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United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025
<https://appropriations.senate.gov>

May 12, 2021

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

Dear Mr. Dodaro,

We recently wrote to you along with 110 of our colleagues regarding President Biden's January 20th Proclamation pausing border wall construction and the obligation of funds for that purpose.¹ In response to that submission, the Administration has made repeated false or misleading claims about the extent and nature of its actions. We write now to supplement the record with evidence responding to those claims.

First, despite the Administration's suggestions to the contrary,² until very recently, *all* border wall construction projects were in a total and complete pause, and no funds, including funds directly appropriated to the Department of Homeland Security (DHS) for the construction of a border wall system, were being obligated by the Department.³ While DHS announced on April 30, 2021, that it was lifting the pause in two isolated cases,⁴ all other construction across the southwest border – from South Texas to the

¹ See Letter from Senator Shelley Moore Capito, Senator Richard Shelby, *et al.* to Gene Dodaro, Comptroller General, Government Accountability Office (March 17, 2021) (Capito/Shelby Letter).

² See, e.g., Caitlin Emma, *Some border wall cash 'moving forward,' Psaki says*, POLITICO PRO, (March 18, 2021); Adam Shaw, *White House says 'limited' wall construction is funded, despite overall pause*, FOX NEWS. (April 6, 2021).

³ We note here, as we did in the original submission, that our request focuses only on the impoundment of appropriations made directly to the Department of Homeland Security for the purpose of constructing a border wall system.

⁴ In the San Diego sector, DHS apparently will resume warranty work related to already-completed construction. This work has no bearing on the analysis related to the alleged impoundment. In the Rio Grande Valley Sector, DHS has indicated it will resume work on a 13-mile stretch of primary pedestrian levee wall. This project, which was funded with appropriations made directly to DHS in fiscal years 2018 and 2019, was abruptly halted after the President's Proclamation, putting the surrounding communities in grave danger. See, e.g., Sandra Sanchez, *'Dangerous' Levee Breaches Remain After Halt in Border Wall Construction, Local Official Say*, VALLEY CENTRAL (April 14, 2021) <https://www.valleycentral.com/news/local->

San Diego shoreline – remains unlawfully halted, as it has been since the President made his Proclamation on January 20th.

The pause has created a confounding set of circumstances at the border. Replacement projects – in progress for years – sit frozen, on the brink of completion. See Attachment A (San Diego Sector – Imperial Beach Replacement Construction). Incomplete installations have left gaps in the border wall system, both seen and unseen. Breaks in the physical infrastructure serve as funnels for illegal crossing, human trafficking, and drug smuggling; create environmental hazards; and unnecessarily tax our Border Patrol agents, who have to sit post at these breaks around the clock. Additionally, ground sensing technology and cameras that enhance the operational effectiveness of the physical barriers await installation or, worse, are installed but not turned on. See Attachment B (San Diego Sector Wall Gaps). And in many cases, the materials needed to finish these projects sit feet away – a jarring reminder of the unthinking nature of this Presidential directive. See Attachment C (Wall Waits for Installation).

Each of these is proof of the President’s illegal pause, and as we explained in our original submission, the harm it is causing is not merely theoretical. Each day this impoundment continues, funds lawfully appropriated for border wall construction are cynically under-executed and a reserve is growing, which the Administration has already targeted for rescission in its budget request.⁵ Worse, in the midst of an unprecedented and rapidly metastasizing crisis at the border, the construction pause has compromised operational control of the border and created unnecessarily dangerous conditions for our brave law enforcement personnel.

Second, the Administration has repeatedly indicated that the President’s pause is being carried out only “to the extent permitted by law.” But the suggestion that the law permits this pause is entirely without merit. The law does not permit the pause as it was ordered in the President’s Proclamation. At all. As explained in our original submission, in order to withhold the funds in question the President would need to either (1) transmit to Congress a special message proposing a deferral or rescission of the funds or (2) point to a programmatic delay impacting the execution of the funds.⁶

news/hidalgo-county-pct-3-officials-address-current-breach-in-rio-grande-river-levee/. We further understand that DHS intends to deviate from the original design of this levee wall system, replacing the 18-foot steel bollards that would have sat atop the concrete levee with a simple guard rail. We have serious doubts that this change will result in a wall that employs “operationally effective designs . . . that prioritize agent safety” as is required by the appropriations law. See, e.g., Consolidated Appropriations Act, 2018, Pub. L. 115-141 (Division F at Sec. 230(b)), 132 Stat. 348.

⁵ See, e.g., B-329092 (Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President’s Budget Request for Fiscal Year 2018) (December 12, 2017) (reaffirming that amounts proposed for cancellation in a President’s budget are not to be withheld from obligation).

⁶ See Capito/Shelby Letter at 5-6.

The President has not sent a special message to Congress proposing a deferral or rescission, and there is no programmatic delay impacting the execution or obligation of the funds appropriated for the construction of a border wall system. In its legal opinions, your office has been clear: a programmatic delay exists when the agency is making reasonable efforts to implement a program but cannot do so because of factors *external* to the executive branch and outside of its control.⁷

For the most part,⁸ the Administration, as directed by the Proclamation, is making no effort to implement construction of the border wall system and, even if it was, there are no external factors to justify the delay. To the contrary, the delay here is entirely of the President's making, and we know from recent experience that the executive branch may not point to a delay of its own making and label it "programmatic."⁹ Moreover, the

⁷ See B-331564 (Office of Management and Budget – Withholding of Ukraine Security Assistance) (Jan. 16, 2020); see also B-329092 (ARPA-E) (noting "limited oral conversations" regarding whether to withhold any budget authority are sufficient to trigger an illegal impoundment).

⁸ While, as noted above, DHS recently announced it was resuming border wall construction in two isolated cases, but that does not change the fact that the funds appropriated for that work had been unlawfully impounded since the Proclamation's direction took effect in late January. Whatever actions taken by DHS now do not cure its unlawful actions to date. Furthermore, we note that DHS justified its limited resumption of border wall construction by pointing to the Proclamation's allowance for exceptions to the pause in cases where "urgent measures [were] needed to avert immediate physical dangers." See "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" at 1(b), *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/>. This construct turns the law on its head. *The President does not have the authority to impound for policy reasons lawfully appropriated dollars. Period.* The Proclamation's suggestion to the contrary, and DHS's reliance on it now, lays bare the unlawful nature of these actions.

⁹ See B-331564 (Ukraine) (noting that the delay in question was not programmatic because the executive branch had "on its own volition" created it). In his Proclamation ordering the pause, President Biden also terminated the national emergency at the southern border first declared by President Trump more than two years ago. That termination has no bearing on this analysis. It was not "an external factor causing unavoidable delay" but rather a determination *made by the Administration* that was entirely within its control. More importantly, though, the national emergency declaration had *no impact whatsoever* on the execution of funds directly appropriated to the Department of Homeland Security for the purpose of constructing a border wall system, which, as noted above, is the focus of our request. The obligations and execution of those direct appropriations were not contingent in any way on a national emergency declaration. Indeed, many of the border wall construction projects that have been paused as a result of the Proclamation were funded with direct appropriations to the Department that *predated* the now-terminated national emergency. Nor is the period of availability of the funds in question relevant to whether a programmatic delay exists here. See B-329092 (ARAP-E) ("We note that the Impoundment Control Act applies to . . . funds despite the fact that they were

current external factors – namely, the most acute immigration crisis in recent memory – support *expediting* work on the border wall system, not halting it. The current pause is all the more frustrating given that the implementation of border wall construction was well underway when the President made his Proclamation.¹⁰ For all of these reasons, the Proclamation’s direction is entirely irreconcilable with the law.

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.”¹¹ Yet, President Biden’s border wall pause continues. It must end, both to vindicate Congress’s power of the purse and to help address the crisis at our southern border.

We hope this information proves useful to you as you consider our request and makes clear the true nature of the Administration’s unlawful actions.

Respectfully,



Shelley Moore Capito
Ranking Member
Subcommittee on Homeland Security
Committee on Appropriations



Richard Shelby
Vice Chairman
Committee on Appropriations

made available without fiscal year limitation.”). We note, however, that the President’s pause has impacted funds appropriated to the Department in fiscal year 2018 for the construction of a border wall system, which are nearing the end of their 5-year period of availability.

¹⁰ See B-331564 (Ukraine) (noting that a programmatic delay had not occurred when the agency had already produced a plan for expending the funds and program execution was “well underway”).

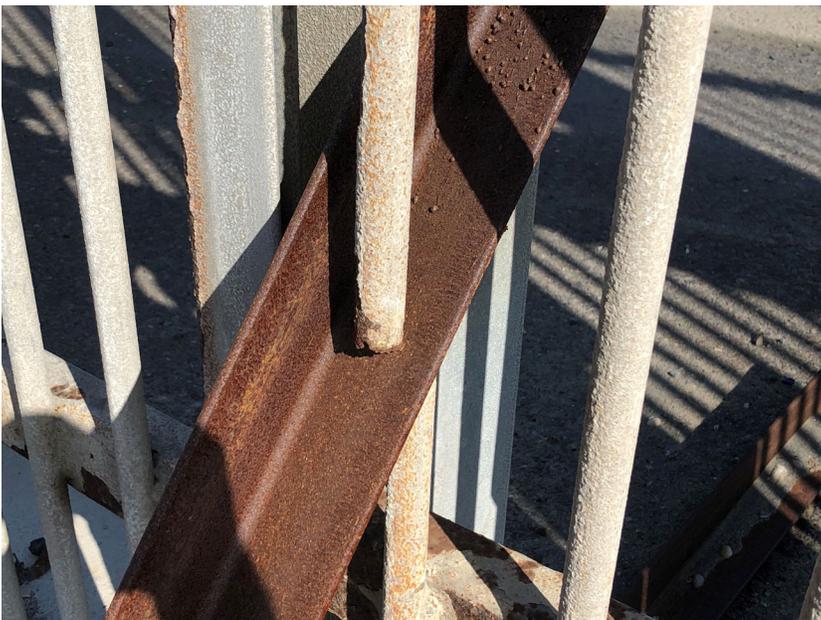
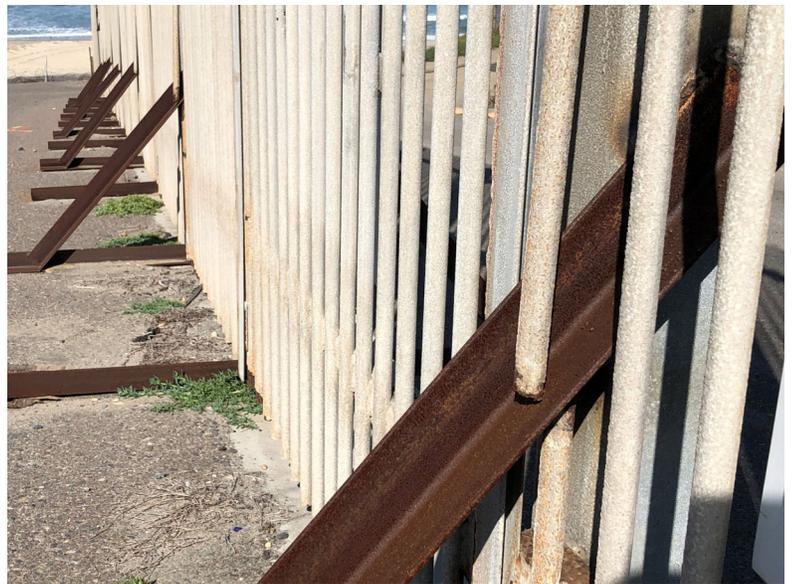
¹¹ See *id.*



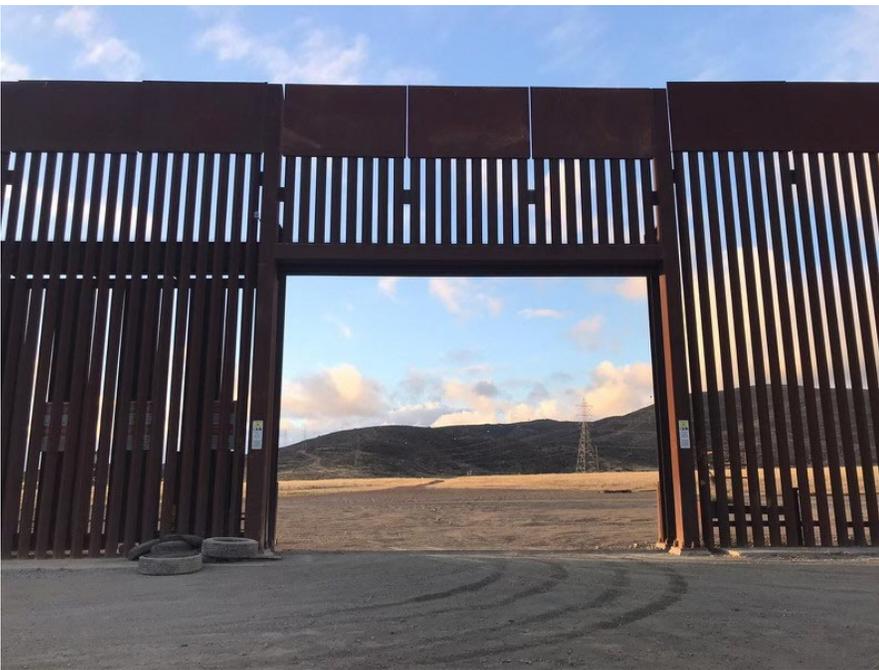
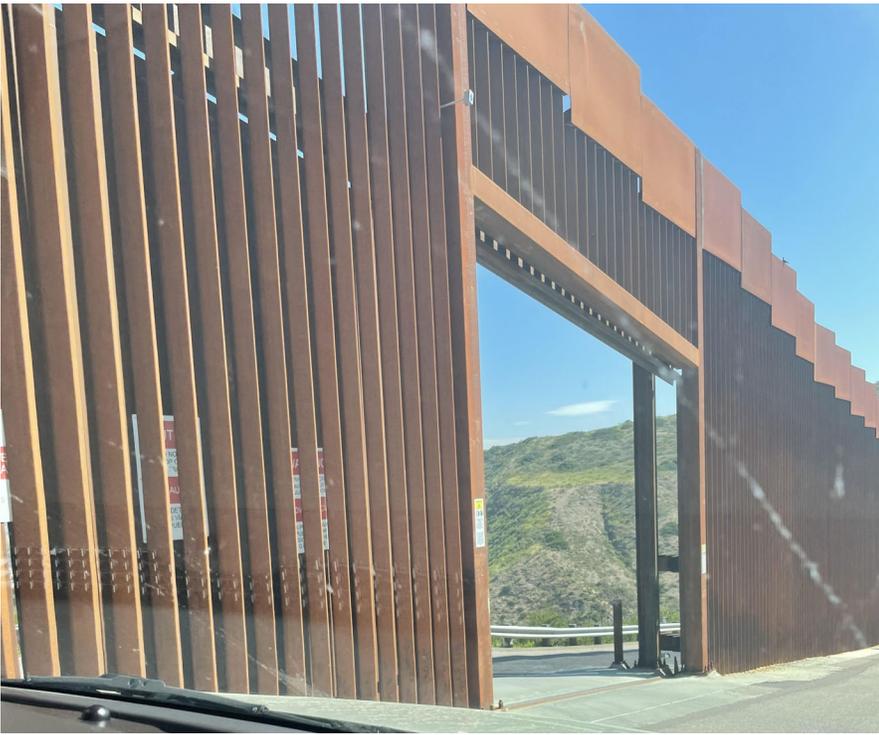
Attachment A

San Diego Sector - Imperial Beach Replacement Construction

Border Patrol had already cut the existing wall to replace it when the President issued his Proclamation. This work was funded in the FY18 DHS appropriations bill (PL 115-141) and would have been completed in January if not for the pause. This information is corroborated by local news outlets. See <https://www.kpbs.org/news/2021/jan/27/work-stops-opponents-border-wall-chart-new-path/>.



The Border Patrol has had to use funds from its operating account to install temporary braces where the old wall was cut to fortify the structure and make it safe, while the pause ordered by the Proclamation continues.



Attachment B
San Diego Sector –
Wall Gaps

Pictured (left) is an issue affecting construction across the southwest border, not just in the San Diego sector. The gates in stretches of both new and replacement wall were on the verge of being completed – with their motors set to be made operational – when the pause was ordered. For months, these gates have sat open (and still others are stuck shut) all because the Proclamation prohibits the contractor from completing the minimal work required to finish these gates. This issue presents significant operational concerns for Border Patrol agents, who either are not able to access the enforcement zone as intended or who have to guard open gates to ensure flows of illegal traffic cannot come through. Many of the San Diego gates that remain unfinished were funded by the FY18 DHS appropriations bill (PL 115-141). Further, because the construction project is not yet complete, the infrastructure has not been turned over to Border Patrol, limiting Border Patrol’s ability to utilize or finish the infrastructure. *See also* Episode 4 of Senate Republican Border Crisis docuseries (<https://twitter.com/i/status/1381629976492056579>) at 2:55.

Attachment B Cont. San Diego Sector – Wall Gaps



The above shows the environmental impact that comes from the construction pause. Pictured is the Tijuana River Basin, which runs through Tijuana and San Diego to the Pacific Ocean. CBP was using its FY18 appropriation (PL 115-141) to design and construct a segment of border wall that would both enhance operational control of the border and mitigate the extreme environmental impact caused by the pollution that freely runs into and through the river. The planned border wall segment would have included gates and a downstream berm to allow agents to better (and more safely) control debris flow and police illegal crossings through this area. That project has been funded and awarded, but it is paused now because of the President's Proclamation.

Attachment C Wall Waits for Installation



In San Diego sector, materials to replace, build, and complete the border wall system sit idle, just a few feet away from where they would be utilized.

