



# Decision

**Matter of:** Department of Homeland Security—Border Barrier Construction and Obligations

**File:** B-335747

**Date:** April 22, 2024

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## DIGEST

In fiscal years 2018 through 2021, Congress appropriated amounts to the Department of Homeland Security (DHS) for constructing barriers, commonly known as a border wall, along the United States' southern border. In January 2021, a presidential proclamation directed officials to pause all construction and obligation of funds for the border wall, to the extent permitted by law.

Unless Congress has enacted a law providing otherwise, executive branch officials must take care to ensure that they prudently obligate appropriations during their period of availability. The Impoundment Control Act of 1974 (ICA) allows the President to withhold funds from obligation, but only under strictly limited circumstances and only in a manner consistent with that Act. In 2021, we concluded that neither the proclamation nor its implementation violated the ICA. B-333110, June 15, 2021. We conclude that DHS has continued to incur obligations against these appropriations at a rate consistent with the ICA.

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## DECISION

In response to a congressional request, this decision addresses whether the Department of Homeland Security (DHS) has complied with the Impoundment Control Act (ICA) as it executes amounts appropriated specifically for border fencing or barriers for fiscal years 2018, 2019, 2020, and 2021.<sup>1</sup> Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title X, §§ 1001–1017, 88 Stat. 297, 332–339 (July 12, 1974), 2 U.S.C. §§ 681–688.

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<sup>1</sup> Letter from Representative Jodey Arrington, Chairman, House Budget Committee, and Representative Jack Bergman, Chair of the Oversight Task Force, House Budget Committee, to Comptroller General (Nov. 9, 2023).

In accordance with our regular practice, we contacted DHS to seek factual information and its legal views on this matter.<sup>2</sup> DHS provided both in its response.<sup>3</sup>

## BACKGROUND

Congress appropriated funds to DHS for a barrier system or fencing for fiscal years 2018 through 2021.<sup>4</sup> On January 20, 2021, the President issued a Proclamation pausing border barrier construction and obligations to the extent permitted by law.<sup>5</sup> The Proclamation also ended the prior Administration’s emergency declaration, stating the new policy that “no more American taxpayer dollars be diverted to construct a border wall.”<sup>6</sup> Among other things, the Proclamation further directed the

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<sup>2</sup> GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at [www.gao.gov/products/gao-24-107329](http://www.gao.gov/products/gao-24-107329); Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, DHS (Dec. 11, 2023).

<sup>3</sup> Letter from Assistant General Counsel for Appropriations and Fiscal Law, DHS, to Assistant General Counsel for Appropriations Law, GAO (Feb. 16, 2024) (with attachments) (Response Letter).

<sup>4</sup> For each year, Congress provided to DHS’s U.S. Customs and Border Protection (CBP) a lump-sum appropriation for construction activities in its Procurement, Construction, and Improvements (PC&I) account. B-333110, June 15, 2021. For fiscal year 2018, of the amounts Congress appropriated to CBP for PC&I, \$1.375 billion was made available for border fencing. DHS Appropriations Act, 2018, Pub. L. No. 115-141, div. F, title II, § 230, 132 Stat. 348, 605, 616–617 (Mar. 23, 2018). For fiscal year 2019, \$1.375 billion was made available for primary pedestrian fencing, including levee fencing. DHS Appropriations Act, 2019, Pub. L. No. 116-6, div. A, title II, § 230(a)(1), 133 Stat. 13, 15, 28 (Feb. 15, 2019). For fiscal year 2020, \$1.375 billion is available for “construction of barrier system along the southwest border.” DHS Appropriations Act, 2020, Pub. L. No. 116-93, div. D, title II, § 209(a)(1), 133 Stat. 2317, 2502, 2511 (Dec. 20, 2019). And for fiscal year 2021, Congress provided \$1.375 billion for the “construction of barrier system along the southwest border.” DHS Appropriations Act, 2021, Pub. L. No. 116-260, div. F, title II, § 210, 134 Stat. 1182, 1448, 1456–1457 (Dec. 27, 2020). These barrier appropriations are available for five fiscal years. Response Letter, Appendix, at 1; see B-333110, June 15, 2021. After fiscal year 2021, Congress has not appropriated funds specifically for border barriers.

<sup>5</sup> Proclamation No. 10142 of January 20, 2021, *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. 27, 2021).

<sup>6</sup> 86 Fed. Reg. 7225.

Secretaries of Homeland Security and Defense to work with other officials and develop a plan for redirecting border wall funds.<sup>7</sup>

In a 2021 decision, we reviewed the Proclamation's pause. B-333110, June 15, 2021. We concluded neither the Proclamation nor its implementation violated the ICA. First, DHS had almost fully obligated its fiscal year 2018, 2019, and 2020 appropriations for barrier construction.<sup>8</sup> Second, although most of DHS's 2021 appropriation was unobligated, the delays stemmed from DHS meeting statutory requirements and developing funding plans. Therefore, these delays were programmatic, not impoundments.

Also in 2021, DHS issued its Border Wall Plan outlining how it would use barrier funds.<sup>9</sup> As relevant here, the plan stated DHS would "undertake a thorough review and replanning process" for projects funded by its fiscal year 2017 through 2020 appropriations.<sup>10</sup> This process could include rescinding or revising legal waivers issued under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA);<sup>11</sup> conducting standard environmental planning; assessing the use of barrier funds to remediate or mitigate environmental damage from past border wall construction; consulting with stakeholders; and reviewing pending eminent domain actions.<sup>12</sup> For the fiscal year 2021 funds, the plan set the following priority order for their use: addressing contingencies; closing out or remediating former Department of Defense (DOD) projects; and planning the next highest priority projects.<sup>13</sup>

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<sup>7</sup> 86 Fed. Reg. 7226.

<sup>8</sup> The small remaining unobligated balances were consistent with sound administrative funds control practices that may reasonably result in small amounts of expired, unobligated balances. B-333110, June 15, 2021, at 12.

<sup>9</sup> Response Letter, Attachment 1 (DHS, *Department of Homeland Security Border Wall Plan Pursuant to Presidential Proclamation 10142* (June 9, 2021)) (Border Wall Plan).

<sup>10</sup> Border Wall Plan, at 2.

<sup>11</sup> Pub. L. No. 104-208, div. C, title I, § 102(c), 110 Stat. 3009-546, 3009-555 (Sept. 30, 1996), as amended by REAL ID Act of 2005, Pub. L. No. 109-13, div. B, title I, § 102, 119 Stat. 302, 306 (May 11, 2005).

<sup>12</sup> Border Wall Plan, at 2–3; Response Letter, at 4–5.

<sup>13</sup> Border Wall Plan, at 3–5; Response Letter, at 5. DOD ceased funding barrier construction projects in 2021 and turned over its projects to DHS. Response Letter, Appendix, at 3; DOD, Deputy Secretary of Defense Memorandum for Director, Office of Management and Budget, *Department of Defense Plan for the Redirection of Border Wall Funds* (June 10, 2021). See also B-333110, June 15, 2021, at 9 & n.36.

In July 2022, DHS amended its plan.<sup>14</sup> The amendment stated DHS would “prioritize the expenditure of the FY18-2021 appropriations” to continue addressing remediation and mitigation requirements from past barrier construction, and to “install barrier system attributes” in areas with physical barriers.<sup>15</sup>

In October 2023, the Secretary of Homeland Security issued a determination waiving 26 federal laws to expedite the construction of barriers and roads in an area of “high illegal entry” in Texas.<sup>16</sup> He did so by invoking his authority under IIRIRA to waive all legal requirements that, in the Secretary’s sole discretion, are necessary to ensure expeditious barrier construction.<sup>17</sup>

The consistency of DHS’s border wall expenditures with the purpose statute, 31 U.S.C. § 1301(a), is the subject of ongoing federal court litigation. See *General Land Office of Texas v. Biden*, Civil Action No. 7:21-cv-00272, and *Missouri v. Biden*, Civil Action No. 7:21-cv-00420 (S.D. Tex., Mar. 8, 2024) (Tipton, J.) (granting a preliminary injunction barring DHS from using its fiscal year 2020 and 2021 barrier appropriations for activities other than constructing “new physical barriers (or their equivalents) at the Southwest border”). We do not address the purpose statute here in our analysis of DHS’s rate of obligation in compliance with the ICA.

## DISCUSSION

At issue is whether DHS has continued to obligate amounts appropriated specifically for barrier construction for fiscal years 2018 through 2021.<sup>18</sup> We conclude that it has.

Unless Congress has enacted a law providing otherwise, executive branch officials must take care to ensure that they prudently obligate appropriations during their period of availability. B-329739, Dec. 19, 2018; B-330330, Dec. 10, 2018. The amount of time required for prudent obligation, however, will vary from one program to another. B-330330. The ICA imposes no specific requirements on the executive

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<sup>14</sup> Response Letter, Attachment 2 (DHS, *Amendment to DHS Border Wall Plan Pursuant to Presidential Proclamation 10142* (July 11, 2022)) (amended Border Wall Plan); Response Letter, at 5.

<sup>15</sup> Amended Border Wall Plan, at 1; Response Letter, at 5.

<sup>16</sup> Notice of Determination, *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 88 Fed. Reg. 69214 (Oct. 5, 2023).

<sup>17</sup> 88 Fed. Reg. 69214. See 8 U.S.C. § 1103 note.

<sup>18</sup> As in B-333110, June 15, 2021, our scope here does not include Treasury Forfeiture Fund amounts or DOD amounts used for border fencing or barrier systems. In a previous decision, we examined DOD’s transfer authority relative to border fence construction. B-330862, Sept. 5, 2019.

branch as to the rate at which it must obligate or expend budget authority. B-319189, Nov. 12, 2010.

The ICA allows the President to withhold funds from obligation, but only under strictly limited circumstances and only in a manner consistent with that Act. B-329739; B-330330. The President has no unilateral authority to withhold funds from obligation. B-330330. In particular, agencies may not withhold amounts from obligation for policy reasons: “[f]aithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law.” B-331564, Jan. 16, 2020. A violation of the ICA may result where an official within or outside of an agency, such as in the Office of Management and Budget (OMB), directs the withholding of budget authority. B-331298, Dec. 23, 2020.

The Administration’s stated policy is that “no more American taxpayer dollars be diverted to construct a border wall.”<sup>19</sup> But the ICA does not forbid executive branch officials from having policy preferences. See B-331564. Rather, it does not permit the executive to withhold amounts because of those preferences. *Id.* Thus, the central issue in our analysis is not the Administration’s stance on the desirability of the construction of a border wall but, rather, is whether DHS has obligated appropriated amounts in a manner consistent with the ICA.

As an initial matter, we note that DHS states OMB has not ordered it to withhold from obligation any amounts appropriated for border barrier construction.<sup>20</sup> DHS also states that at no time has it withheld barrier amounts from obligation.<sup>21</sup> Therefore, we turn to DHS’s actual obligations to determine whether there is any indication of an improper withholding. We conclude there is not.

#### *Fiscal years 2018-2020 barrier funds*

As in our prior review, DHS has almost fully obligated the amounts appropriated for fiscal years 2018 and 2020 for barrier construction projects.<sup>22</sup> As of January 8, 2024, DHS obligated nearly all of the \$1.375 billion appropriated for fiscal year 2018, leaving an expired balance of \$340,000.<sup>23</sup> However, sound administrative funds

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<sup>19</sup> 86 Fed. Reg. 7225.

<sup>20</sup> Response Letter, Appendix, at 3.

<sup>21</sup> Response Letter, Appendix, at 4.

<sup>22</sup> Response Letter, Appendix, at 2; Response Letter, at 12.

<sup>23</sup> Response Letter, Appendix, at 1–2. In addition to amounts it obligated, DHS transferred about \$54 million to other appropriations. Response Letter, Appendix, at 1–2 n.3; Response Letter, at 6 n.28. DHS states that it made this transfer pursuant to authority in a recurring provision of its annual appropriation act. Response Letter, Appendix, at 1–2 n.3; Response Letter, at 6 n.28; see Pub. L. No. 116-260, § 503(c), 134 Stat. at 1469.

control practices may reasonably result in small amounts of expired, unobligated balances. B-333110, June 15, 2021. The rate at which DHS has incurred obligations against its 2018 appropriation is, therefore, consistent with the ICA.

As of January 8, 2024, DHS has obligated 84 percent of the amount appropriated for fiscal year 2019, down from a corresponding amount of 98 percent as of March 31, 2021.<sup>24</sup> DHS states the lower obligated balance is due to “variables in the contracting process” beyond its control.<sup>25</sup>

Programmatic delays occur when an agency is taking reasonable and necessary steps to implement a program or activity, but the obligation or expenditure of funds is unavoidably delayed. B-331564.1, Feb. 10, 2022. Here, DHS explains it intended to use \$274 million of its remaining unobligated fiscal year 2019 barrier funding to build additional barriers in Texas.<sup>26</sup> But on September 8, 2023, the U.S. Army Corps of Engineers (USACE), with which DHS had entered into an interagency agreement, deobligated and returned \$114 million in fiscal year 2019 funds.<sup>27</sup> Accordingly, DHS immediately began planning to award a contract for a project it believed would almost fully obligate its remaining fiscal year 2019 funds.<sup>28</sup> Though DHS awarded the contract on September 28, 2023, the successful bid was lower than expected and thus did not require DHS to obligate its entire remaining balance.<sup>29</sup> With only 2 days remaining before the fiscal year 2019 funds expired on September 30, 2023, DHS lacked sufficient time to plan and award contracts to obligate the remaining balance.<sup>30</sup> As a result, the fiscal year 2019 appropriation has an expired balance of \$146.4 million.<sup>31</sup>

DHS’s explanation is sufficient to show these events constitute a programmatic delay. DHS was taking reasonable and necessary steps to use its remaining unobligated fiscal year 2019 barrier funds, but the project’s complex contracting process and USACE’s late return of unobligated funds prevented DHS from

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<sup>24</sup> See Response Letter, Attachment 3. B-333110, June 15, 2021, at 9 n. 38. In addition to amounts it obligated, DHS transferred about \$69 million to other appropriations. See footnote 23 above (noting DHS’s use of transfer authority); Response Letter, Appendix, at 2 n.4; Response Letter, at 6 n.29, and Attachment 3.

<sup>25</sup> Response Letter, at 12.

<sup>26</sup> Response Letter, at 12.

<sup>27</sup> Response Letter, at 12.

<sup>28</sup> Response Letter, at 12–13.

<sup>29</sup> Response Letter, at 12–13.

<sup>30</sup> Response Letter, at 12–13.

<sup>31</sup> Response Letter, at 6. Although these funds have expired, they remain available for five fiscal years for recording, adjusting, and liquidating obligations properly chargeable to the appropriation account. 31 U.S.C. § 1553(a).

prudently obligating the funds before the fiscal year's end.<sup>32</sup> Therefore, we find these circumstances reflect a programmatic delay, and that DHS did not intend to withhold those amounts from obligation in violation of the ICA. See B-329092, Dec. 12, 2017 (ICA violations “hinge on whether the agency clearly intended to withhold the obligation of budget authority”).

As of January 8, 2024, DHS has obligated most of the \$1.375 billion appropriated for fiscal year 2020, leaving an unobligated balance of about \$12 million.<sup>33</sup> This amount remains available for obligation through September 30, 2024.<sup>34</sup> This remaining balance represents less than 1 percent of the amount appropriated. This amount stands in reasonable proportion both to the time that has elapsed since these funds first became available in calendar year 2019 and to the several months that these funds will remain available for obligation before they expire at the end of fiscal year 2024. Thus, as with its obligations of its 2018 appropriation, the rate at which DHS has incurred obligations against its 2020 appropriation is also consistent with the ICA.<sup>35</sup>

#### *Fiscal year 2021 barrier funds*

As of January 8, 2024, DHS had obligated about 47 percent of its \$1.375 billion appropriation for barrier construction for fiscal year 2021, with about 48 percent of that appropriation remaining available for obligation.<sup>36</sup> DHS states it is taking steps to select barrier projects for funding per its amended Border Wall Plan, and it will continue to do so until these funds expire on September 30, 2025.<sup>37</sup> Thus, these funds will remain available for obligation for more than one full fiscal year, DHS states that it will continue to obligate them consistent with a written plan, and we are aware of no order to withhold these funds from obligation. Considering these factors, the unobligated balance of the 2021 appropriation does not suggest an improper impoundment, and we conclude that the rate at which DHS is incurring obligations against this appropriation is consistent with the ICA.

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<sup>32</sup> See Response Letter, at 13.

<sup>33</sup> Response Letter, Appendix, at 2.

<sup>34</sup> Pub. L. No. 116-93, 133 Stat. at 2506, 2511.

<sup>35</sup> Response Letter, Attachment 3.

<sup>36</sup> Response Letter, Appendix, at 2; Response Letter, at 6 and Attachments 3 and 5. DHS has obligated \$644.2 million, of which it has expended \$334.8 million. Response Letter, Attachment 3. And \$662.1 million remains available for obligation. *Id.* The obligated and unobligated balances do not sum to the enacted appropriation of \$1.375 billion because DHS has transferred to other appropriations \$68.8 million, or about 5 percent, of the \$1.375 billion appropriation. See footnote 23 above; Response Letter, Appendix, at 2 n.8; Response Letter, at 6 n.27, and Attachment 3.

<sup>37</sup> Response Letter, Appendix, at 2, 4.

### *Discretionary authority to waive legal requirements*

Finally, we note that nothing in the ICA requires the Secretary of Homeland Security to expedite barrier construction by exercising his discretionary authority to waive legal requirements. The Secretary has statutory authority to waive all legal requirements where determined necessary to ensure expeditious construction of barriers along the border. B-333110, June 15, 2021. Crucially, this broad authority is discretionary: IIRIRA provides the Secretary with “a choice of whether to waive any laws and, if so, which laws to waive.” *Id.* at 13 n.59.

Agencies must take reasonable and necessary steps to implement programs and to prudently obligate amounts. B-329739, Dec. 19, 2018; B-330330.1, Dec. 10, 2018. But the ICA imposes no “specific requirements on the Executive Branch as to the rate at which budget authority must be obligated or expended.” B-319189, Nov. 12, 2010. Applying these principles here, the ICA does not compel the Secretary to use IIRIRA’s waiver authority to achieve a certain result relative to barrier construction. Regardless of whether the Secretary exercises this authority, so long as DHS is prudently obligating amounts and not improperly withholding them, there is no ICA violation. Therefore, the ICA does not require the Secretary to issue waivers to expedite barrier construction.<sup>38</sup>

### CONCLUSION

Since our 2021 decision, DHS has continued to incur obligations against amounts appropriated specifically for border barriers for fiscal years 2018 through 2021 at a rate consistent with the ICA.



Edda Emmanuelli Perez  
General Counsel

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<sup>38</sup> As we observed in our 2021 decision, Congress could modify the Secretary’s discretion by amending the law. B-333110, June 15, 2021, at 13 n.59.