that the transferred DOD counterdrug funding had expired at the end of the fiscal year in which it had been provided, and would no longer be available for obligation.<sup>18</sup> In contrast, \$2.1 billion associated with four unawarded contracts (to be paid for with redirected military construction funds) could be released back to relevant DOD components.<sup>19</sup>

## Biden Border Wall Funding Plans

### Initial Plan

On June 11, 2021, the Biden Administration released its plan for further use of border wall funding.<sup>20</sup>

The plan indicated that DOD and DHS had indeed paused work on all border barrier construction, “with the exception of activities related to ensuring project sites are safe and secure in accordance with the terms and conditions of the contracts,” and had not made additional obligations.

DHS had continued to pay invoices under existing contracts in the interim and, in contrast to DOD, had not deobligated any funding, or cancelled contracts at that point.<sup>21</sup>

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<sup>15</sup> Proclamation 10142, Section 1(b).

<sup>16</sup> U.S. Department of Homeland Security, “DHS Announces Steps to Protect Border Communities from Wall Construction,” press release, April 30, 2021, <https://www.dhs.gov/news/2021/04/30/dhs-announces-steps-protect-border-communities-wall-construction>.

<sup>17</sup> U.S. Department of Defense, “DOD Release Regarding Cancellation of Border Barrier Project Cancellation”[sic], press release, April 30, 2021, <https://www.defense.gov/News/Releases/Release/Article/2591993/dod-release-regarding-cancellation-of-border-barrier-project-cancellation/>.

<sup>18</sup> Robert G. Salesses, Performing the Duties of the Assistant Secretary of Defense (Homeland Defense and Global Security), Memorandum to the Deputy Secretary of Defense, “Subject: Department of Defense Actions Implementing Presidential Proclamation 10142,” April 27, 2021, [https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165643828\\_20-138%20USA%20Letter%20Update%20Enclosure.pdf](https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165643828_20-138%20USA%20Letter%20Update%20Enclosure.pdf). Hereinafter “Salesses memo.” A DOD information paper attached to the memorandum as Tab E further noted that USACE estimated that \$624 million would be expended to pay outstanding contract claims and termination costs, and \$415 million would be paid for suspension costs, although they noted these amounts were subject to negotiations with contractors. See Tab E.

<sup>19</sup> Salesses memo, Tab E. The information paper included as Tab E further noted that USACE estimated \$261 million in deobligations would be made from awarded contracts, \$180 million would pay for termination costs, and \$160 million would pay for suspension costs, although they noted these amounts were subject to negotiations with contractors.

<sup>20</sup> Office of Management and Budget, “FACT SHEET: Department of Defense and Department of Homeland Security Plans for Border Wall Funds,” June 11, 2021, <https://www.whitehouse.gov/omb/briefing-room/2021/06/11/fact-sheet-department-of-defense-and-department-of-homeland-security-plans-for-border-wall-funds/>.

<sup>21</sup> June 2021 Plan, p. 1. Contract suspension and cancellation can result in the government covering certain costs incurred by the contractor.

### IIRIRA Waivers for Border Barrier Construction

One of the perceived challenges to quick action on federal procurement and construction is the requirement for public engagement and review under a variety of laws.

In 2005, through Section 102 of the REAL ID Act of 2005 (P.L. 109-13, Div. B), Congress amended Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), allowing the Secretary of DHS to waive “all legal requirements” that might impede the construction of border barriers and roads.

Such a waiver is not required, but it can be exercised at the Secretary’s “sole discretion” if the Secretary determines that it is “necessary to secure expeditious construction.”<sup>22</sup> Before the Biden Administration, the authority was exercised five times under President George W. Bush, and 27 times by the Trump Administration, covering more than 900 miles, by some calculations.<sup>23</sup>

In its June 2021 plan, the Biden Administration stated a desire to engage in the traditional processes for environmental planning and public engagement for border barrier construction, but has continued work under some existing waivers, and exercised the authority for a new project in October 2023, as discussed below.

For more information on legal authorities for border barrier construction, including the waiver authority, see CRS Legal Sidebar LSB11059, *Barriers Along the U.S. Border: Key Authorities and Recent Developments*, by Michael John Garcia and Sean M. Stiff.

### The Plan for DHS Appropriations

The excepted emergency projects in the Rio Grande Valley and San Diego (noted above) would proceed under previously existing waivers for environmental review, given their urgency.

Going forward, the Biden Administration’s June 2021 plan noted that before further construction on border wall projects funded by pre-FY2021 DHS appropriations, DHS would “undertake a thorough review and replanning process,” including:

- regardless of the existence of IIRIRA waivers, engaging in standard environmental planning processes for continuing projects, to include public scoping and comment, except in cases of projects needed to address life, safety, environmental, or other remediation requirements;
- substantively consulting with stakeholders in the public and private sector as part of the environmental planning of projects and their execution; and
- reviewing all border wall land eminent domain actions begun between 2016 and 2020, and reassessing their necessity based on the environmental planning activities.<sup>24</sup>

The plan indicated that FY2021 border barrier construction appropriations would be used to complete and remediate border wall projects that would be turned over by DOD to DHS, as well as for cost overruns on the Rio Grande Valley emergency levee repair project. Any funds not required for such purposes would then be used for the next highest priority barrier segments identified by DHS, initially prioritizing projects required for life, safety, environmental, or other remediation requirements. Those projects would begin with a National Environmental Policy Act (NEPA)-compliant planning process.

<sup>22</sup> 8 U.S.C. §1103 note.

<sup>23</sup> Kenneth D. Madsen, “Institutionalising the Exception: Homeland Security Section 102(c) Waivers and the Construction of Border Barriers,” *Geopolitics*, 2023, vol. 28, iss. 5, pp. 1783-1806, <https://www.tandfonline.com/doi/full/10.1080/14650045.2022.2126766>.

<sup>24</sup> June 2021 Plan, pp. 2-3. The plan also discusses modifying plans to reduce the use of land acquired through adverse eminent domain proceedings, possible revestment of unneeded land already acquired, and use of condemnation as a last resort.

At various points, the plan noted that DHS was exploring use of appropriated funds to address issues with construction carried out with redirected funds, including remediation. The plan noted that “The specific amount of funding required will depend upon the condition of the DOD projects and the amount of work DHS can undertake.” The DHS plan thus implied that the transfer of the DOD projects had yet to take place.<sup>25</sup>

### The Plan for Other Funding

According to the plan, \$146 million of the \$601 million transferred from the Treasury Forfeiture Fund (TFF) in FY2019 had been obligated.

Under the plan, DHS would end border wall construction funded by TFF resources, and terminate the contracts, once tasks to protect life, safety, and the environment were completed.

Unobligated balances of \$455 million were returned to the TFF to fund other law enforcement purposes, as it had originally been intended. Any funds deobligated after project cancellation would also be returned to the TFF.

#### The Fate of DOD Border Wall Funding

Most of the DOD funding redirected to border barrier construction under counterdrug authorities had already been obligated and expended—less than \$130 million of the \$6.46 billion directed through those channels remained unobligated when the Biden Administration took office, and more than two-thirds of the obligated resources had been expended. However, of the \$3.6 billion in redirected military construction funds, only \$1.5 billion had been obligated and less than two-thirds of the obligated amount had been expended.

The day the Administration released its plan for the use of DHS border barrier funding, it restated its policy, saying that “no more money will be diverted for the purposes of building a border wall,” and noting that DOD had begun the process of canceling all border barrier projects using the diverted funds. It also announced that more than \$2 billion in unobligated diverted military construction funding was being returned to meet its original purposes.

### Administration Plan Implementation

Announcements of contract actions resulting from the “review and replanning” outlined by the administration began in July 2021. That month, two CBP projects in the Laredo Sector were canceled,<sup>26</sup> and DHS authorized CBP to complete projects to address life, safety, environmental, and other remediation requirements in the El Centro, Rio Grande Valley, and San Diego Sectors.<sup>27</sup> In October 2021, CBP announced it would cancel all other border barrier contracts in the Laredo and Rio Grande Valley Sectors, and begin environmental planning activities for border barrier system projects in the Rio Grande Valley, Laredo, and El Centro Sectors.<sup>28</sup>

CBP continued to undertake more activities to address life, safety, environmental, and other remediation requirements across seven sectors in the following months. Before the plan was a

<sup>25</sup> June 2021 Plan, p. 4.

<sup>26</sup> DHS, “DHS to Cancel Laredo Sector Border Barrier Contracts,” press release, July 23, 2021, <https://www.dhs.gov/news/2021/07/23/dhs-cancel-laredo-sector-border-barrier-contracts>.

<sup>27</sup> DHS, “DHS to Address Life, Safety, Environmental, and Operational Considerations for Specific Border Barrier Projects,” press release, July 27, 2021, <https://www.dhs.gov/news/2021/07/27/dhs-address-life-safety-environmental-and-operational-considerations-specific-border>.

<sup>28</sup> DHS, “DHS to Terminate Border Barrier Contracts in Laredo and Rio Grande Valley,” press release, October 8, 2021, <https://www.dhs.gov/news/2021/10/08/dhs-terminate-border-barrier-contracts-laredo-and-rio-grande-valley>.

year old, 20 projects had been approved, including six projects to remediate border barrier projects undertaken with DOD counterdrug funding.<sup>29</sup>

## Plan Amendment

On July 11, 2022, DHS announced an amendment to the June 2021 plan,<sup>30</sup> providing more specifics as to the uses of available funds by fiscal year:

Since the release of the Plan, and through that continued assessment, DHS has found that the remediation and mitigation requirements from past barrier construction are more substantial than anticipated and can be addressed through the lawful expenditure of DHS funds. Additionally, DHS has determined that the installation of barrier system attributes, which may include, as appropriate to each location, lighting, cameras, and detection technology, in areas where physical barrier has already been constructed, is consistent with the purpose of the FY18-2021 appropriations, will enhance the functionality of previously constructed barrier and can be implemented in a manner that is consistent with the planning criteria and other principles of the Plan.<sup>31</sup>

In its amendment, DHS took note of the specific purpose for each appropriation, stating that it would:

- Use FY2018 and FY2019 appropriations, which had been specifically directed to primary pedestrian fencing in the Rio Grande Valley Sector, “to address remediation and mitigation requirements from past barrier construction” and “complete the installation of barrier system attributes, which may include, as appropriate to each location, lighting, cameras, and detection technologies, in the areas where physical barrier was constructed previously with FY18 and FY19 appropriations.”<sup>32</sup>
- Use DHS border barrier system funding from FY2020 and FY2021, which was more broadly directed to “construction of barrier system along the southwest border” to (1) “close out,” remediate, or mitigate in areas where DOD border construction had taken place, and (2) to install border wall system attributes, like lighting, cameras, and detection technology, in places where barrier panels had already been placed.<sup>33</sup>

## Further Implementation

Under the revised plan, DHS has continued activities to close and remediate issues with border barrier projects funded with redirected military construction funds. In announcing some of these projects in December 2022, DHS noted:

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<sup>29</sup> Information on CBP environmental management and recent projects can be found at <https://www.cbp.gov/about/environmental-management>. For more information on environmental planning under the National Environmental Policy Act (NEPA), see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite.

<sup>30</sup> DHS, “DHS Update on Border Wall Remediation Efforts,” press release, July 11, 2022, <https://www.dhs.gov/news/2022/07/11/dhs-update-border-wall-remediation-efforts>.

<sup>31</sup> DHS, *Amendment to DHS Border Wall Plan Pursuant to Presidential Proclamation 10142*, July 11, 2022 (hereinafter, “Amendment”), p. 1, [https://www.dhs.gov/sites/default/files/2022-07/22\\_0711\\_dhs\\_security\\_border\\_wall\\_plan\\_amendment.pdf](https://www.dhs.gov/sites/default/files/2022-07/22_0711_dhs_security_border_wall_plan_amendment.pdf).

<sup>32</sup> Amendment, pp. 1-2. Because of the directive language associated with the appropriations, all of these projects must be within the Rio Grande Valley Sector.

<sup>33</sup> Amendment, pp. 2-3.

While the U.S. Army Corps of Engineers ensured that DoD contractors made their work sites safe, if left incomplete or unaddressed, conditions at these locations create potential safety risks to CBP personnel and surrounding communities and pose a potential risk of flooding and property damage to communities and landowners. They also create a risk of environmental degradation related to lack of proper grading, erosion control measures, and slope stabilization.<sup>34</sup>

Some projects were approved to support Border Patrol operations, in addition to the life, safety, environmental, or other remediation requirements prioritized under the initial plan. These either close gaps in incomplete projects,<sup>35</sup> or build additional miles of border wall system.

On June 30, 2023, DHS had announced plans to move ahead with planning and execution of up to 20 miles of border barrier system in Starr County, TX, in the Rio Grande Valley sector, using FY2019 appropriations.<sup>36</sup> Public comment on the project was open for a month, closing on September 15, 2023.<sup>37</sup> The contract was awarded September 28, 2023, two days before the unobligated balances of that appropriation would expire. On October 5, 2023, DHS announced that it would exercise its waiver authority under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>38</sup> to expedite that construction project—the first time the Secretary had exercised that authority.

In the Secretary’s determination, published in the *Federal Register*, he noted the following:

The United States Border Patrol’s (Border Patrol) Rio Grande Valley Sector is an area of “high illegal entry.” As of early August 2023, Border Patrol had encountered over 245,000 such entrants attempting to enter the United States between ports of entry in the Rio Grande Valley Sector in Fiscal Year 2023.

Therefore, I must use my authority under section 102 of IIRIRA to install additional physical barriers and roads in the Rio Grande Valley Sector. Therefore, DHS will take immediate action to construct barriers and roads. Construction will be funded by a fiscal year 2019 appropriation through which Congress appropriated funds for the construction border barrier in the Rio Grande Valley, and DHS is required to use those funds for their appropriated purpose. This project is consistent with DHS’s plan to fulfill the requirements of President Biden’s Proclamation (Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021)), which ended the diversion of funds for border wall from military projects or other sources while calling for the expenditure of any funds Congress appropriated for barrier construction consistent with their appropriated purpose.<sup>39</sup>

<sup>34</sup> DHS, “DHS to Address Life, Safety, Environmental, and Remediation Requirements for Border Barrier Projects in San Diego, Yuma, El Paso,” press release, December 13, 2022, <https://www.dhs.gov/news/2022/12/13/dhs-address-life-safety-environmental-and-remediation-requirements-border-barrier>.

<sup>35</sup> DHS, “DHS to Address Life, Safety, and Operational Requirements in the U.S. Border Patrol’s Yuma Sector,” press release, July 28, 2022, <https://www.dhs.gov/news/2022/07/28/dhs-address-life-safety-and-operational-requirements-us-border-patrols-yuma-sector>; and see, for example, <https://www.cbp.gov/document/environmental-assessments/morelos-dam-border-barrier>.

<sup>36</sup> CBP, “CBP Moves Forward on RGV Barrier and Yuma Andrade and El Centro Calexico Fence Replacement Projects to Mitigate Immediate Life, Safety and Operational Risks,” press release, June 30, 2023, <https://www.cbp.gov/newsroom/local-media-release/cbp-moves-forward-rgv-barrier-and-yuma-andrade-and-el-centro-calexico>. The press release indicated that the unobligated balance of FY2019 border barrier appropriations was estimated to be “\$190 million” as of that date. This would appear to reflect deobligations of FY2019 border barrier appropriations when contracts were canceled as announced in October 2021.

<sup>37</sup> CBP, *Starr County Border Barrier Stakeholder Feedback Report*, October 30, 2023, p. 3, <https://www.cbp.gov/document/environmental-assessments/rio-grande-valley-border-barrier-environmental-planning>.

<sup>38</sup> 8 U.S.C. § 1103 note.

<sup>39</sup> U.S. Department of Homeland Security, Office of the Secretary, “Determination Pursuant to Section 102 of the (continued...)”

DHS had indicated in its June 2020 plan for use of border wall system appropriations, that

For all activities or projects that will continue, with the exception of the projects and activities [for emergencies specified in the Plan] or projects necessary to address life, safety, environmental, or other remediation requirements, regardless of whether an applicable IIRIRA waiver is rescinded or revised, DHS intends to engage in standard environmental planning including taking certain actions consistent with National Environmental Policy Act (NEPA) and other environmental planning and statutes. DHS intends to undertake a multistep environmental planning process, which will include public scoping and comment on potential environmental impacts through the NEPA process.<sup>40</sup>

Despite the intent outlined in the June 2021 plan, the Administration found it necessary to waive NEPA and 25 other federal statutes to expedite the new border wall construction in Starr County,<sup>41</sup> and while DHS did receive public comment, given the intent to “take immediate action to construct barriers and roads,” the environmental planning process is less deliberate than the process for the other developing projects.

## Congressional Action on Border Barrier Funding

### Obligation Pause Challenged

In March and April of 2021, several Senators and Members of the House wrote the Comptroller General asking GAO for a legal opinion on whether President Biden’s pause in border barrier obligations and construction were illegal under the Impoundment Control Act.<sup>42</sup>

On June 15, 2021, GAO issued a decision that indicated “delays in the obligation and expenditure of DHS’s appropriations are programmatic delays, not impoundments.”<sup>43</sup>

Almost all border barrier construction funding for FY2017-FY2020 had already been obligated, but FY2021 funding had not. GAO noted that when the Administration chose to cease redirecting funds within DOD to construct border barriers, and restore what unexpended funds it could to its original purposes, DHS needed to determine what its new construction priorities and funding needs were. Furthermore, the Administration intended to proceed when it could without exercising discretionary waivers of statutory prerequisites, such as the National Environmental Policy Act and procurement laws, and thus had to follow a more deliberate process, similar to other government construction and procurement efforts.

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Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” 88 *Federal Register* 69214, October 5, 2023.

<sup>40</sup> June 2021 Plan, p. 2.

<sup>41</sup> Department of Homeland Security, “Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,” 88 *Federal Register* 69214-69215, October 5, 2023.

<sup>42</sup> B-333110, p. 3, fn. 8. As noted above in the “How to Follow the Money” text box, the Administration is required to make a good faith effort to use the budget authority it is appropriated for the purposes it is provided for. The President may submit a request to Congress requesting the cancellation (rescission) of certain unobligated budget authority. If Congress does not pass legislation rescinding the requested budget authority within 45 days of the request, however, then the President is required to make the budget authority available for obligation. Under 2 U.S.C. §684, the Administration can only delay obligation or expenditure of funds to provide for contingencies; to achieve savings through changes in requirements or greater efficiency; or as specifically provided by law. If the Comptroller General, who is charged with reviewing such actions, finds the Administration has improperly withheld required funds from obligation, the Comptroller General can take action in court to compel the availability of the budget authority for obligation.

<sup>43</sup> B-333110, p. 1.



GAO distinguished this case from their previous finding of an impoundment in the case of the Trump Administration’s handling of military assistance for Ukraine,<sup>44</sup> noting that in the case of the aid:

OMB did not justify the withholding of Ukraine security assistance funding by presenting evidence of any statutory prerequisites that needed to be satisfied before funds could be obligated. Here, delays in the obligation and expenditure of DHS’s border barrier appropriations stem from the time required to meet applicable statutory requirements and develop plans for the use of the funds that consider current circumstances.<sup>45</sup>

## Selected Legislative Actions

### Secure the Border Act of 2023 (H.R. 2, 118<sup>th</sup> Congress)

Sections 102 and 103 of H.R. 2, which passed the House of Representatives by a vote of 219-213 on May 11, 2023,<sup>46</sup> would provide legislative direction to the current and future Secretaries of Homeland Security on actions they must undertake regarding border barriers, requiring them to:

- “resume all activities related to the construction of the border wall along the border between the United States and Mexico that were underway or being planned for prior to January 20, 2021.”;
- “expend all unexpired funds appropriated or explicitly obligated for the construction of the border wall that were appropriated or obligated, as the case may be, for use beginning on October 1, 2019.”;
- Within 90 days of enactment, “submit to the appropriate congressional committees an implementation plan, including annual benchmarks for the construction of 200 miles of such wall and associated cost estimates for satisfying all requirements of the construction of the border wall, including installation and deployment of tactical infrastructure, technology, and other elements as identified by the Department prior to January 20, 2021, through the expenditure of funds appropriated or explicitly obligated, as the case may be, for use, as well as any future funds appropriated or otherwise made available by Congress.”;
- “construct a border wall, including physical barriers, tactical infrastructure, and technology, along not fewer than 900 miles of the southwest border until situational awareness and operational control of the southwest border is achieved.”;
- “deploy along the southwest border the most practical and effective physical barriers, tactical infrastructure, and technology available for achieving situational awareness and operational control of the southwest border.”;
- “consult with the Secretary of the Interior, the Secretary of Agriculture, appropriate representatives of State, Tribal, and local governments, and appropriate private property owners in the United States to minimize the impact on natural resources, commerce, and sites of historical or cultural significance for the communities and residents located near the sites at which physical barriers,

<sup>44</sup> U.S. Government Accountability Office, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564, January 16, 2020, <https://www.gao.gov/products/b-331564>.

<sup>45</sup> B-333110, p. 3.

<sup>46</sup> Roll Call #209, <https://clerk.house.gov/Votes/2023209>.

tactical infrastructure, and technology are to be constructed. Such consultation may not delay such construction for longer than seven days.”; and

- “waive all legal requirements necessary to ensure the expeditious design, testing, construction, installation, deployment, integration, operation, and maintenance of the physical barriers, tactical infrastructure, and technology under this section. The Secretary shall ensure the maintenance and effectiveness of such physical barriers, tactical infrastructure, or technology. Any such action by the Secretary shall be effective upon publication in the Federal Register.”

In addition, the bill would remove discretion that exists in current law for the Secretary to use their judgement as to whether installation of barriers or other infrastructure in specific areas is appropriate. Under current law, the Secretary is not required to do so if they determine that such action is not the most appropriate means to achieve operational control of the border.<sup>47</sup>

H.R. 2 has not been taken up by the Senate at this time.

## House and Senate Appropriations Action

### *FY2022*

The Administration proposed rescinding all unobligated DHS border barrier construction funds in their FY2022 budget request. Several of the Administration’s communications in calendar year 2021 regarding planning for FY2022 noted that the Administration at the time was seeking the rescission<sup>48</sup> of the funds for those projects from Congress, but that the law required DHS to proceed with a good faith effort to use those funds consistent with their appropriated purpose.

Ultimately, the Administration’s efforts to rescind the unobligated funds was unsuccessful, as the enacted Department of Homeland Security Appropriations Act, 2022 (P.L. 117-103, Division F) did not rescind the funds. The accompanying explanatory statement accompanying the act directed the Secretary to “convene a multi-agency working group to identify the impacts of complete and incomplete border security infrastructure on border security, communities, tribes, wildlife, and local environments, including the impacts of erosion and improper drainage associated with partially complete infrastructure projects.”<sup>49</sup> Furthermore, the Secretary was directed to provide a plan to the appropriations committees for addressing such impacts by mid-November 2022.

### *FY2023*

The Administration proposed three new administrative provisions providing more flexibility with the use of unobligated border barrier construction budget authority:

- authorization for CBP to use unobligated balances of its “Procurement, Construction, and Improvement” appropriations from FY2018 to FY2021 for other specified border management purposes;
- removal of previously enacted restrictions on the types of border barrier that could be constructed that had been carried in DHS appropriations acts for FY2018 to FY2020; and

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<sup>47</sup> H.R. 2, Section 103(2)(B)(v).

<sup>48</sup> See the “How to Follow the Money” text box, above.

<sup>49</sup> *Congressional Record*, Daily Edition (March 9, 2022), vol. 168, no. 42, p. H2395.

- authorization for DHS to transfer up to \$225 million in unobligated CBP Procurement Construction, and Improvement appropriations from prior years to the Department of the Interior (including any agency or bureau within the Department of the Interior) or the Forest Service “for the execution of environmental and other mitigation projects or activities ... related to the construction of border barriers on the southwest border.”<sup>50</sup>

None of these administrative provisions were included in the enacted FY2023 consolidated appropriations measure.<sup>51</sup>

## **FY2024**

The Administration proposed the same three administrative provisions that it did in FY2023, though the language no longer referenced FY2018 and FY2019.<sup>52</sup>

H.R. 4367, the FY2024 DHS appropriations bill developed and passed by the House of Representatives, included a rescission of \$2.104 billion from FY2020 and FY2021 CBP Procurement, Construction, and Improvement (PC&I) appropriations, and Section 211 directed \$2.104 billion from the FY2024 CBP PC&I appropriation to border barrier construction.<sup>53</sup> The new appropriation would be available for obligation until the end of FY2028. Section 211 also would place strict limits on barrier parameters and locations for barrier construction, and would require the Secretary to begin obligation of border barrier construction funding no later than 120 days after the date of enactment. A new administrative provision, Section 212, would restrict the removal of existing border barriers unless they are being repaired or replaced.<sup>54</sup>

S. 2625, the Senate Appropriations Committee-reported FY2024 Homeland Security appropriations bill, included no such rescissions, reappropriations, or language.

## **Senate Bipartisan Border Proposal (S.Amdt. 1386, 118<sup>th</sup> Congress)**

A bipartisan border security measure negotiated in the U.S. Senate in association with a supplemental appropriations package would also provide direction on border barrier policy.<sup>55</sup> Section 205 of that measure would rescind and reappropriate all unobligated border barrier construction funding,<sup>56</sup> making it available for at least four more fiscal years (through FY2028), under the same conditions as provided in the original appropriations measures.

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<sup>50</sup> Office of Management and Budget, *Appendix, Budget of the United States Government, Fiscal Year 2023* (U.S. Government Publishing Office, 2023), <https://www.govinfo.gov/app/collection/budget/>, p. 530.

<sup>51</sup> P.L. 117-328, Division F.

<sup>52</sup> Office of Management and Budget, *Appendix, Budget of the United States Government, Fiscal Year 2024* (U.S. Government Publishing Office, 2023), <https://www.govinfo.gov/app/collection/budget/>, p. 520.

<sup>53</sup> While this would appear to be a 1:1 replacement of old balances for new, only unobligated balances are available for rescission, and given ongoing border construction activity using the unobligated balances targeted by the bill, it is unlikely such a large amount would be available to rescind at the time of enactment.

<sup>54</sup> CRS is unaware of any Biden Administration, DHS, or CBP proposal to remove existing border barriers without replacing them.

<sup>55</sup> S.Amdt. 1386 to H.R. 815.

<sup>56</sup> Unlike the rescission and reappropriation in H.R. 4367, this reappropriation was drafted without specific dollar values, only referencing “unobligated balances” of budget authority specified for border barrier construction and “an amount of additional new budget authority equivalent to the amount rescinded pursuant to this section.” The FY2020 budget authority will no longer be available for obligation after September 30, 2024, and the FY2021 budget authority will no longer be available after FY2025.

Provisos of that same section would require the barriers to be built at locations specified in the Border Security Improvement Plan submitted to Congress on August 2020, under the Trump Administration. However, the Commissioner of CBP could reprioritize those projects, or “add additional miles of pedestrian physical barriers where no such barriers exist, prioritized by operational requirements developed in coordination with U.S. Border Patrol leadership” with the prior approval of the appropriations committees.

Finally, before any of the reappropriated funds could be used, the DHS Secretary would have to submit a report to the Appropriations committees “detailing how the funds will be used, by sector, to include the number of miles to be built.”

## **Considerations for Congress**

### **The Power of Appropriations**

The legal and administrative handling of the border wall project by the two administrations can serve as a case study to highlight the power of appropriations law and practice, if properly overseen. While the Trump Administration secured more funding for border wall construction through transfers and reprogrammings within DOD, it is the funding appropriated to DHS that is still building miles of border wall system. Those enacted appropriations measures provided persistent direction beyond the presidential transition.

It can be argued that border barrier construction was one of President Trump’s highest policy priorities. Under his administration, \$5.84 billion in appropriations were provided by Congress for border barrier planning and construction. Beginning in 2019, the Trump Administration also took steps to secure funding beyond the levels approved by Congress for border barriers. More than \$10 billion was redirected from DOD and Military Construction appropriations to border wall development by the DOD under counterdrug and emergency authorities. Roughly \$601 million from the Treasury Forfeiture Fund (TFF) was also transferred to DHS for border wall construction.

It can also be argued that this priority was a key point of contrast in the 2020 presidential campaign. Then-candidate Biden campaigned on a platform of stopping border wall construction. However, the realities of the status of the project and its funding stream have precluded its instant termination.

The Biden Administration has some authority related to the termination of such activities. For example, the redirection of DOD and Military Construction appropriations under emergency authority was quickly stopped by the Administration’s cancellation of the underlying declaration, and the Administration has chosen not to transfer other funds.

The Biden Administration has limited authority to terminate or otherwise alter activities related to existing enacted appropriations and associated direction, however. The Administration did have the flexibility to use unobligated and deobligated DHS border wall construction appropriations to address a variety of issues with DOD border infrastructure construction projects. However, the direction to use specific budget authority for border barrier construction within the appropriations measures required the Administration to move ahead on a policy it did not endorse, absent legislative redirection. While the Biden Administration sought legislative redirection, through rescission of the funds or addition of flexibility in its use, Congress did not provide it.

The handling of the transferred funding—both within the Department of Defense and from the TFF to DHS—was legally distinct from DHS appropriations. These resources were transferred by

the previous Administration for the purpose of constructing border barriers through executive action, rather than being provided to construct border barriers in an appropriations act. Thus, there was no legal requirement that those funds be used for the redirected purpose by the new Administration. Had the Trump Administration secured DOD or Military Construction appropriations specifically for border barrier construction, rather than redirecting other appropriations, similar requirements would have applied.

Advocates for and detractors of border wall construction policy can both look at the flexibility within the appropriations processes and see benefits. The Trump Administration used the flexibilities in the Department of Defense budget process to transfer and reprogram budget authority under two existing authorities to build border barriers (despite congressional objections from some quarters). The Biden Administration was able to take appropriations provided for DHS border wall construction and apply them to completion of DOD-initiated projects and remediation of issues with existing construction. The Biden Administration also refocused DHS construction efforts to reprioritized areas after the remaining redirected DOD resources were returned to their original purposes and DOD-funded construction of barriers ceased.

### Information for Oversight

Congress has at times been challenged in obtaining information on border barrier construction for use in public debate. In recent discussions, the Trump Administration, the Biden Administration, and Congress, in discussions about border barriers, have relied on the *U.S. Border Patrol Impedance and Denial Prioritization Strategy*, which includes a list of projects for barrier construction. This is not a document available for use in public debate, as it is a report to a specific committee of Congress, and its contents, while not classified information, are restricted from public circulation.<sup>57</sup>

There were no known authoritative cost estimates for the total construction or operation and maintenance costs of these projects if they were all completed, or publicly available assessments of how completion of various projects might affect CBP's operational costs.

In its decision regarding whether the delay in obligations for border barrier construction at the beginning of the Biden Administration was an impoundment, GAO noted the following:

In order to facilitate Congress's oversight of executive spending and its Constitutional power of the purse, the congressional oversight and appropriations committees should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligating DHS's fiscal year 2021 appropriation. A detailed timeline could serve as a tool for rigorous oversight to ensure the President does not substitute his own policies and priorities in place of those established through the legislative process.<sup>58</sup>

Some observers note that a new balance may need to be struck on this issue between the need for strategic and tactical information security and broader availability of information for congressional and public oversight.

### Enforcement

The question may arise as to how Congress could enforce its mandates in a timely fashion should an administration choose to defy those practices in the future. The Trump Administration had to

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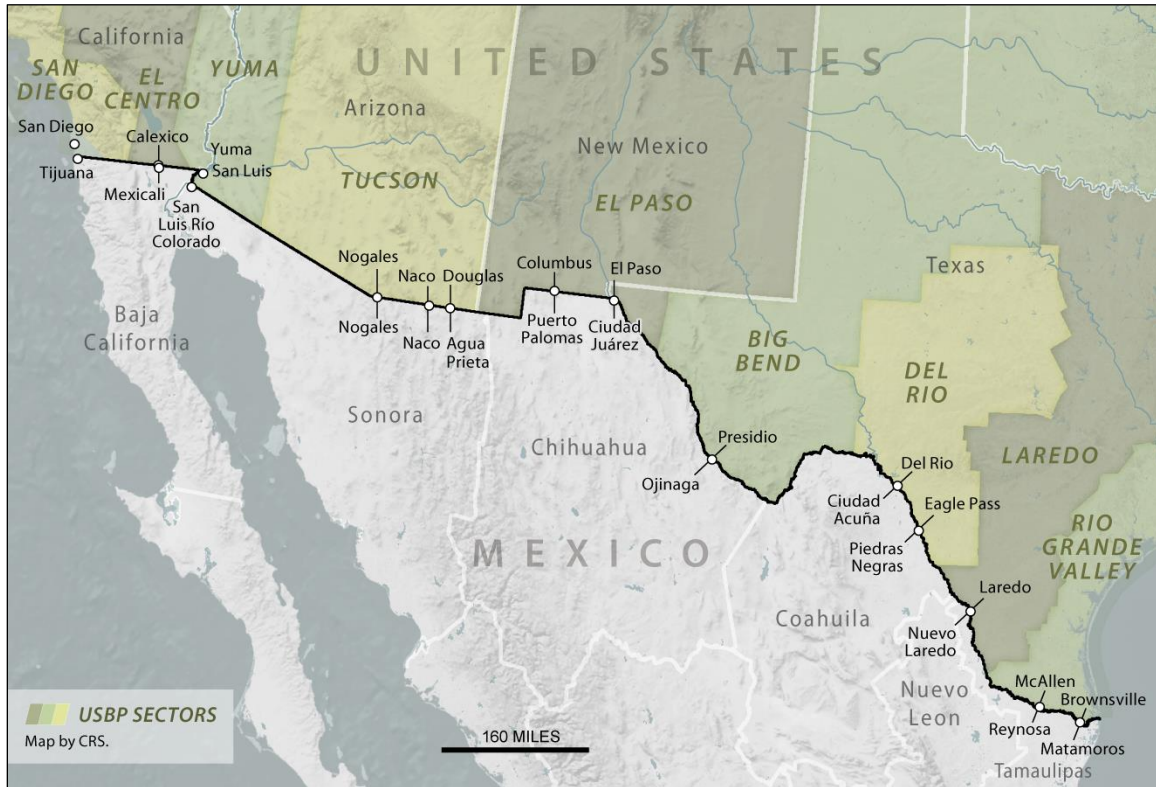
<sup>57</sup> The Strategy is part of a report to a specific committee of Congress, and is designated Law Enforcement Sensitive. This designation indicates that the information is sensitive (but unclassified) and for that reason, DHS, by guidance, restricts circulation of it beyond those with a "need-to-know" to perform official governmental duties.

<sup>58</sup> B-333110, p. 1.

defend its position on the transfer and reprogramming of DOD and military construction resources to build border barriers in court. Those challenges took time, and absent injunctive relief, large amounts of the money were obligated before the courts began to rule. Had the Biden Administration chosen to withdraw appropriated budget authority from availability to obligate, and allow large amounts of unobligated budget authority to expire rather than using it for its intended purpose, it is not unlikely that similar court cases might unfold.

# Appendix. Map of Border Patrol Sectors on the U.S.-Mexico Border

Figure A-1. Border Patrol Sectors on the U.S. Mexico Border



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