United States Senate

WASHINGTON, DC 20510

March 17, 2021

The Honorable Gene L. Dodaro
Comptroller General
Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Mr. Dodaro,

On January 20th, in one of the first official acts of his presidency, Joseph Biden suspended border wall construction and ordered a freeze of funds provided by Congress for that purpose. In the weeks that followed, operational control of our southern border was compromised and a humanitarian and national security crisis has ensued. The President's actions directly contributed to this unfortunate, yet entirely avoidable, scenario. They are also a blatant violation of federal law and infringe on Congress's constitutional power of the purse. We write regarding these actions. We believe they violated the Impoundment Control Act (ICA), as interpreted by your office, and we request your legal opinion on the matter. Prompt action to end these violations is required to restore order at the border.

BACKGROUND

In response to an alarming and sustained increase in the rates of illegal border crossings, Congress appropriated funds for the construction of a barrier along the country's southern border. These line-item appropriations were the subject of protracted congressional negotiation and are quite specific, providing the permissible design of the barrier to be constructed and the location of its placement. In the Department of Homeland Security (DHS) appropriations bills for fiscal years 2020 and 2021, for example, Congress provided nearly three billion dollars "for the construction of barrier system along the southwest border" which "shall only be available for barrier systems that— (1) use— (A) operationally effective designs deployed as of the date of enactment of the Consolidated Appropriations Act, 2017…; and (2) are constructed in the highest priority locations as identified in the Border Security Improvement Plan."[1] Similarly, in the DHS appropriations bills for fiscal years 2018 and 2019 Congress provided funds "for the construction of primary pedestrian fencing, including levee pedestrian fencing".[2] In short, Congress intentionally left little discretion to the executive branch over how it would execute the funding for border wall construction.

Once provided, this funding was quickly operationalized. By the end of calendar year 2020, DHS had used its appropriations to build and repair or replace 112 miles of border wall across a majority of the country's southern border sectors. Not coincidentally, and in conjunction with a

[1] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2511; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260.
[2] Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13; Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348.

number of other important immigration policy reforms, the rate of illegal border crossings fell substantially and operational control of the border increased dramatically.[3]

Despite this progress, on January 20, 2021, in one of his first official actions, President Biden issued a Proclamation directing DHS, in consultation with the Office of Management and Budget (OMB), to "pause immediately the obligation of funds related to construction of the southern border wall" and to "pause work on *each* construction project on the southern border wall."[4]

The Proclamation provides as justification for its mandates only a policy-based rationale – namely, that "building a massive wall that spans the entire southern border is not a serious policy solution" and that this congressionally mandated project is "a waste of money that diverts attention from genuine threats to our homeland security."[5]

The Proclamation was not just empty political rhetoric. We understand from DHS that it has suspended its border wall projects, that the continued obligation of funds for those purposes has been halted, and that both are a direct consequence of the Proclamation. News reports confirm this is true.[6] As these unlawful pauses have proceeded, the rate of illegal crossings has surged, creating a crisis across our southern border,[7] at times with tragic consequences.[8] Meanwhile, billions in lawfully appropriated dollars, which were provided by Congress to address precisely this issue, sit unused by the Biden Administration.

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[3] In the Yuma area, for example, illegal border crossings fell 87% from FY19 to FY20 in areas where border wall was constructed.

[4] "Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction," *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/ (*hereinafter* "Proclamation"). The Proclamation specifies that this "pause . . . shall apply to wall projects funded by redirected funds," which we understand to refer primarily to defense and military construction appropriations that were transferred to fund certain border wall projects, "as well as wall projects funded by direct appropriations," which we understand to refer to appropriations provided directly to DHS specifically for border wall construction. *Id.* at section 1(b). Our request focuses only on this latter category of funding. Furthermore, we understand that DHS did not commingle redirected funds and direct appropriations in funding border wall construction projects. Accordingly, our request focuses only on the suspension of border wall construction that was funded with appropriations provided directly to DHS for that purpose.

[5] *Id.*

[6] *See, e.g.,* John Burnett, *With Border Wall Construction Finally on Hold, Activists Worry About What's Next*, NPR (February 1, 2021) https://www.npr.org/2021/02/01/962761279/with-border-wall-construction-finally-on-hold-activists-worry-about-whats-next (last visited March 10, 2021) (indicating that "Biden's Homeland Security Department and the U.S. Army Corps of Engineers confirmed to NPR that every wall construction project has been suspended from San Diego to the Rio Grande Valley").

[7] *See* Zolan Kanno-Youngs and Michael D. Shear, *Biden Faces Challenge From Surge of Migrants at the Border*, NY TIMES (March 8, 2021) https://www.nytimes.com/2021/03/08/us/politics/immigration-mexico-border-biden.html.

[8] *See* Miriam Jordan, *Migrants in Deadly Crash Had Crossed Through Border Wall, Officials Say*, NY TIMES (March 3, 2021) https://www.nytimes.com/2021/03/03/us/migrants-border-crash-el-centro.html.

DISCUSSION

At issue is whether President Biden's Proclamation directed an impoundment of funds in violation of the ICA.

The Constitution specifically vests Congress with the power of the purse, providing that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[9] The President is not vested with the power to ignore or amend a duly enacted law.[10] Instead, he must "faithfully execute" the law as Congress enacts it.[11]

An appropriations act is a law like any other; therefore, the President must take care to ensure that appropriations are prudently obligated in the manner they were provided by Congress.[12] The Constitution grants the President no unilateral authority to withhold funds from obligation.[13] Instead, Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances. These circumstances are expressly provided in the ICA and separated into two exclusive categories—deferrals and rescissions.[14]

With a deferral, the President may temporarily withhold funds from obligation only in a limited range of 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.[15] The deferral of budget authority for any other purpose, including to advance a policy disagreement, is unlawful.[16]

With a rescission, the President may seek the permanent cancellation of funds for fiscal policy or other reasons, including the termination of programs for which Congress has provided budget authority.[17]

In either case, the ICA requires that the President transmit a special message to Congress that includes the amount of budget authority proposed for deferral or rescission and the reason for the

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[9] U.S. Const. art. I, § 9, cl. 7.
[10] *See Clinton v. City of New York,* 524 U.S. 417, 438 (1998) (the Constitution does not authorize the President "to enact, to amend, or to repeal statutes").
[11] U.S. Const., art. II, § 3.
[12] *See* B-329092, Dec. 12, 2017 (the ICA operates on the premise that the President is required to obligate funds appropriated by Congress, unless otherwise authorized to withhold).
[13] *See* B-135564, July 26, 1973.
[14] *See* 2 U.S.C. §§ 681–688; *see also* S. Rep. No. 93-688, at 75 (1974) (explaining that the objective of the ICA was to assure that "the practice of reserving funds does not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress").
[15] 2 U.S.C. § 684(b).
[16] *Id.*
[17] *Id.* at § 683.

proposal.[18] Critically, the burden to justify a withholding of budget authority rests with the executive branch.

The only other circumstance in which the withholding of appropriated funds may be justified is in the case of a "programmatic delay." A programmatic delay occurs when "an agency is taking necessary steps to implement a program, but because of factors *external to the program*, funds temporarily go unobligated. This presumes, of course, that the agency is *making reasonable efforts to obligate*."[19] If there is "no external factor causing an unavoidable delay," but instead the failure to obligate is the result of an agency "on its own volition explicitly barr[ing]" the obligation of funds, then a delay is not programmatic.[20] Instead, such actions are an unlawful impoundment. This is especially true when"[p]rogram execution [is] ... well underway."[21]

Not long ago, in a decision captioned "Office of Management and Budget – Withholding of Ukraine Security Assistance", your agency applied these legal principles to a set of factual circumstances remarkably similar to the ones here. At issue in that matter was a pause in funding provided to the Department of Defense (DOD) for security assistance to Ukraine. There, the Administration did not formally propose a rescission or deferral of the DOD funding by transmitting a special message to Congress. Even if it had proposed a deferral, GAO concluded that it would have been unlawful under the ICA, as the pause had been prompted by policy reasons. And GAO rejected claims then made by the Administration that the pause in funding was programmatic because "there was no external factor causing an unavoidable delay. Rather, OMB on its own volition explicitly barred DOD from obligating amounts."[22]

This body of law and precedents is clear, and their application to the actions directed by the Proclamation is straightforward. In consecutive fiscal years, Congress passed bills appropriating funds to DHS for the construction of a border wall. The President signed those bills into law. Accordingly, the President, through DHS and OMB, must prudently obligate and execute those funds for the purposes for which they were provided. The President now in office is charged with faithfully executing these laws, notwithstanding any policy or political disagreements with his predecessor who signed them.

Nevertheless, this President, by his Proclamation, has directed that funds provided for southern border wall construction be withheld and that related construction be suspended. And, as noted above, those pauses were effected in late January and remain in effect today.[23]

The only lawful justification for these actions would be if the President: (1) transmits to Congress a special message proposing the deferral of the funds; (2) transmits to Congress a special message proposing the permanent rescission of those funds; or (3) can point to a

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[18] 2 U.S.C. §§ 683–684. These special messages must provide detailed and specific reasoning to justify the withholding. *See id.*; B-237297.4, Feb. 20, 1990 (vague or general assertions are insufficient to justify the withholding of budget authority).
[19] B-331564, Jan. 16, 2020 (emphasis added) (citations in original omitted).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *See, supra*, notes 8-10 and accompanying text.

programmatic delay responsible for the pause in obligation. Failing that, the pauses ordered by the Proclamation are an unlawful impoundment and an assault on Congress's constitutional power of the purse. The Biden Administration has pursued none of these paths.

The Proclamation is not a special message, and it does not purport to be one. Nor does the Proclamation assert that the President will send a special message proposing a deferral or rescission of the border wall funds in question. To date, the Congress has not otherwise received a special message regarding the border wall funding in question. We must therefore conclude that the President – notwithstanding the pauses he ordered – has not proposed a deferral or rescission of DHS's border wall construction appropriations.[24] Importantly, even if the President were to now transmit such a special message, it would not change the fact that these DHS appropriations have been unlawfully impounded since the Proclamation's direction took effect in late January. Whatever actions the President takes going forward, they will not cure the unlawful actions he has taken to date.

Nor is it credible to claim that these funds are the subject of a "programmatic delay." The Proclamation makes no mention of any external factor causing an unavoidable delay in obligating border barrier funding or constructing border wall. To the contrary, at the time of the Proclamation, DHS "had already produced a plan for expending the funds" and the resulting construction of border wall was proceeding apace before the President "on [his] on volition explicitly barred [DHS] from" taking further action by issuing the Proclamation.[25] Now, at least 17 separate wall system projects – each of which was designated by law enforcement officials as a priority to advance operational control of the border – are suspended. The delay caused by the Proclamation clearly is not programmatic.

We note also that the Proclamation limits the pauses it directs "to the extent permitted by law." But this bit of lawyering does not save the Proclamation or the pauses it directs. The law *does not allow* the President to suspend construction of the border wall or pause the obligation of funding provided for that purpose in the manner he has directed in the Proclamation. The Proclamation's direction is therefore entirely irreconcilable with the law, and any suggestion to the contrary is illusory.

The delay here is the manifestation of a disagreement between Congress and the President over immigration policy. The President bemoans the border wall system funded by Congress as "not a serious policy solution"[26] and "a waste of money."[27] It is his right to levy those criticisms, and he is free to propose budgets that advance his alternative approach to securing our nation's borders. But he cannot unilaterally impound funding provided by Congress in duly enacted appropriations laws. As has long been recognized, enacted statutes, and not the President's

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[24] Even if the President did transmit a special message proposing the deferral of DHS's border wall funds, the Proclamation does not articulate any rationale sufficient to justify such a deferral under the ICA, and we are not aware that one exists. *See* 2 U.S.C. § 684(b). Instead, the Proclamation provides only that the pauses it directs are the result of a policy disagreement with Congress. The ICA, of course, does not permit deferrals for policy reasons. *See* B-331564, Jan. 16, 2020; B-237297.3, Mar. 6, 1990.

[25] B-331564, Jan. 16, 2020.

[26] Biden Border Wall Proclamation.

[27] *Id.*

policy priorities, necessarily provide the animating framework for all actions agencies take to carry out government programs.[28]

GAO has rightly concluded that "[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."[29] Yet, with his Proclamation, the President has done just that. The legal result of those actions is an impoundment of funds in violation of the ICA. The practical result is a growing crisis across our southern border. We will abide neither. A President, regardless of the administration and regardless of the purposes for which the underlying funds are provided, must be held accountable for violations of the ICA. If he is not, "we will open the floodgates for this and future Administrations to violate the ICA with impunity"[30] and that – as we are seeing now – will have real consequences for our nation.

We look forward to your timely response and we thank you in advance for your efforts.

Sincerely,

Shelley Moore Capito
United States Senator

Richard Shelby
United States Senator

Mitch McConnell
United States Senator

John Thune
United States Senator

[28] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (a federal agency is "a creature of statute" and "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

[29] B-331564, Jan. 16, 2020.

[30] Letter from Senator Chris Van Hollen to Gene Dodaro, Comptroller General, Government Accountability Office (Dec. 23, 2019) *available at* https://www.vanhollen.senate.gov/imo/media/doc/Letter%20to%20GAO%20on%20Ukraine%20withholding%20and%20Impoundment%20Control%20Act%20SIGNED%2012-23-19.pdf.

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