

MILITARY FUNDING FOR SOUTHWEST BORDER BARRIERS*

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SUMMARY

The Department of Defense (DOD, or the Department) has played a prominent role in the Trump Administration's border security strategy because of controversies related to \$13.3 billion in defense funding it has sought to use for border barrier construction projects not otherwise authorized by Congress. These defense funds would comprise a complex mix of DOD program savings and unobligated military construction funds from past years (\$6.1 billion), as well as a request for new appropriations in FY2020 (\$7.2 billion). An additional \$2 billion in non-DOD appropriations are often cited as part of the Administration's overall border funding plan. These include \$1.375 billion in previously enacted FY2019 Department of Homeland Security (DHS) appropriations, and \$601 million in contributions from a Treasury Forfeiture Fund (TFF) that manages seized assets. Altogether, these defense and non-defense funds would total \$15.3 billion, of which 87% would be DOD funds.

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President Donald Trump has consistently declared the deployment of fencing, walls, and other barriers along the U.S.-Mexico border a high priority, however, he has been unable to fully secure from Congress the total amount of funding he deems necessary for that purpose. On February 15, 2019, in part to gain access to such funding, the President declared a national emergency at the southern border that required use of the Armed Forces, an act that triggered statutes allowing the President to redirect national resources—including unobligated military construction funds—for purposes for which they were not originally appropriated by Congress. Concurrent with the declaration, the Administration released a fact sheet entitled, *President Donald J. Trump's Border Security Victory* (hereafter referred to as the *border security factsheet*) that described a plan for redirecting \$6.1 billion in DOD funds to border barrier construction projects not authorized by Congress. An additional \$601 million was included using TFFs. The plan invoked a mixture of emergency and nonemergency authorities that included:

- \$2.5 billion in defense funds authorized by the (nonemergency) statute 10 U.S.C. 284 Support for counterdrug activities and activities to counter transnational organized crime;
- \$3.6 billion in defense funds authorized by the emergency statute Title 10 U.S.C. 2808 Construction authority in the event of a declaration of war or national emergency; and
- \$601 million in nondefense, nonemergency TFFs.

Shortly after the release of the *border security fact sheet*, the DHS requested that DOD undertake 11 construction projects along the Southwest U.S.-Mexico border for execution under 10 U.S.C. 284 authority. Typically, such construction would be funded using congressionally provided appropriations from DHS's own budget. Nevertheless, citing the ongoing state of emergency, DOD agreed to undertake seven of the projects and, between March and May 2019, reprogrammed \$2.5 billion in defense program savings over the objections of

House congressional defense committees, a deviation from the Department's own regulations. Subsequent court injunctions temporarily prevented approximately half (\$1.2 billion) of these appropriations from being fully obligated, and resulted in the suspension of contracts that had been quickly awarded following DOD's reprogramming actions. The U.S. Supreme Court lifted these injunctions on July 26, 2019, but there has been no final ruling in the case (*Sierra Club v. Trump*). It remains unclear how a potentially unfavorable ruling might affect construction completed during the ongoing litigation. In September, DOD officials stated that \$1.9 billion of the 10 U.S.C. 284 funds have been obligated, with the remainder to be obligated by the end of the month.

On September 3, 2019, the Secretary of Defense exercised his authority under the emergency statute 10 U.S.C. 2808 to defer approximately 127 authorized military construction projects (\$3.6 billion) and redirect the funds to 11 border barrier projects identified by the DHS. Deferred military construction projects would be halted indefinitely (or terminated) unless Congress were to provide replenishing appropriations. Congressional critics of the Administration's border barrier funding plans have hesitated to reimburse DOD for transfer actions they opposed or expressly prohibited. Furthermore, in March 2019, as part of its annual budget submission to Congress, the Administration also requested an additional \$7.2 billion in defense appropriations (not described by the February 2019 *border security factsheet* plan). DOD officials stated that half this amount (\$3.6 billion) would be used to support new DHS border barrier projects which the Administration has not yet described. The other half (\$3.6 billion) would replenish military construction projects deferred by DOD's earlier 10 U.S.C. 2808 transfer actions.

There has been considerable congressional concern over the Administration's efforts to fund the construction of border barriers outside of the regular budgetary process. In broad terms, these concerns are related to the novel and unorthodox use of emergency authorities, and the possibility that the Administration's actions jeopardize congressional

control of appropriations, thereby potentially violating the Constitution's separation of powers. At the interagency level, DOD's break from comity-based agreements with congressional defense committees on reprogramming actions has generated new legislative interest in limiting the Department's budgetary flexibility and applying sharper oversight. More narrowly, individual Members have voiced apprehensions that military construction projects in their states and districts have been jeopardized by DOD's emergency transfers.

FY2020 defense authorization and appropriation bills currently under consideration (as of September 2019) include provisions that would constrain the Administration from fully executing its plan, though final versions have not yet been passed. In late July 2019, news outlets reported congressional leadership had come to an informal understanding as part of a settlement of the annual budget caps for FY 2020 and FY2021 that would specifically prohibit legislative provisions limiting the use of transfer authority—a key part of the President's Border security factsheet plan—unless such language was adopted on a bipartisan basis.

Ongoing litigation has generally slowed the execution of border barrier construction and imperiled large portions of the President's plan. Of the \$6.7 billion in future DOD and Treasury Funds included in the *border security factsheet*, \$2.1 billion (32%) has been obligated as of September 13, 2019. This includes \$242 million in TFFs and \$1.9 billion transferred from the defense Drug Interdiction and Counter-Drug Activities account.

INTRODUCTION

Funding for new border barrier construction became the focal point of a partial government shutdown that began on December 22, 2018, and lasted 34 days, the longest on record.¹ Congress ultimately did not accept

¹ CRS Legal Sidebar LSB10242, *Can the Department of Defense Build the Border Wall?*, by Jennifer K. Elsea, Edward C. Liu, and Jay B. Sykes.

President Donald Trump's demand for \$5.7 billion in new funding for the construction of a proposed border wall, providing instead \$1.375 billion for additional pedestrian fencing as part of the Consolidated Appropriations Act of 2019 (CAA).²

Unsatisfied with the negotiated agreement, the Trump Administration issued a Presidential Proclamation on the 15th of February, 2019, declaring a national emergency at the southern border of the United States, a move that, among other things, allowed the President to invoke special authorities for redirecting military construction appropriations.³

Concurrently, the White House released a plan for reprogramming or transferring \$6.7 billion to southwest border barrier projects, of which \$6.1 billion would come from unobligated Department of Defense (DOD or Department) appropriations.⁴

Congress, noting the President's attempt to secure more funding than provided in the CAA, and concerned over a potential violation

² Enacted on February 15, 2019, the CAA provided a total of \$2.4 billion for border related programs and improvements. Of this amount, \$1.375 billion was for the construction of primary pedestrian fencing, \$0.725 million for border security technologies, and \$0.270 million for facility improvements. See Consolidated Appropriations Act, 2019 (H.J. Res. 31), Title II Administrative Provisions, Section 230, available at: <https://www.congress.gov/116/bills/hjres31/BILLS-116hjres31enr.pdf#page=16>; See also explanatory text in associated committee report H.Rept. 116-9, available at <https://www.congress.gov/116/crpt/hrpt9/CRPT-116hrpt9.pdf#page=480>.

³ White House, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, February 15, 2019. "The President: No. Look, I went through Congress. I made a deal. I got almost \$1.4 billion when I wasn't supposed to get one dollar — not one dollar. "He's not going to get one dollar." Well, I got \$1.4 billion. But I'm not happy with it...In fact, the primary fight was on the wall. Everything else, we have so much, as I said, I don't know what to do with it we have so much money. But on the wall, they skimmed. So I did — I was successful, in that sense, but I want to do it faster. I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster...And I think that I just want to get it done faster, that's all." Available at: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>; The White House, "Proclamation No. 9844 Declaring a National Emergency Concerning the Southern Border of the United States," 84, No. 34 *Federal Register* 4949, February 20, 2019, available at: <https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-03011.pdf>.

⁴ The White House plan cited \$8.1 billion, an amount that included \$1.375 billion previously provided in the Consolidated Appropriations Act, 2019 (H.J. Res. 31, P.L. 116-6). See White House Fact Sheet, "President Donald J. Trump's Border Security Victory," February 15, 2019, available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>.

of its constitutional prerogatives to manage appropriations, acted quickly in an attempt to terminate the national emergency declaration.⁵ A joint resolution, H.J.Res. 46, *Relating to a national emergency declared by the President on February 15, 2019*, was passed by both houses on March 14, 2019, but was subsequently vetoed by the President one day later.⁶ On March 26, 2019, an attempt to override the veto fell short of the required two-thirds majority in the House by a vote of 248-181. In September 2019, Congress again attempted to terminate the state of national emergency with a joint resolution (S.J.Res. 54) passed by both chambers.⁷ The legislation has yet to be considered by the President. The national emergency remains in effect.

This chapter outlines the Administration's FY2020 border barrier funding plans using defense funds, describes the various authorities involved, details the process for each budgetary action, indicates the status of appropriated funds, identifies recent congressional actions, and identifies potential issues for Congress.

The report does not include a comprehensive overview of DHS funding for border barriers, or describe that agency's FY2020 request for related projects.⁸ It also does not address the deployment and concomitant expense of mobilizing active and reserve military personnel for service on the border.

⁵ The National Emergency Act (NEA) does not stipulate when a President may declare an emergency. When the Act was enacted in 1976, Congress may have believed that it could rely on a concurrent resolution (which requires a simple majority in both houses) to check the Executive if the power was abused. See <https://verdict.justia.com/2019/03/04/president-trumps-emergency-wall-declaration-a-guide-to-the-legal-issues>.

⁶ The Joint Resolution failed passage in the House by the required two-thirds majority on March 26, 2019 by a vote of 248-181. See *Relating to a national emergency declared by the President on February 15, 2019* (H.J.Res. 46).

⁷ The joint resolution S.J.Res. 54 was passed by the Senate on September 25, 2019 by a roll call vote of 54-41, and in the House on September 27, 2019 by a roll call vote of 236-174. For Senate roll call vote, see https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00302; for House roll call vote, see <http://clerk.house.gov/evs/2019/roll553.xml>.

⁸ See CRS Report R45888, *DHS Border Barrier Funding*, by William L. Painter and Audrey Singer.

THE TRUMP ADMINISTRATION'S FY2020 FUNDING PLAN

On February 15, 2019, President Trump issued a proclamation declaring a national emergency at the southern border that required use of the Armed Forces.⁹ Concurrent with the announcement, the White House released a Fact Sheet entitled, *President Donald J. Trump's Border Security Victory* (hereafter referred to as the *border security factsheet*) that described steps the Administration intended to take in order to provide \$6.7 billion in appropriations outside of the regular legislative process for new border barrier projects. Drawing on both emergency and nonemergency authorities, the Administration outlined a number of steps it stated would be “used sequentially and as needed.”¹⁰

In March 2019, the Administration delivered its annual budget to Congress. The FY2020 proposal included an additional \$7.2 billion in Army Overseas Contingency Operations (OCO) military construction funding, half of which (\$3.6 billion) would replenish accounts affected by the Administration's *border security factsheet* plan. The remainder, \$3.6 billion, would fund future border barrier projects.¹¹ According to Deputy Under Secretary of Defense (Comptroller) Elaine McCusker:

We have \$3.6 billion -- up to \$3.6 billion to backfill any MILCON projects that we end up having to fund in '20 instead of '19. And then we also have \$3.6 billion for potential new construction for the border, and the reason we've done this is to reflect the fact that we have a presidential priority that has a macro funding level and we want to help get to that funding level.¹²

⁹ White House, “Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States,” February 15, 2019, available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>.

¹⁰ White House, “President Donald J. Trump's Border Security Victory,” February 15, 2019, available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>.

¹¹ The additional \$3.6 billion in future Army funding was not included in the Administration's *border security factsheet* plan.

¹² Department of Defense News Briefing on the President's Fiscal Year 2020 Defense Budget, March 12, 2019. Transcript available at <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1783618/department-of-defense-news-briefing-on-the-presidents-fiscal-year-2020-defense/>.

Table 1. Trump Administration’s Border Funding Plan and FY2020 Request

Includes FY2020 Budget Request					
DOD	Authority	Type	Source	Status	Plan
FY2019 Future Plan and FY2019 Enacted (\$8.1 billion)					
Non-DOD]	FY2019 Enacted DHS Appropriations			Complete	\$1.375 billion
Non-DOD		Nonemergency	Treasury Forfeiture Fund (TFF)	Partially Complete	\$601 million (\$242 available for obligation)
DOD	10 U.S.C. 284	Nonemergency	DOD Support for Counterdrug Activities	Partially Complete	\$2.5 billion (\$1.9 billion obligated)
DOD		Emergency	Unobligated Military Construction Project Funds	Ongoing	\$3.6 billion
Additional Amounts in FY2020 Military Construction Budget Request (\$7.2 billion)					
DOD	FY2020 Military Construction Appropriations	Additional Wall funding		Requested	\$3.6 billion
DOD	FY2020 Military Construction Appropriations	Replacement, or “backfill” funding. Not additive.		Requested	\$3.6 billion
Total DOD portion					\$15.3billion \$13.3 billion

Source: White House, “President Donald J. Trump’s *Border Security Victory*,” February 15, 2019; Department of Defense Comptroller, FY2020 Defense Budget Materials – FY2020, *Military Construction, Family Housing, and Base Realignment and Closure Program (C-1)*; See also transcript of *Briefing by Deputy Under Secretary of Defense (Comptroller) Elaine A. McCusker; Lt. Gen. Anthony R. Ierardi, USA, Director, Force Structure, Resources and Assessment, Joint Staff (J8)*, March 12, 2019.

Notes: The total indicates all funding described by the President’s *Border security factsheet* plan, including \$1.375 billion in DHS appropriations previously enacted as part of the FY2019 Consolidated Appropriations Act (P.L. 116-6), part of a negotiated settlement to end a 35 day government shutdown that began on December 22, 2018. The total also includes the FY2020 additional (and replenishing) amounts the Administration has requested as part of its annual budget submission to Congress.

Overall, funding actions the Administration described between February and March 2019 included a complex mixture of realigned DOD program savings and unobligated military construction funds from past

years (\$6.1 billion), as well as a request for new defense appropriations in FY2020 (\$7.2 billion).

In its *border security factsheet* plan, the Administration cited an additional \$2 billion in non-DOD appropriations; \$1.375 billion in previously enacted FY2019 Department of Homeland Security (DHS) appropriations (included in the CAA), and \$601 million in contributions from a Treasury Forfeiture Fund (TFF) that manages seized assets. Altogether, these defense and non-defense funds would total \$15.3 billion, of which 87% would be DOD funds.

The Table 1 indicates all such actions.

Status of Funds

Of the \$601 million in FY2019 Treasury Forfeiture Funds described in the Administration's plan, at least \$242 million has been transferred for use by the U.S. Army Corps of Engineers (USACE). The Treasury Department has stated that it will transfer the remaining \$359 million when additional funds become available.¹³

Of the \$2.5 billion the Administration has designated for transfer through the defense Drug Interdiction and Counterdrug Activities account (hereafter referred to as the defense *Drug Interdiction* account), \$1.9 billion has been obligated.¹⁴ A substantial portion of the total amount, previously frozen by court injunctions, became available on July 26, 2019 when the U.S. Supreme Court struck down lower court injunctions. Since then, DOD border barrier construction has been allowed to proceed, though the courts have made no final ruling.

¹³ Opposition to Motion for Preliminary Injunction, Ex. 8, *California v. Trump*, No. 19-cv-00872 (N.D. Cal. Apr. 25, 2019), ECF. No. 89-8 ("Second Declaration of Loren Flossman") [hereafter Second Declaration of Loren Flossman].

¹⁴ See Motion for Partial Summary Judgement, Ex. 12, *Sierra Club v. Trump*, No. 19-cv-00892 (N.D. Cal. May 29, 2019), ECF. No. 181-12 ("Declaration of Eric. M. McFadden") [hereafter First Declaration of Eric McFadden]; Motion for Partial Summary Judgement, Ex. 13, *Sierra Club*, No. 19-cv-00892, ECF. No. 181-13 ("Second Declaration of Eric. M. McFadden") [hereafter Second Declaration of Eric McFadden]; Based on a non-public briefing by DOD officials, September 13, 2019.

After an extended review process, on September 3, 2019, the Secretary of Defense invoked the emergency construction statute 10 U.S.C. 2808 and directed the Department to transfer appropriations from 127 previously authorized military construction projects to eleven barrier projects identified by DHS.¹⁵

The figure below illustrates the status of the Administration's *border security factsheet* plan as of September 2019. Of the \$6.7 billion in newly introduced funds, approximately \$2.1 billion has been obligated (or otherwise made available for obligation). For completeness, the figure also includes \$1.375 billion in FY2019 DHS appropriations that were included in the President's *Border security factsheet* announcement, though these funds were previously enacted and do not represent a plan for future actions.

OVERVIEW OF DOD FUNDS AVAILABLE FOR SECURING THE BORDER

Although the Secretary of the DHS is charged with preventing the entry of terrorists, securing the borders, and carrying out immigration enforcement functions, funding to carry out those missions may be supplemented in part by resources from other agencies. Within DHS, U.S. Customs and Border Protection (CBP), is chiefly responsible for securing the borders of the United States, preventing terrorists and their weapons from entering the country, and enforcing hundreds of U.S. trade and immigration laws.

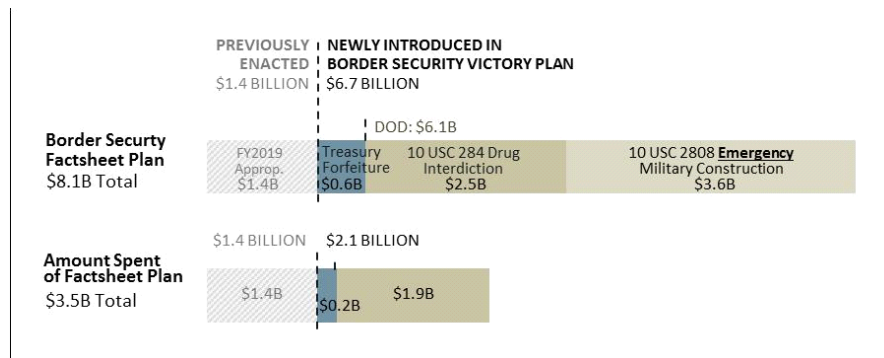
Because border security lies primarily within the jurisdiction of DHS, Congress has not generally provided DOD with significant funds to address that mission.¹⁶ Congress has instead authorized the military to

¹⁵ This includes one \$13.6 billion planning and design project.

¹⁶ For more information on the role of the Armed Forces on the border, see CRS Legal Sidebar LSB10121, *The President's Authority to Use the National Guard or the Armed Forces to Secure the Border*, by Jennifer K. Elsea. "The armed forces do not appear to have a direct legislative mandate to protect or patrol the border or to engage in immigration enforcement. Chapter 15 of Title 10, U.S. Code —Military Support for Civilian Law Enforcement

support DHS (or local authorities) in certain situations, such as to assist with drug interdiction or with terrorist incidents involving weapons of mass destruction. According to DOD officials:

Active-duty and National Guard personnel have supported Federal and State counterdrug activities (e.g., detection and monitoring of cross-border trafficking, aerial reconnaissance, transportation and communications support, and construction of fences and roads) beginning in the early 1990s. Most recently, U.S. Northern Command’s Joint Task Force-North executed 53 counterdrug support missions in fiscal year (FY) 2017 and 23 missions in FY2018. When the Secretary of Defense approved the four border States’ plans for drug interdiction and counterdrug activities, DoD committed \$21 million in funds in FY2017 and \$53 million in FY2018.¹⁷



Source: CRS analysis of White House Fact Sheet, “President Donald J. Trump’s Border Security Victory,” February 15, 2019. On September 3, 2019, DOD officials announced the Department would obligate \$3.6 billion in funds using 10 U.S.C. 2808 authority.

Figure 1. *Border Security Victory* Factsheet Funding Plan vs. Execution as of September 2019.

Agencies, however, provides general legislative authority for the armed forces to provide certain types of support to federal, state, and local law enforcement agencies, in particular in counterdrug and counterterrorism efforts. Such authorities might permit the military to provide indirect border security and immigration control assistance.”

¹⁷ Testimony of Mr. Robert G. Salesses (written statement), Deputy Assistant Secretary of Defense, Homeland Defense Integration and Defense Support of Civil Authorities, Department of Defense, Subcommittee on Border Security, Facilitation, and Operations (Committee on Homeland Security), June 20, 2019, available at: <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=109664>.

Congress has also permitted DOD special flexibility for undertaking military construction projects during periods of national crisis, such as when the President declares a national emergency. (The National Emergencies Act, or NEA, establishes procedures for how a President may declare a *national emergency* but does not explicitly define that term.¹⁸) Historically, emergency military construction has been used to support troops engaged in contingency operations overseas at locations that include Iraq and Afghanistan.¹⁹

DOD Funding Available without a Declaration of a National Emergency

The Administration's plan would tap funds for border barriers using both statutory military construction authorities and non-statutory general transfer authorities. This section provides an overview of those available to the Administration (both invoked and not invoked). Later sections examine the Administration's use of specific authorities in depth.

Statutes Permitting Military Construction

Statutes that would authorize DOD to undertake military construction activities along the border but that would not require a Presidential declaration of a national emergency include the items below.

The Administration has invoked:

¹⁸ An emergency may be terminated in three cases: (1) automatically after one year unless the President publishes a notice of renewal in the Federal Register; (2) upon a presidential declaration of termination; or (3) upon the enactment of a Joint Resolution (requiring a presidential signature or, in the case of a veto, a two-thirds majority in each house). See CRS Legal Sidebar LSB10267, *Definition of National Emergency under the National Emergencies Act*, by Jennifer K. Elsea.

¹⁹ 10 U.S.C. §2808. *Construction authority in the event of a declaration of war or national emergency*, was invoked 18 times between 2001 and 2013. One of these instances was for domestic construction related to security measures for weapons of mass destruction. For additional information, see CRS Insight IN11017, *Military Construction Funding in the Event of a National Emergency*, by Michael J. Vassalotti and Brendan W. McGarry.

- 10 U.S.C. 284 Support for counterdrug activities and activities to counter transnational organized crime. Upon request by qualifying entities, this statute authorizes DOD to reprogram funds to construct roads, fences, and lighting along international drug smuggling corridors in order to support law domestic (and foreign) law enforcement. The Department's activities are funded from a central transfer account called the *Drug Interdiction and Counter-Drug Activities*, which also receives direct annual appropriations.²⁰

The Administration has not invoked:

- 10 U.S.C. 2803 Emergency construction. This statute authorizes the Secretary of Defense, under conditions the Secretary determines to be vital to the national security or the protection of health, safety, or environmental quality, to obligate \$50 million for military construction projects not otherwise authorized by law.²¹ This authority was not included in the Administration's *Border security factsheet* plan for wall funding.

General and Special Transfer Authorities (Section 8005 and Section 9002)

The Administration's use of the statute 10 U.S.C. 284 is predicated on accessing DOD funds made available by General Transfer Authority (GTA) transfers. GTA (sometimes colloquially referred to as *Section 8005*, though the provision number may change), refers to the recurring provision in annual defense appropriations acts that set the maximum amount permitted for DOD's base reprogramming actions (usually around \$4

²⁰ DOD's *Drug Interdiction and Counterdrug Activities* account receives direct annual appropriations and is also a central transfer account; a vehicle for passing additional funds to domestic and foreign agencies to assist with combatting organized crime and drug activity. Conceived in 1991 as part of the war on drugs, the statute authorizes various forms of support, including the construction of roads, fences, and lighting to block drug and criminal activity. For more information, please see CRS Insight IN11052, *The Defense Department and 10 U.S.C. 284: Legislative Origins and Funding Questions*, by Liana W. Rosen.

²¹ 10 U.S.C. §2803.

billion). Section 9002 is the equivalent designation for war-related, *Title IX Overseas Contingency Operations*, funds (usually around \$2 billion). Congress typically requires that reprogramming be undertaken within a specified timeframe (less than year) and meet the following additional criteria:

That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress.²²

Congress has generally considered reprogramming authority provided to Executive branch departments and agencies to be a privilege.²³ Though the constitution invests Congress with the “powers of the purse,” legislators typically provide executive branch agencies some limited flexibility to shift funds among various accounts in recognition of a complex budget execution process wherein estimated costs often vary based on unforeseen events. Such flexibility allows agencies to accommodate changing circumstances, while continuing to carry out the essential functions for the programs and activities for which funds have been provided.

Congress can grant reprogramming and transfer authorities in a variety of forms. They may be statutory or non-statutory. Congress may establish a central transfer account for a special purpose, or alternately, apply a broader criteria that describe which funds may be exchanged, and in what specific circumstances. Historically, Congress has consistently provided some limit to the total amount of funds that may be used.²⁴

²² See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (P.L. 115-245).

²³ House Armed Services Committee, Department of Defense Budget Hearing, March 26, 2019. Acting Secretary of “Defense Patrick Shanahan: . . . It was a very difficult discussion and we understand the significant downsides of losing what amounts to a privilege (reprogramming authority).”

²⁴ For more information on DOD transfer and reprogramming, see CRS In Focus IF11243, *Defense Primer: DOD Transfer and Reprogramming Authorities*, by Aaron D. Walenga and Brendan W. McGarry.

Why Does Congress Permit Reprogramming?

“The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements.”

Deputy Secretary of Defense William H. Taft IV, Hearing Before the House Armed Services Committee, *Reprogramming Action within the Department of Defense*, September 30, 1985. Cited in *FY2019 Fiscal Law Deskbook, Judge Advocate General’s Legal Center and School* (page 12-7).

DOD Funding Available with a Declaration of a National Emergency

With the declaration of a national emergency, the President may invoke statutory authorities that allow DOD to fund military construction projects that support the national response.²⁵ These authorities generally last only as long as the emergency is in effect (expiring immediately or within 180 days of termination). They include DOD military and civil works funds.²⁶

²⁵ An emergency may be terminated in three cases: (1) automatically after one year unless the President publishes a notice of renewal in the Federal Register, (2) upon a presidential declaration of termination, or (3) upon the enactment of a Joint Resolution (requiring a presidential signature or, in the case of a veto, a two-thirds majority in each house). See CRS Legal Sidebar LSB10267, *Definition of National Emergency under the National Emergencies Act*, by Jennifer K. Elsea.

²⁶ Congress funds the Department of the Army’s USACE civil works activities and accounts through annual and supplemental appropriations that are distinct from DOD military funds. The civil works annual appropriations typically are provided through an annual Energy and Water Development Appropriations act.

What is Military Construction?

“The term ‘military construction’ as used...(in any) provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a *military installation*...or any acquisition of land or construction of a defense access road...

The term ‘military installation’ means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department...”

Excerpt from 10 U.S.C. 2801 (definitions used in Chapter 169 of the U.S. Code, which contains statutes related to military construction and family housing)

In his February 2019 proclamation, the President invoked:

- 10 U.S.C. 2808 Construction authority in the event of a declaration of war or national emergency. This broad authority permits the Secretary of Defense to undertake military construction projects not otherwise authorized by law that may be necessary to support the use of the Armed Forces after the declaration of a national emergency. New projects are funded from the unobligated balances of existing ones, with no other upper limit on the overall total.

In his February 2019 proclamation, the President did not invoke:

- 33 U.S.C. 2293 Reprogramming during national emergencies. This statute permits the Secretary of the Army in the event of a declaration of war or a declaration of a national emergency that requires or may require use of the Armed Forces to terminate or defer Army civil works projects that the Secretary deems are nonessential to national defense, and apply the resources of the Department’s civil works program to, “authorized civil works,

military construction, and civil defense projects that are essential to the national defense.”²⁷

Figure 2 summarizes the main points of each of the statutes listed above as they pertain to the use of military construction.²⁸

	Require National Emergency		Do Not Require National Emergency	
	10 USC 2808	33 USC 2293	10 USC 2803	10 USC 284
RESULT	MILCON projects deferred or cancelled	Civil works projects are deferred or cancelled	MILCON projects are deferred or cancelled	No MILCON projects affected
THRESHOLD	Funds limited to amount of unobligated military construction funds	Funds are limited to amount of Army Civil Works programs	\$50 million limitation	Funds limited directly by appropriations provisos and indirectly by transfer thresholds in appropriations Acts
ALLOWANCE	Allows any type of military construction	Allows authorized civil works, military construction, and civil defense projects	Allows any type of military construction	Allows construction of roads, fences, and lighting; funds aerial and ground surveillance
LIMITS	Use of armed forces must be a military necessity; construction must support troops	Projects must be essential to the national defense	Must be for urgent national security, health, safety, or environmental considerations	Must be used to counter transnational organized crime; construction permitted must block international drug smuggling corridors
HISTORY	Has been invoked	Has not been invoked	Has not been invoked	Has been invoked

National Emergencies are often invoked and they may be terminated by Joint Resolution (Congress enacts and the President signs). There are currently 31 national emergencies in effect.

Source: CRS graphic based on analysis of identified statutes.

Figure 2. Selected DOD authorities enabling military construction.

²⁷ For more information, see CRS In Focus IF11084, *Redirecting Army Corps of Engineers Civil Works Resources During National Emergencies*, by Nicole T. Carter.

²⁸ For discussion of what constitutes a national emergency, see CRS Legal Sidebar LSB10267, *Definition of National Emergency under the National Emergencies Act*, by Jennifer K. Elsea.

USE OF AUTHORITIES TO FUND BORDER BARRIER CONSTRUCTION

The following two subsections contain a detailed examination of DOD’s proposed use of statutory and non-statutory authorities espoused in the Trump Administration *border security factsheet*.²⁹ These include: 10 U.S.C. 2808, which would make \$3.6 billion available, and; 10 U.S.C. 284, which would transfer \$2.5 billion of defense program savings in concert with the non-statutory authority Section 8005 (General Transfer Authority). The final subsection addresses the use of Treasury Forfeiture Funds, which would provide \$601 million for the Administration’s border funding plan.

10 U.S.C. 2808: Military Projects Deferred by Emergency Statute

Overview

When the President declares a national emergency requiring the use of the Armed Forces and invokes the emergency statute 10 U.S.C. 2808, the Secretary of Defense is permitted to undertake military construction projects “not otherwise authorized by law that are necessary to support such use of the armed forces.”³⁰ Such projects are funded using the unobligated appropriations of construction projects currently underway—effectively deferring them until Congress provides replenishing appropriations.

On February 15, 2019, President Trump issued Proclamation 9844, *Declaring a National Emergency Concerning the Southern Border of the United States*, to address what he described as a long-standing and worsening problem of large-scale, unlawful migration through the southern border. The Proclamation asserted that the severity of the crisis justified

²⁹ For legal arguments related to statutory authorities, please see CRS Report R45908, *Legal Authority to Repurpose Funds for Border Barrier Construction*, by Jennifer K. Elsea, Benjamin Hayes, and Edward C. Liu.

³⁰ 10 U.S.C. §2808.

use of the Armed Forces, and invoked 10 U.S.C. 2808, thus unlocking emergency construction authority.³¹

On September 3, 2019, the Secretary of Defense determined that 11 construction projects requested by DHS were necessary to support the use of the Armed Forces along the southern border, pursuant to 10 U.S.C. 2808.³²

In a memorandum to the Department, the Secretary directed the DOD Comptroller to transfer \$3.6 billion in unobligated military construction appropriations for the new construction, and urged the Secretary of Army to begin work expeditiously. The transfers indefinitely deferred 127 previously authorized military construction projects, roughly half of which were at overseas locations (\$1.8 billion for 64 non-U.S. projects).

Of the deferred military construction projects outside the United States, approximately 42% (\$772 million; 21 projects) would have supported the European Deterrence Initiative (EDI), a program intended to increase the capability of U.S. forces in Europe against non-NATO regional adversaries.³³ In public remarks to the media on September 5, 2019, Secretary of Defense Mark Esper suggested allies reimburse the United States for the funding shortfalls.³⁴

³¹ “Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.... To provide additional authority to the Department of Defense to support the federal Government’s response to the emergency at the southern border, I hereby declare that this emergency requires use of the Armed Forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. 1631), that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available.” The White House, “Proclamation No. 9844 Declaring a National Emergency Concerning the Southern Border of the United States,” 84, No. 34, Federal Register 4949, February 20, 2019, available at: <https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-03011.pdf>.

³² Notice of Filing of Administrative Record for Border Barrier Projects Undertaken Pursuant to 10 U.S.C. 2808, September 13, 2019, No. 19-cv-0006, ECF. No.123-1 (Memorandum from the Secretary of Defense to the Acting Under Secretary of Defense (Comptroller)/Chief Financial Officer, “Military Construction Necessary to Support the Use of the Armed Forces in Addressing the National Emergency at the Southern Border,” September 3, 2019).

³³ CRS analysis. See Office of the Under Secretary of Defense (Comptroller), *European Deterrence Initiative Budget Justification for FY2020*, March 2019. Available at: https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/fy2020_EDJ_Book.pdf.

³⁴ Secretary of Defense Mark Esper: “The message that I’ve been carrying, since when I was acting secretary to today, has been about the increase in burden sharing...So part of the message will be ‘Look, if you’re really concerned then maybe you should look to cover those projects for us’ because that’s going to build infrastructure in many cases in their

Table 2. U.S. Military Construction Projects Deferred by Use of 10 U.S.C. 2808, by Location

Includes U.S.-Affiliated Territories		
State or Territory	Amount (millions)	Amount as % of Total
Puerto Rico	402.6	22.8%
Guam	257.3	14.6%
New York	160.0	9.1%
New Mexico	125.0	7.1%
Alaska	102.4	5.8%
Virginia	89.2	5.1%
Washington	89.0	5.0%
North Carolina	80.3	4.6%
Maryland	66.5	3.8%
Kentucky	62.6	3.6%
Utah	54.0	3.1%
Louisiana	39.0	2.2%
Texas	38.5	2.2%
Hawaii	32.0	1.8%
Arizona	30.0	1.7%
Virgin Islands	27.4	1.6%
Indiana	24.0	1.4%
Florida	17.0	1.0%
South Carolina	10.8	0.6%
Oregon	10.5	0.6%
Oklahoma	8.0	0.5%
Wisconsin	8.0	0.5%
California	8.0	0.5%
Colorado	8.0	0.5%
Mississippi	8.0	0.5%
Alabama	5.2	0.3%
Total	1,763.2	100.0%

Source: CRS analysis of DOD September 3, 2019 notification to congressional defense committees on projects to be deferred by the use of 10 U.S.C. 2808.

countries...Part of the message is burden sharing, 'Maybe pick up that tab.'" Reuters, Pentagon chief suggests European allies replace funds diverted to border wall, September 5, 2019. Available at <https://af.reuters.com/article/worldNews/idAFKCN1VQ2W6>.

Of deferred military construction projects within the United States (and associated territories), the largest share of funds would come from Puerto Rico (\$403 million, or 23% of total) and, to a lesser extent, Guam (\$257 million, or 15% of the total).³⁵

The Table 2 summarizes the total amount of deferred funds, grouped by U.S. State or affiliated territory.

DOD has stated that it would make funds available to the Department of the Army for border barrier projects by prioritizing the deferral of \$1.8 billion in *non-U.S. projects*. Funds associated with projects in the United States (\$1.8 billion) would be made available at some later date.³⁶

DOD's action has attracted warnings from Members of Congress concerned over military construction projects that may be affected in their states and districts.³⁷ Critics have also expressed concerns that the President's use of emergency powers could circumvent (or be perceived as circumventing) the congressional appropriations process.

DOD Imposed Non-Statutory Selection Criteria to Identify Project Funds as Sources for Potential Reprogramming

DOD developed internal criteria not required by 10 U.S.C. 2808 that narrowed the pool of military construction projects eligible for deferment under the Administration's use of that statute.

In testimony before the Subcommittee on Military Construction, Veterans Affairs, and Related Agencies in February 2019, Assistant Secretary of Defense for Sustainment Robert McMahon explained the Department's reasoning for the additional guidelines:

³⁵ Approximately half of all projects deferred in Puerto Rico (\$219 million of \$403 million) are associated with infrastructure improvements at Camp Santiago. All deferred projects in Guam (\$257 million for eight projects) are located at Joint Region Marianas.

³⁶ Department of Defense transcripts, *DOD Briefing on Use of 2808 MILCON Funds for Construction of the Border Wall*, September 3, 2019. Available at: <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1952191/dod-briefing-on-use-of-2808-milcon-funds-for-construction-of-the-border-wall/>. CRS been unable to determine the effect of delaying funds associated with the deferment of U.S. projects.

³⁷ See, for example, Letter to House and Senate Defense Committee Chairs and Ranking Members, from Senator Charles Schumer, Representative Sean Maloney, and Senator Kirsten Gillibrand, September 9, 2019. Available at https://www.gillibrand.senate.gov/imo/media/doc/MILCON_Joint_Letter_CES_KG_Maloney.pdf.

In order to protect military readiness, the projects that are most likely to be temporarily delayed include those that pose no or minimal operational or readiness risks if deferred, projects that were already scheduled to be awarded in the last six months of the fiscal year, and recapitalization projects of existing facilities that can be temporarily deferred for a period of months.³⁸

The Department's internal criteria narrowed the scope of the project funding pool by applying the following selection criteria:³⁹

- No military construction projects would be considered that have already received a contract award;
- No military construction projects with FY2019 award dates would be considered;⁴⁰ and
- No military housing, barracks, or dormitory projects would be considered.

In official statements, DOD has said that if its FY2020 budget request for military construction is approved by Congress, it will use the funds provided to replenish funding for projects deferred in favor of newly funded border barrier construction.

If the Department's FY2020 budget is enacted on time as requested, no military construction project used to source section 2808 projects would be delayed or cancelled.⁴¹

Nevertheless, projects deferred by use of the statute effectively remain underfunded (or unfunded) unless Congress enacts additional amounts to

³⁸ Written Testimony of Robert H. McMahon, Assistant Secretary Of Defense U.S. Congress, House Committee on Appropriations, Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, *The President's 2019 National Emergency Declaration Circumventing Congress to Build a Border Wall & its Effect on Military Construction and Readiness*, 116th Cong., February 27, 2019, available at: <https://appropriations.house.gov/legislation/hearings/the-2019-national-emergency-declaration-to-build-a-border-wall-its-effect-on>.

³⁹ Department of Defense, *Fact Sheet on Section 2808 Funding Pool*, March 18, 2019, available at: <https://www.reed.senate.gov/imo/media/doc/Milcon%20Wall%20Project.pdf>.

⁴⁰ In other words, the award date must be after September 30, 2019.

⁴¹ Department of Defense, *Fact Sheet on Section 2808 Funding Pool*, March 18, 2019, available at: <https://www.reed.senate.gov/imo/media/doc/Milcon%20Wall%20Project.pdf>.

replenish the original appropriations. DOD has requested \$3.6 billion in additional Army military construction funds as part of its FY2020 budget submission for this purpose. Congressional opponents have argued against replenishment and asserted that DOD transfers would be tantamount to cancelling—not deferring—affected projects.

DOD's Emergency Decision-Making May Have Deviated from Precedent

The current DOD decisionmaking process for construction in the event of a declaration national emergency appears to differ from the one described in the Department's Financial Management Regulation (FMR) and associated internal directives. The current process appears to have been driven by DHS requests, not generated internally by Military Departments in conjunction with Combatant Commanders (COCOMs).⁴²

DOD's Internal Process on Use of 10 U.S.C. 2808 Remains Unclear

Though DOD has not fully disclosed internal deliberations related to its 10 U.S.C. 2808 funding decisions, an approximate chronology of events has emerged from court records, media reporting and official briefings. (See **Appendix A** for detailed chronology.)

On February 18, 2019, then-Acting Secretary of Defense Patrick Shanahan requested DHS provide a prioritized list of construction projects that, according to its assessment, would improve the operational effectiveness of troops deployed to the border.⁴³ DHS responded on March 20, 2019

⁴² DOD Financial Management Regulation DOD 7000.14, Volume 3, Chapter 17, section 170303, paragraph 3, available at: https://comptroller.defense.gov/Portals/45/documents/fmr/current/03/03_17.pdf#page-17. When a Secretary of a Military Department decides, in conjunction with the supported Combatant Commander, to request use of this authority, the Secretary of the Military Department will submit a request to ASD(Sustainment).

⁴³ Tara Copp, Leo Shane III, and Joe Gould, "The Pentagon wants to know how a border wall will improve troops' 'effectiveness' before it contributes DoD dollars," *Military Times*, February 21, 2019, available at: <https://www.militarytimes.com/news/your-military/2019/02/21/dod-asks-dhs-for-data-to-justify-milcon-use-for-border-wall/>.

with a prioritized list that included \$5 billion in projects along 220 miles of both public and private U.S.-Mexico borderland.⁴⁴

On April 11, 2019, then-Acting Secretary of Defense Shanahan directed the Chairman of the Joint Chiefs of Staff to provide a detailed evaluation of the DHS proposal by May 10th, 2019 and assess how the DHS-requested projects might support the mobilization of the Armed Forces to the southern border. Concurrently, the Acting Secretary instructed the DOD Comptroller and others to identify \$3.6 billion in unobligated balances from existing military construction projects that might serve as a source of funding for border barriers.

On May 6, 2019, the Chairman of the Joint Chiefs of Staff submitted his final report, *Assessment of Whether the Construction of Barriers at the Southern Border is Necessary to Support the Use of Armed Forces in Securing the Border*, which concluded that all DHS-identified construction projects were necessary to support the use of the Armed Forces.⁴⁵ The report's methodology was based, in part, on the assumption that any construction along the border would provide necessary support, wherever troops may (or may not) be deployed:

In general, construction projects in one sector of the border have ripple effects across all other sectors. This recognition drives our conclusion that any border barrier construction supports the use of the armed forces on the border to some extent, regardless of where the construction occurs relative to the current location of DoD operations.⁴⁶

⁴⁴ Opposition to Motion for Preliminary Injunction, Ex. 10, California, No. 19-cv-00872, ECF. No. 89-10 ("Declaration of Kenneth Rapuano") [hereafter First Declaration of Kenneth Rapuano].

⁴⁵ 10 U.S.C. 2808 reads, in part, "In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces."

⁴⁶ Notice of Filing of Administrative Record for Border Barrier Projects Undertaken Pursuant to 10 U.S.C. 2808, September 13, 2019, No. 19-cv-0006, ECF. No.123-2 (Info Memo General Joseph Dunford, Chairman of the Joint Chiefs of Staff, "Assessment of Whether the Construction of Barriers at the Southern Border is Necessary to Support the Use of Armed Forces in Securing the Border," May 6, 2019).

On August 21, 2019, Kenneth Rapuano, Assistant Secretary of Defense, Homeland Defense & Global Security (ASD/HDGS), recommended the Secretary of Defense adopt an action plan that would execute 11 DHS identified projects and defer \$3.6 billion in existing military construction. The Secretary of Defense approved all these recommendations on September 3, 2019.

DOD Directives on Use of 10 U.S.C. 2808 Describe a Process that Originates with Combatant Commanders

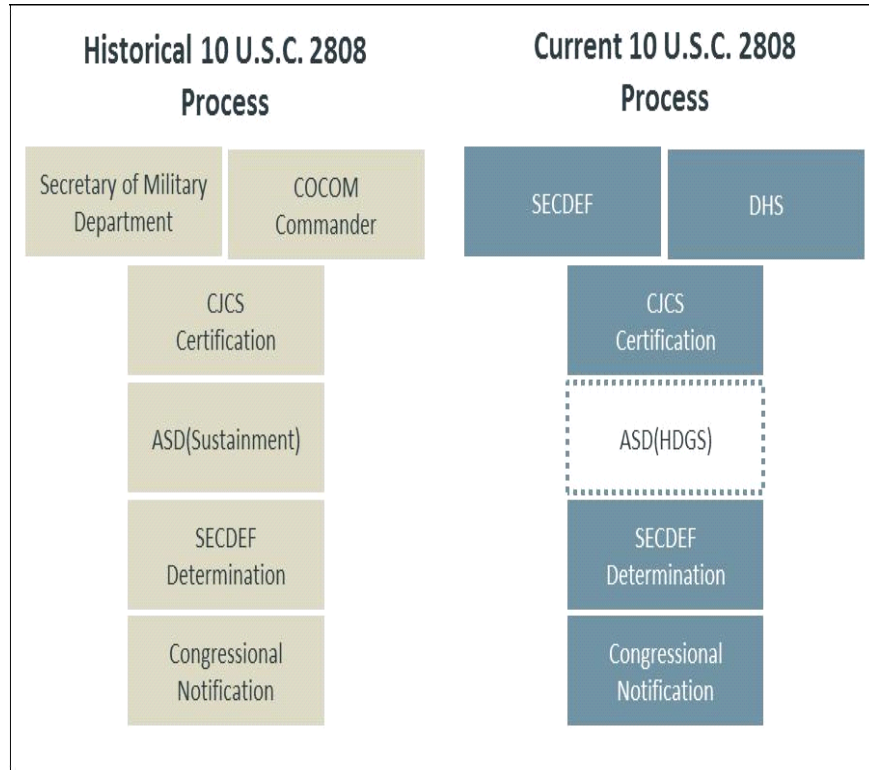
Historically, DOD has used 10 U.S.C. 2808 to fund projects at overseas locations for war related infrastructure.⁴⁷ Requests for emergency construction projects originate with the Secretaries of the Military Departments and COCOMs, who together make a preliminary assessment on whether use of 10 U.S.C. 2808 authorities is warranted.⁴⁸ For each emergency project, officials must provide detailed justification materials that analyze possible alternatives to use of the emergency authority, give a history of the request and rationale for why the project may not be deferred, and submit a cost estimate and timeline for completion.⁴⁹ The Chairman of the Joint Chiefs of Staff (CJCS) is then required to certify any proposed projects are consistent with current theater basing plans and do not conflict with other operational priorities.

Having made these determinations, the Secretaries then forward their list of proposed emergency projects and detailed justification materials to the Under Secretary of Defense for Acquisition and Sustainment, or ASD (Sustainment). That office, in turn, provides the Secretary of Defense with its recommendations.

⁴⁷ See CRS Insight IN11017, *Military Construction Funding in the Event of a National Emergency*, by Michael J. Vassalotti and Brendan W. McGarry.

⁴⁸ “When a Secretary of a Military Department decides, in conjunction with the supported Combatant Commander, to request use of this authority (10 U.S.C. 2808), the Secretary of the Military Department will submit a request to ASD(Sustainment).” DOD Financial Management Regulation DOD 7000.14, Volume 3, Chapter 17, section 170303, paragraph 3, available at: https://comptroller.defense.gov/Portals/45/documents/fmr/current/03/03_17.pdf#page-17.

⁴⁹ “DOD Financial Management Regulation DOD 7000.14, Volume 3, Chapter 17, section 170303, paragraph 3, subparagraphs a-e, available at: https://comptroller.defense.gov/Portals/45/documents/fmr/current/03/03_17.pdf#page-17.



Source: CRS analysis of DOD Financial Management Regulation DOD 7000.14, Volume 3, Chapter 17, part 170303 Emergency and Contingency Construction; Department of Defense Directive 4270.05 Military Construction, Part 5 Responsibilities.

Figure 3. 10 U.S.C. 2808 process (as reported).

The Secretary makes a final decision on projects to be undertaken and notifies all appropriate defense committees of the pending action, as required by statute. Following this notification, the Office of the Under Secretary of Defense (Comptroller) (OUSDC) is permitted to issue funds for execution.⁵⁰

⁵⁰ Department of Defense, *Financial Management Regulation DoD 7000.14-R (Volume 3, Chapter 17)*, February 2016. See Section “170303. Emergency and Contingency Construction.” Available at: https://comptroller.defense.gov/Portals/45/documents/fmr/Vol_ume_03.pdf#page=270#page=270.

10 U.S.C. 284: DOD Transferred Funds over Congressional Objections in Contravention of DOD Directives

Overview

To execute the plan described by the Administration's *border security factsheet*, DOD reprogrammed \$2.5 billion from a variety of nondrug defense programs, through the Department's Drug Interdiction and Counterdrug Activities, and on to the U.S. Army Corps of Engineers, the federal agency that both DHS and DOD have asked to manage border barrier construction activities.

This two-stage process—transferring funds into and out of the defense Drug Interdiction account—was permitted by multiple authorities: first by Section 8005 *General Transfer Authority* and Section 9002 *Special Transfer Authority*, and in the final stage by the statute 10 U.S.C. 284.

By transferring funds from nondrug programs into the defense Drug Interdiction account, DOD was able to tap a larger pool of appropriations than might otherwise have been available by using the account's own funds. At the same time, the Drug Interdiction account's ongoing programs were safeguarded from diminishing transfers. DOD officials have stated they would not tap the account's own appropriations for wall-related projects:

DOD will not use any DoD counter-narcotics funding for the drug-demand-reduction program, the National Guard counter-drug program, or the National Guard counter-drug schools program to provided support to DHS under 10 U.S.C. 284(b)(7).⁵¹

To accomplish the first stage of the \$2.5 billion transfer process—transferring savings from nondrug programs to the defense Drug Interdiction account—DOD did not comply with internal regulations that require the Department to first seek congressional prior approval for general transfer authority (Section 8005) actions.⁵²

⁵¹ First Declaration of Kenneth Rapuano.

⁵² DOD Financial Management Regulation DOD 7000.14-R, Volume 3, Chapter 6. "No reprogramming request will be approved if the funds requested have been obligated or

Drug Interdiction and Counterdrug Activities, Defense

The Drug Interdiction and Counterdrug Activities account is a defense-wide appropriation that typically receives roughly \$1.1 billion annually. Approximately 70% of its funds support counterdrug activities focused on detecting and monitoring illicit networks, providing domestic support to non-DOD agencies, and working with international partners to combat criminal activity. Generally, the remaining 30% of funds support drug testing and prevention programs within DOD for military and civilian personnel.⁵³ The Table 3 provides a brief funding history.

**Table 3. Drug Interdiction and Counterdrug Activities,
Defense Funding History**

Enacted (amounts in thousands of dollars)				
Budget Activity: Account	FY2016	FY2017	FY2018	FY2019
BA01: Counter-Narcotics Support	902,109	841,420	748,948	670,271
BA02: Drug Demand Reduction Program	121,589	118,713	120,813	121,900
BA03: National Guard Counterdrug Program	212,900	254,000	236,353	217,178
BA04: National Guard Counterdrug Schools	N/A	N/A	25,000	25,276
Total Enacted	1,236,598	1,214,133	1,131,114	1,034,625

Source: See Department of Defense (Comptroller), *Budget Execution: DD 1414 Base for Reprogramming Actions (FY2019-FY2016)*. Available at: <https://comptroller.defense.gov/Budget-Execution/>; See also annual Department of Defense Comptroller, *Operation and Maintenance Overview, Drug Interdiction and Counterdrug Activities*. Available at: <https://comptroller.defense.gov/Budget-Materials/Budget2019/>

Notes: Includes base and Overseas Contingency Operations (OCO). Note that OCO generally added to BA01: Counter-Narcotics Support.

committed prior to congressional committee review and approval.” Available at https://comptroller.defense.gov/Portals/45/documents/fmr/Volume_03.pdf#page=44.

⁵³ Department of Defense Comptroller, *Operation and Maintenance Overview, Fiscal Year 2019 Budget Estimates*, March 2018. (See “Appropriation Highlights: Drug Interdiction and Counterdrug Activities.”) Available at: https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2019/fy2019_OM_Overview.pdf#page=65.

DOD's process for submitting prior-approval requests to congressional defense committees is a non-statutory requirement intended to preserve comity with legislators who set the Department's reprogramming thresholds each year. Disapproval by any one of the four committees terminates further action, according to DOD regulations, though the Department may request reconsideration or submit a modified request.⁵⁴

On March 25, 2019, the Department notified the four congressional defense committees of its plan to transfer \$1 billion, the first of several reprogramming actions.⁵⁵ The House Armed Services and House Committee on Appropriations immediately denied the request.⁵⁶ DOD nevertheless completed its transfer on March 26, 2019, for the first time overriding congressional disapprovals.⁵⁷ The Department followed up with an additional reprogramming action of \$1.5 billion, which it completed on May 9, 2019.⁵⁸

⁵⁴ GAO, Budget Reprogramming: Department of Defense Process for Reprogramming Funds (GAO/NSIAD-86-164BR), July 1986, available at: <https://www.gao.gov/assets/80/75702.pdf#page=21>; GAO, Budget Reprogramming: Department of Defense Process for Reprogramming Funds (GAO/NSIAD-86-164BR), July 1986, available at: <https://www.gao.gov/assets/80/75702.pdf#page=21>.

⁵⁵ Under Secretary of Defense (Comptroller), Reprogramming Action (FY 19-01 RA), March 25, 2019, available at: https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2019/reprogramming_action/19-01_RA_Support_for_DHS_Counter_Drug_Activity.pdf.

⁵⁶ Chairman Adam Smith, House Armed Services Committee, *Letter to Under Secretary of Defense, Comptroller and Chief Financial Officer David L. Norquist*, March 26, 2019, available at: https://armedservices.house.gov/_cache/files/5/7/57ea01fb-9872-4a49-b8789b844ca0b030/B5C69226DA76BB0F77AC9E06052FA8AC.fy-19-01-ra.pdf; Chairman Peter Visclosky, Defense Subcommittee, House Committee on Appropriations, *Letter to Under Secretary of Defense, Comptroller and Chief Financial Officer David L. Norquist*, March 26, 2019, available at: <https://appropriations.house.gov/sites/democrats.Appropriations.house.gov/files/Visclosky%20Letter%20Denying%20Reprogramming.pdf>.

⁵⁷ U.S. Congress, House Committee on Appropriations, *The Fiscal Year 2020 National Defense Budget Request from the Department of Defense*, 116th Cong., March 26, 2019. (Remarks by Adam Smith, "...the sort of gentleman's agreement was if you reprogram money, you will not do it without first getting the approval of all relevant committees...For the first time...you are not asking for our permission."), available at: <https://armedservices.house.gov/2019/3/the-fiscal-year-2020-national-defense-budget-request-from-the-department-of-defense>.

⁵⁸ Under Secretary of Defense (Comptroller), Reprogramming Action (FY 19-02 RA), May 9, 2019, available at: https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2019/reprogramming_action/19-02_RA_Support_for_DHS_Counter_Drug_Activity.pdf.

How DOD Transferred \$2.5 Billion in Two Reprogramming Actions

DOD's first reprogramming action occurred on March 25, 2019, and included \$1 billion for construction of high priority projects in Yuma Sector Arizona (Projects 1 and 2) and El Paso Sector Texas (Project 1). All projects were to be managed by the U.S. Army Corps of Engineers.

The transfer of funds took place in two stages. In the first stage, the Department used General Transfer Authority (also known as *Section 8005* authority) to shift \$1 billion in Army military personnel program savings into the defense Drug Interdiction account.⁵⁹ The funds consisted of:

- \$812 million (81%) in excess appropriations due to a shortfall of 9,500 personnel from the Army's targeted end strength, and
- \$188 million (19%) in program savings from several military benefits programs.⁶⁰

In the second stage of the transfer action, the Department invoked 10 U.S.C. 284 to authorize moving the \$1 billion into an Army Operation and Maintenance appropriation for use by the Army Corps of Engineers, which is responsible for managing all DOD approved border barrier projects.

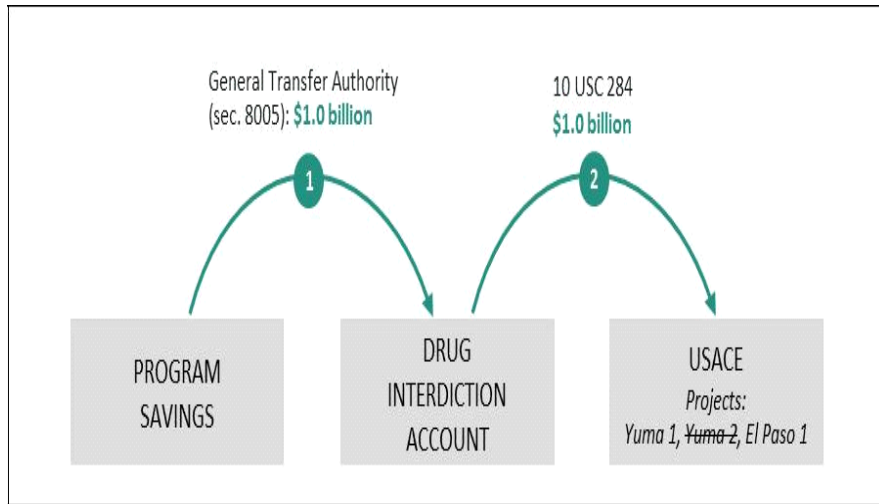
On May 9, 2019, DOD notified congressional defense committees of a second reprogramming action of \$1.5 billion for four additional border barrier projects (El Centro California Project 1 and Tucson Sector Arizona Projects 1-3; see Appendix Table B-2 for complete list).⁶¹ Unlike the first action, the Department transferred both base and OCO funds:

⁵⁹ *Section 8005* refers to the recurring designation in annual appropriations measures that authorizes base general transfer authority and sets the maximum amount permitted (typically around \$4-5 billion). *Section 9002* is the equivalent designation for war-related funds. Congress typically requires reprogrammed funds to meet three criteria. Reprogrammed funds must: 1) be used for higher priority items; 2) based on unforeseen military requirements, and; 3) in be case be used for items previously denied by Congress.

⁶⁰ Additional funds were made available due to DOD overestimates in the number of personnel transferring to the new Blended Retirement System and those applying for unemployment compensation benefits.

⁶¹ See Second Declaration of Kenneth Rapuano, California, No. 19-cv-00872, ECF. No. 143 [hereafter referred to as *Second Declaration of Kenneth Rapuano*].

- Base: \$818.5 million (55%) drawn from a variety of accounts, including research and development technologies to reduce the U.S. chemical stockpile (\$252 million), recovered savings related to lower than expected contributions to the Thrift Savings Plan retirement (\$224 million), and the cancellation of a National Security Space Launch mission (\$210 million).
- Overseas Contingency Operations: \$681.5 million (approximately 45%) drawn from funding for training of Afghan security forces and reimbursement to Pakistan for logistics support.

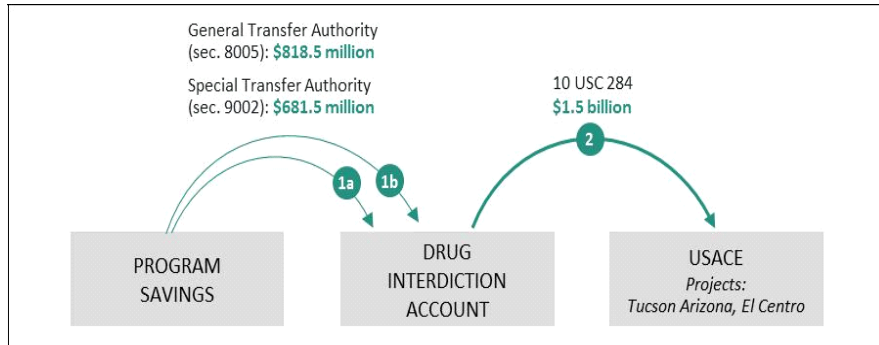


Source: Under Secretary of Defense (Comptroller), Reprogramming Action (FY 19-01 RA), March 25, 2019.

Notes: Drug Interdiction and Counterdrug Activities funds were transferred to an “Operations and Maintenance, Army” appropriation with a one-year period of availability that expires on September 30, 2019. The appropriation is accessible by USACE.

Figure 4. First DOD reprogramming tranche of \$1 billion.

Base and OCO reprogramming authorities are derived from separate provisions with nearly identical legislative language; for base Section 8005 of P.L. 115-245 and Section 1001 of P.L. 115-232; and for OCO Section 9002 of P.L. 115-245 and Section 1512 of P.L. 115-232.



Source: Under Secretary of Defense (Comptroller), Reprogramming Action (FY 19-02 RA), May 9, 2019.

Notes: Unlike the first reprogramming tranche, funds in this action were drawn from FY2019 appropriations with varying periods of availability. Approximately \$224 million, or 15% of the total, would otherwise have expired after one year; \$933 million, or 62% of the total amount, would have expired after two years; and \$344 million, or 23% of the total, after three years. Like the first tranche, all these funds were transferred to an “Operations and Maintenance, Army” account appropriation with a one-year period of availability that expire on September 30, 2019. The appropriation is accessible by USACE.

Figure 5. Second reprogramming tranche of \$1.5 billion.

DOD Has Undertaken Six Border Barrier Projects Requested by DHS under 10 U.S.C. 284

On February 25, 2019, DHS requested that DOD undertake 11 construction projects on the U.S.-Mexico southwest border in California, Arizona, and New Mexico. The projects involved construction or replacement of roads, lighting, and vehicle and pedestrian fencing along drug smuggling corridors that were also areas of high illegal entry. DHS stated the purpose:

To support DHS's action under Section 102 of IIRIRA, DHS is requesting that DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences roads, and lighting within the Project Areas to block drug-smuggling corridors across the international boundary between the United States and Mexico.

DOD initially agreed to fund seven of the 11 projects in multiple funding tranches (described above).⁶² The Defense Department subsequently cancelled one of these projects (Yuma Sector Project 2), which was later funded using the emergency authority 10 U.S.C. 2808. All the projects were to be managed by the U.S. Army Corps of Engineers (USACE).

DOD's first reprogramming funding tranche of \$1 billion supported: Yuma Sector Arizona Projects 1 and 2, and El Paso Sector Texas Project 1.⁶³ DOD's second funding tranche of \$1.5 billion supported: El Centro California Project 1 and Tucson Sector Arizona Projects 1-3.⁶⁴

Court Challenges Delayed Project Execution while Funds Expire September 30, 2019

As of September 2019, DOD has obligated \$1.9 billion of the \$2.5 billion it reprogrammed for wall related construction under 10 U.S.C. 284.⁶⁵ Until recently, operations were suspended due to multiple court injunctions in a legal case challenging DOD's reprogramming actions, *Sierra Club v. Trump*. The delays incurred additional costs as contractors that had received contract awards were compelled to idle their equipment and put laborers on standby.⁶⁶ On July 26, 2019, the U.S. Supreme Court lifted all injunctions in the case, allowing construction to once again proceed. Nevertheless, the litigation remains unresolved. In the case of an unfavorable ruling, the government has suggested that it may be required to take down the new construction.

⁶² DOD funded three projects using 10 U.S.C. 2808 that it was unable to fund using 10 U.S.C. 284. These were: Yuma 2; Yuma 3, and El Paso 2.

⁶³ Yuma 2 was later terminated. See Second Declaration of Kenneth Rapuano.

⁶⁴ In August and September, DOD identified three additional projects that were to be funded using unanticipated contract savings. Those savings were eventually found to be insufficient, and the plans for adding the new projects were aborted.

⁶⁵ Based on a non-public briefing by DOD officials, September 13, 2019.

⁶⁶ First Declaration of Eric McFadden; Second Declaration of Eric McFadden.



Source: First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, “Request for Assistance Pursuant to 10 U.S.C. 284,” February 25, 2019) and Second Declaration of Kenneth Rapuano.

Figure 6. Locations of U.S.-Mexico border construction projects for which DHS requested assistance from DOD pursuant to 10 U.S.C. 284 as of July 2019.

DOD is under some pressure to complete the obligation of reprogrammed appropriations before funds are no longer available. Due to legislative language regarding the period of availability of transferred appropriations, all unobligated amounts expire at the end of the current fiscal year, on September 30, 2019, thus incentivizing quick action.⁶⁷ Additionally, due to the complex funding structure of contracts under consideration, USACE requires some actions be taken within 100 days of the award date, according to Army officials:

⁶⁷ Legislative language governing DOD’s General Transfer Authority (Section 8005) and the defense Drug Interdiction and Counterdrug Activities account is identical regarding the period of availability of transferred appropriations: “That the funds appropriated under this heading shall be available for obligation for the same time period and for the same purpose as the appropriation to which transferred.” DOD has successively used each of those authorities to transfer \$2.5 billion in program savings to the FY2019 Army Operations and Maintenance appropriations account (for use by USACE), a one year appropriation whose unobligated balances expire on the last day of FY2019 (as stipulated by Section 8003 Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, P.L. 115-245).

...contracts require *definitization* not later than 100 days from the date of contract award...If the Corps does not have sufficient time available prior to September 30, 2019, to definitize these contracts and thereby obligate the balance of the contract price, the remaining unobligated funds will become unavailable for obligation...As a consequence, the Corps will be unable to complete the projects as planned, and the contracts will have to be significantly de-scoped or terminated.⁶⁸

Treasury Forfeiture Funds (TFF) Available

Established in 1992 for the purpose of managing cash and other resources seized as the result of civil or criminal asset forfeiture, the Treasury Forfeiture Funds (TFF) functions as a multi-Departmental source of funding for law enforcement interests of the Departments of the Treasury and Homeland Security. With executive authority to define what fits within this broadly defined purpose, the Administration determined that it could be a source of wall funding.⁶⁹

The TFF is managed by the Treasury Executive Office of Asset Forfeiture (TEOAF), which makes budget authority available to other federal agencies or bureaus via interagency agreements, reimbursing them upon the receipt of spending invoices. Payments are limited by the total value of seized property. TEOAF's mission statement is:

To affirmatively influence the consistent and strategic use of asset forfeiture by law enforcement bureaus that participate in the Treasury Forfeiture Fund (the Fund) to disrupt and dismantle criminal enterprises.⁷⁰

⁶⁸ Identical language contained in First Declaration of Eric McFadden, and Second Declaration of Eric McFadden.

⁶⁹ Office of Inspector General, *Audit of the Department of the Treasury Forfeiture Fund's Financial Statements for Fiscal Years 2018 and 2017*, Department of the Treasury, OIG-19-022, December 13, 2018, p. 11, <https://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG-19-22.pdf#page=11>.

⁷⁰ Treasury Executive Office of Asset Forfeiture, *Congressional Budget Justification and Annual Performance Report and Plan FY2020*, Department of the Treasury, p. 3, <https://home.treasury.gov/system/files/266/19.-TEOAF-FY-2020-CJ.pdf#page=3>.

On February 15, 2019, the Treasury Department notified congressional appropriators that it had approved a DHS request (submitted in December 2018) to provide a total of \$601 million in TFF to the CBP for border security purposes.⁷¹ The first tranche of \$242 million was made available to CBP for obligation on March 14, 2019.⁷² The second tranche of \$359 million is expected to be made available at a later date, upon Treasury's receipt of additional anticipated forfeitures. All funds the TFF provides to U.S. Customs and Border Protection (CBP) may be used for various aspects of border security –not only the construction of a physical wall.⁷³

CONGRESSIONAL ACTIONS

Congressional response to the Administration's *border security factsheet* plan has generally split by chamber, with the House Armed Services and Appropriations committees moving swiftly to pass legislative language that would block the President's actions and the Senate Armed Services and Appropriations committees expressing some support.

In late July 2019, news outlets reported congressional leadership had come to an informal understanding as part of a settlement of the annual budget caps for FY2020 and FY2021 that might exclude legislative language restricting the use of federal funds for border barriers from annual appropriations measures. The deal would specifically prohibit legislative provisions limiting the use of transfer authority—a key part of the President's *Border security factsheet* plan—unless such language was adopted on a bipartisan basis. The effect of such language is still unclear as is how it may otherwise be used to modify ongoing legislative activity.⁷⁴

⁷¹ Second Declaration of Loren Flossman.

⁷² An interagency agreement between Treasury and DHS was finalized on March 13, 2019. See Declaration of John Farley.

⁷³ CRS correspondence with TFF officials.

⁷⁴ Niels Lesniewski, Kellie Mejdrih, Andrew Siddons and Doug Sword, "White House, Hill leaders agree on two-year budget deal," *Roll Call*, July 22, 2019, available at: <https://www.rollcall.com/news/congress/white-house-hill-leaders-agree-two-year-budget-deal>. The article cites a congressional aide's comment, "In divided government, every bill needs bipartisan support. Language saying provisions in appropriations bills require bipartisan agreement is meaningless verbiage designed to make the obvious seem profound..."

House Authorization

The House-passed version of the FY2020 National Defense Authorization Act (H.R. 2500) contains a number of provisions that if enacted would limit or prohibit the use of DOD funds for construction of border barriers. Furthermore, it provides no funding for the Administration's request for replenishment of defunded projects or for related future projects. The bill targets each stage of the Administration's funding plan:

- **Transfer Authority.** *Section 1001* would sharply curtail the total amount of base funds that may be used for reprogrammed, reducing the limit to \$1 billion (from \$4.5 billion in FY2019). *Section 1512*, the equivalent transfer authority used for war-related funds, would be reduced to \$500 million (from \$3.5 billion in FY2019).
- **10 U.S.C. 284.** *Section 1011* would remove fence construction as a permitted type of support authorized under 10 U.S.C. 284 and would impose additional congressional notification requirements associated with use of the statutory authority.
- **10 U.S.C. 2808.** *Section 2802* would limit the total amount of funds that could be used under 10 U.S.C. 2808 emergency authorities to \$500 million if used for construction "outside the United States," or \$100 million if used for domestic construction projects. (Currently, transfers are only limited to the total amount of all unobligated military construction appropriations.) These changes would apply only to projects pursuant to a declared emergency and would not impact projects that support a declared war.
- **General Prohibition.** *Section 1046* would prohibit the use of national defense funds appropriated between FY2015-FY2020 for the construction of any type of physical border barrier along the southern border. *Section 2801* contains identical language that applies to military construction funds.

On May 15, 2019, a group of legislators led by House Armed Services Committee members introduced H.R. 2762, a bill that would modify 10 U.S.C. 2808 by imposing a \$250 million cap on the total amount that could be used for emergency military construction projects in the event of a national emergency. Additionally, “The bill would only allow money that cannot be spent for its intended purpose to be used for an emergency, would require additional information in a congressional notification, and delay the start of construction until after a waiting period following the notification going to Congress.”⁷⁵

Senate Authorizations

The Senate passed version of the FY2020 National Defense Authorization Act (S. 1790) would support the actions described in the President’s *Border security factsheet* plan by providing \$3.6 billion in military construction funds to replenish projects deferred by the Administration’s use of 10 U.S.C. 2808 and avoiding large cuts to DOD reprogramming thresholds.⁷⁶ However, the Senate bill would not authorize the additional \$3.6 billion requested by the Administration for future border barrier projects.

- Transfer Authority. *Section 1001* and *Section 1522* provide \$4 billion in general transfer authority— a decrease of \$0.5 billion from FY2019 authorized amounts— and \$2.5 billion in special transfer authority— a decrease of \$1 billion from FY2019 authorized amounts, respectively.

⁷⁵ House Armed Services Press Release, “HASC Democrats Introduce Bill to Limit DOD’s Authority to Reprogram Military Construction Funds,” May 15, 2019, available at: <https://armedservices.house.gov/2019/5/hasc-democrats-introduce-bill-to-limit-dod-s-authority-to-reprogram-military-construction-funds>.

⁷⁶ During Senate Armed Services Committee markup, a motion to include a provision prohibiting the use of FY2015-FY2021 military construction funds for border barrier construction failed by a roll call vote of 12-15. See S.Rept. 116-48, Available at: <https://www.congress.gov/116/crpt/srpt48/CRPT-116srpt48.pdf#page=641>.

- 10 U.S.C. 2808 Replenishment funding. *Section 2906* would provide \$3.6 billion to replenish military construction projects affected by the use of 10 U.S.C. 2808 transfers, fulfilling the Administration's entire request for that purpose. Authorization for the transfer of these funds into the depleted accounts would terminate at the end of FY2020 (September 30, 2020).

House Appropriations

The House has generally sought to limit the Administration's funding actions across multiple appropriations bills. In the first of two FY2020 appropriations minibus measures, the Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020 (H.R. 2740), Division C (Department of Defense Appropriations, H.R. 2968) and Division E (Energy And Water Development And Related Agencies Appropriations Act, 2020, H.R. 2960) contained the following provisions that would affect the Administration's plan for funding border barrier construction:

- Transfer Authority. *Section 8005* would limit general transfer authority of base funds to \$1 billion (a reduction from \$4 billion in FY2019⁷⁷) and require the Secretary of Defense and others to certify the transferred funds will be used for higher priority items. The *Section 9002* special transfer authority for war funds would provide authority to transfer up to \$500 million (a reduction from \$2 billion in FY2019).⁷⁸

⁷⁷ See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (P.L. 115-6157), available at: <https://www.congress.gov/115/bills/hr6157/BILLS-115hr6157enr.pdf#page=19>.

⁷⁸ See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (P.L. 115-6157), available at: <https://www.congress.gov/115/bills/hr6157/BILLS-115hr6157enr.pdf#page=6>; Section 8005 Available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr>

- 10 U.S.C. 284. Though the legislation would provide \$816.8 million for Drug Interdiction and Counterdrug Activities transfer account (for use under 10 U.S.C. 284), the bill prohibits use of any of those funds for construction of border barrier fencing, and further prohibits any transfer of these funds.⁷⁹
- General Prohibition. *Section 8127* would broadly prohibit defense appropriations from being used for construction of a wall, fence, border barrier, or border security infrastructure along the southern border.⁸⁰
- U.S. Army Corps of Engineers. *Section 108* of Division E would broadly prohibit USACE from using any civil works funds for border barrier construction.⁸¹

Notwithstanding any other provision of law, none of the funds made available by this Act or any other prior appropriations Acts for the Civil Works Program of the United States Corps of Engineers may be committed, obligated, expended, or otherwise used to design or construct a wall, fence, border barriers, or border security infrastructure along the southern border of the United States.⁸²

The House passed the second of two FY2019 appropriations mini-buses, H.R. 3055 on June 25, 2019. It contains a number of limiting restrictions in Division D (Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2020) that would interrupt the Administration's plans for funding border barriers.

2740eh.pdf#page=225; Section 9002 Available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr2740eh.pdf#page=328>.

⁷⁹ See Title VI Other Department of Defense Programs, subsection Drug Interdiction and Counterdrug Activities, Defense, available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr2740eh.pdf#page=221>.

⁸⁰ Section 8127 available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr2740pcs.pdf#page=304>.

⁸¹ See Division E (Energy and Water Development and Related Agencies Appropriations Act, 2020), General Provisions – Corps of Engineers-Civil, available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr2740eh.pdf#page=596>.

⁸² Available at: <https://www.congress.gov/116/bills/hr2740/BILLS-116hr2740eh.pdf#page=599>.

- Reprogramming Guidelines. *Section 122* would require the Department of Defense to follow its own guidelines when reprogramming military construction funds, a directive that would make significant transfers contingent on congressional prior-approval.⁸³ In committee language, the House cautioned the Department of Defense that “reprogramming is a courtesy provided to the Department of Defense and that it can be taken away if the authority is abused” and urged the Department to adhere to its own directives when seeking to reprogram funds.⁸⁴
- General Prohibition on Transfers. In committee language, the House underscored the absence of wall funding in the current appropriations language and its efforts to preserve previously appropriated projects from becoming a pool of funds for the Administration’s efforts to construct border barriers.

The Committee recommendation does not provide these requested funds. Also, the accompanying bill includes language that protects previously appropriated projects, as well as fiscal year 2020 projects included in this bill from being used as a source for wall funding.⁸⁵

- Prohibition on Design and Construction. *Section 612* would prohibit the use of military construction appropriations provided in any act from FY2015-FY2020 to be used for the purpose of designing or constructing border barriers or access roads along the southern border. The provision uses the strongest possible

⁸³ See H.R. 3055, Division D (Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2020), House Rules Committee print, Available at: <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR3055-RCP116-18.pdf#page=384>.

⁸⁴ See H.Rept. 116-63, Report from the Committee on Appropriations to accompany H.R. 2745, available at: <https://www.govinfo.gov/content/pkg/CRPT-116hrpt63/pdf/CRPT-116hrpt63.pdf#page=7>.

⁸⁵ See H.Rept. 116-63, Report from the Committee on Appropriations to accompany H.R. 2745.

legislative language by stating it would apply, “notwithstanding any other provision of law.”⁸⁶

The House-passed *Financial Services and General Government Appropriations Act, 2020* (H.R. 3351) contains a provision (Section 126) that would bar the Administration’s use of Treasury Forfeiture Funds for planning, designing, or executing any kind of barrier or road along the southwest border.⁸⁷ If enacted, this language would likely prevent the use of \$601 million funds approved by the Treasury Department for these purposes.

Senate Appropriations

On September 12, 2019, the Senate Committee on Appropriations reported the Defense Appropriations Act, 2020 (S. 2474, S.Rept. 116-103), which would retain transfer authorities at FY2019 levels (\$4 billion for General Transfer Authority, or Section 8005; \$2 billion for OCO related transfers) and contained no additional wall-related provisions.⁸⁸

⁸⁶ See H.R. 3055, Division D (Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2020), House Rules Committee print, Available at: <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR3055-RCP116-18.pdf#page=444>.

⁸⁷ See *Title I, Department of the Treasury, Administrative Provisions- Department of the Treasury, Section 126*, available at: <https://www.congress.gov/116/bills/hr3351/BILLS-116hr3351rfs.pdf#page=29>.

⁸⁸ Department of Defense Appropriations Act, 2020 (S. 2474). Section 8005 Transfer Authority available at <https://www.congress.gov/116/bills/s2474/BILLS-116s2474rs.pdf#page=42>; Section 9002 Transfer Authority available at <https://www.congress.gov/116/bills/s2474/BILLS-116s2474rs.pdf#page=141>.

Table 4. Side-by-Side Comparison of FY2020 Congressional Action on Wall DOD Funding

Provision	House Authorizers (H.R. 2500)	Senate Authorizers (S.1790)	House Appropriators (H.R. 2740): Includes Defense	House Appropriators (H.R. 3055): Includes Military Construction
Transfer Authority	<p><i>Section 1001</i> lowers the limit for base budget transfers from \$4.5 billion in FY2019 to \$1.0 billion in FY2020.</p> <p><i>Section 1512</i> reduces the war-related funds cap from \$3.5 billion in FY2019 for \$0.5 billion in FY2020.</p>	<p><i>Section 1522</i> decreases base budget transfer authority from \$4.5 billion in FY2019 to \$4.0 billion in FY2020.</p> <p><i>Section 1522</i> lowers war-related transfer limits from \$3.5 billion in FY2019 to \$2.5 billion in FY2020.</p>	<p><i>Section 8005</i> lowers the base budget cap from \$4 billion in FY2019 to \$1.0 billion in FY2020 and requires that the Secretary of Defense to certify the process.</p> <p><i>Section 9002</i> reduces the cap on war-related transfers from \$2 billion in FY2019 to \$.5 billion in FY2020.</p>	<p>In committee language, the House underscored the absence of wall funding in the current appropriations language and its efforts to preserve previously appropriated projects from becoming a source of funds for the Administration's efforts to construct border barriers</p>
10 U.S.C. 284 Drug Interdiction	<p><i>Section 1011</i> removes fence construction as a permitted type of support authorized under 10 U.S.C.284 and imposes additional reporting requirements.</p>		<p>Provides \$816.8 million for Drug Interdiction and Counter-Drug Activities but prohibits the construction of border barrier fencing.</p>	

Provision	House Authorizers (H.R. 2500)	Senate Authorizers (S.1790)	House Appropriators (H.R. 2740): Includes Defense	House Appropriators (H.R. 3055): Includes Military Construction
10 U.S.C. 2808 Emergency Military Construction	<i>Section 2802</i> sets a \$500 million funding limit for international construction, and \$100 million for domestic construction projects; currently, transfers are only limited to the total amount of all unobligated military construction appropriations. These changes apply only to projects pursuant to declared emergencies (not war).	<i>Section 2906</i> provides \$3.6 billion to replenish, or <i>backfill</i> , military construction projects affected by the use of 10 U.S.C. 2808 transfers, but transfers would terminate at the end of the fiscal year (September 30, 2020).		
General Provisions	<i>Sections 1046</i> prohibits the use of defense funds appropriated between FY2015-FY2020 for the construction of any type of physical border barrier along the southern border. <i>Section 2801</i> contains identical language that applies to military construction funds.		<i>Section 8127</i> prohibits defense appropriations from being used for construction of a wall, fence, border barrier, or border security infrastructure along the southern border.	<i>Section 612</i> prohibits the use of military construction funds appropriated between FY2015-FY2015 for the construction of roads or barriers along the southern border.
U.S. Army Corps of Engineers			<i>Section 108</i> prohibits the use of funds in any bill for USACE barrier construction.	

Source: See preceding section for detailed source notes.

ISSUES FOR CONGRESS

Separation of Powers

At the highest level, the President's statements regarding the use of emergency powers to supplement the congressional appropriations process have raised questions for some about the reach of the executive branch's lawful authority.

"I could do the wall over a longer period of time. I didn't need to do this [national emergency]. But I would rather do it much faster."¹⁴⁵—
President Trump, February 15, 2019

Critics also assert the President's actions risk violating the constitutional separation of powers. Article I, Section 9 of the U.S. Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."¹⁴⁶ Supporters have argued the President has lawfully reallocated funds to address a national crisis.

On June 3, 2019, in a lawsuit brought by the House of Representatives that argued the Administration's actions to fund a border wall represented a breach of the Appropriations Clause of the Constitution, a federal judge ruled the legislature had no standing to sue.¹⁴⁷

In the 116th Congress, House authorizers and appropriators have inserted provisions into annual legislation that would broadly prohibit the use of defense funds for construction of a wall, fence, border barrier, or other security infrastructure along the southern border. Some of these prohibitions would appear to apply retroactively to all appropriations since FY2015.

¹⁴⁵ White House, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, February 15, 2019, available at: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>.

¹⁴⁶ U.S. Constitution available at National Archives: <https://www.archives.gov/founding-docs/constitution-transcript>.

¹⁴⁷ *United States House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 11 (D.D.C. 2019) ("And while the Constitution bestows upon Members of the House many powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority. The Court therefore lacks jurisdiction to hear the House's claims and will deny its motion."), available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv0969-54.

Section 8005 (and Related) Reprogramming Guidelines

DOD's recent decision to undertake general and special reprogramming transfers (in conjunction with 10 U.S.C. 284), "without regard to comity-based DOD policies that prescribe prior approval from congressional committees" has introduced uncertainty into a historically uncontroversial process.¹⁴⁸ For some, DOD's disregard for long-standing reprogramming agreements with congressional defense committees has signaled a challenge to the legislative branch's ability to conduct oversight of approximately \$6 billion in annual defense appropriations. Consequently, the Department's actions have generated new congressional interest and actions (particularly in the House) that would sharply limit the annual budget flexibility provided to the Department in authorizations and appropriations acts.

Others view DOD's recent reprogramming notifications in support of border wall construction as a justifiable anomaly in an otherwise unbroken agreement supported by the Department's own internal directives.

In cases where DOD reprogramming actions do not reflect congressional intent (or adhere to DOD directives), Congress may consider what legislative recourse might be available to prohibit future violations. In some cases, decreasing the Department's budgetary flexibility may potentially undermine DOD's ability to effectively execute congressionally directed policies and programs.

DOD's Emergency Military Construction Selection Criteria

The emergency Military Construction statute (10 U.S.C. 2808) does not limit the types of military construction projects that may be deferred based on a set of criteria, including, for example, whether such delays will affect military readiness. Nevertheless, DOD has stated it will apply its

¹⁴⁸ First Declaration of Kenneth Rapuano at Ex. C, (Memorandum from Acting Secretary of Defense Patrick Shanahan to Under Secretary of Defense (Comptroller)/Chief Financial Officer, "Funding Construction in Support of the Department of Homeland Security Pursuant to 10 U.S.C. § 284," March 25, 2019).

own criteria to the 10 U.S.C. 2808 pool of eligible projects in order to preserve readiness. Congress may evaluate whether DOD’s guidelines are sufficient and whether they serve as a sound basis for governing future decisions.

APPENDIX A. SELECTED COMMUNICATIONS AND DOCUMENTS

The tables below contains a chronology of selected communications, correspondence, and documents relevant to the use of 10 U.S.C. Section 2808 and Section 284, drawn primarily from court records.

Table A-1. Interagency Correspondence Pursuant to 10 U.S.C. 284 (and Related Reprogramming Authorities)

Date	From	To	Subject
4/4/2018	Presidential Memorandum	DOD, DHS, U.S. Attorney General	Directs the SecDef to activate National Guard and assist DHS in securing the southern border
2/25/2019	DHS	DOD	Request for Assistance Pursuant to 10 U.S.C. 284; letter contains a prioritized list of 11 border projects.
3/25/2019	DOD	DHS	Letter affirming DOD will undertake Yuma Sector Projects 1-2 and El Paso Sector Project 1
3/25/2019	SecDef	SecArmy	Memo identifying USACE as the construction agent and directing construction to begin as quickly as possible on Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 consistent with applicable law.
3/25/2019	SecDef	DOD Comptroller	Directing internal reprogramming “without regard to comity-based DOD policies that prescribe prior approval from congressional committees”
3/25/2019	DOD Comptroller	OMB	Request for reprogramming approval
3/25/2019	DOD Comptroller	Congress	First tranche of \$1 billion (for Yuma and El Paso): Notification of Prior-Approval Reprogramming Action FY 19-01-RA (from DOD program savings to defense Drug Interdiction account); Notification of Internal Reprogramming Action FY 19-11 IR
3/25/2019	DOD Comptroller	Congress	First tranche of \$1 billion (for Yuma and El Paso): Notification of Prior-Approval Reprogramming Action FY 19-01-RA (from DOD program savings to defense Drug Interdiction account); Notification of Internal Reprogramming Action FY 19-11 IR (from defense Drug Interdiction account to Army O&M 2019/2019 appropriation)
3/26/2019	Congress	DOD	HASC and HAC deny reprogramming action; DOD completes transfer of first tranche

(Appendix A continued on next page.)

Date	From	To	Subject
3/29/2019	DHS	DHS	Modification Request (1 of 2) for El Paso Sector Project 1 to include anti-climb features (30 foot bollard)
4/5/2019	DHS	DOD	Modification Request (2 of 2)
4/9/2019	DOD	DHS	Notice of approval of DHS modifications requests; 30 foot steel bollard with anti-climb plate for Yuma Sector Project 1 and El Paso Sector Project 1, and; 18 foot steel bollard with anti-climb plate for Yuma Sector Project 2
4/12/2019	DHS	DOD	Request to terminate Yuma Sector Project 2 contracts
4/18/2019	DOD	DHS	Approval of further modification (de-scoping)
5/9/2019	DOD Comptroller	Congress	Second tranche of \$1.5 billion (for Tucson Sector Projects 1-3 and El Centro 1); Notification of Prior-Approval Reprogramming Action FY 19-02-RA (from DOD program savings to Drug Interdiction and Counter Drug Activities, Defense); Notification of Internal Reprogramming Action FY 19-16 IR (from defense Drug Interdiction account to Army O&M 2019/2019 appropriation)
5/24/2019	Federal district court in CA		<i>Sierra Club v. Trump</i> : preliminary injunction barring transfer of \$1 billion (first reprogramming tranche); USACE suspends construction
6/28/2019	Federal district court in CA		<i>Sierra Club v. Trump</i> : Permanent injunction prohibiting both reprogramming tranches (USACE suspends new construction)
7/26/2019	U.S. Supreme Court		U.S. Supreme Court lifts both injunctions
8/16/2019	DHS	DOD	Letter requesting DOD add additional mileage for Yuma Sector Project 3 (8 miles), Yuma Sector Project 4 (1.1 miles), and Yuma Sector Project 5 (2.5 miles), based on anticipated project savings.
8/22/2019	Internal DOD (ASD HDGS to SecDef)		Recommendation for SecDef to disapprove Yuma Sector Project 3 modification (due to location being interspersed with 31 miles of 10 U.S.C.2808 proposed construction) and approve Yuma Sector Projects 4 and 5, and additionally, Tucson Sector Project 4(14.4 miles).
8/26/2019	Internal DOD: SecDef to USACE		SecDef directs USACE to use excess funds to undertake construction of Yuma Sector Projects 4 and 5 and Tucson Sector Project 4(rejecting DHS request for Yuma Sector Project 3 and Tucson Sector Project 5).
8/26/2019	DOD	DHS	DOD confirms modifications of 20 miles in Yuma Sector Projects 4 and 5, and additional mileage in Tucson Sector Project 4 (subject to availability of funds).
9/13/2019	DOD	Court (declaration)	DOD declares that, due to shortfall in anticipated project savings, it no longer intends to undertake new projects Yuma Sector Projects 4 and 5 and Tucson Sector Project 4.

Source: U.S. District Court, Northern District of California filings in *California v. Trump*, No. 19-cv-00872 (N.D. Cal. filed Feb. 18, 2019) and *Sierra Club v. Trump*, No. 19-cv-00892 (N.D. Cal. filed Feb. 19, 2019).

Notes: Abbreviations include: SecDef- Secretary of Defense; CJCS – Chairman of the Joint Chiefs of Staff

Table A-2. Interagency Correspondence Pursuant to 10 U.S.C. 2808 (As Of 9/17/2019)

Date	From	To	Subject
2/10/2019	CJCS	SecDef	CJCS provides a preliminary assessment of DOD support for border barrier projects.
2/15/2019			<i>Presidential declaration of national emergency and use of armed forces (10 U.S.C.2808 invoked)</i>
2/18/2019	DOD	DHS	Acting Secretary of Defense Shanahan requests DHS provide a prioritized list of projects and asks that the agency provide analysis explaining how they will support deployed troops.
3/18/2019	DOD	Congress	DOD provides "Fact Sheet on Section 2808 Funding Pool" with list of potentially affected military construction projects
3/20/2019	DHS	DOD	DHS provides prioritized list of border projects
4/11/2019	SecDef	CJCS	SecDef directs a detailed assessment of DHS projects and other border-related analysis (due by May 10, 2019)
4/11/2019	SecDef	DOD Comptroller	Directs Comptroller (in consultation with others) to identify \$3.6 billion in existing military construction projects potentially subject to 10 U.S.C.2808 (Due May 10)
5/6/2019	CJCS	SecDef	Chairman submits final assessment on border barrier projects that concludes all 11 projects under consideration are necessary to support use of the armed forces
5/23/2019	DOD	Congress	Update to 10 U.S.C. 2808 Funding Pool award dates
8/21/2019	ASD(HDGS)	SecDef	Recommendation to approve funding for all 11 projects under consideration. Memo provides a roadmap summarizing necessary actions. (Approved on 9/3/19)
9/3/2019	SecDef	Military Departments; Comptroller	Directs Acting Secretary of the Army to undertake 11 projects (\$3.6 billion), beginning immediately with Yuma Sector Project 2 10/27 (on Barry Goldwater Range under the jurisdiction of the Navy); to be followed by Yuma Sector Projects 3 and 6, El Paso Sector Projects 2 and 8, San Diego Sector Projects 4 and 11, El Centro Sector Projects 5 and 9, and Laredo Sector Project 7.
9/3/2019	SecDef	DHS	Notification that DOD has authorized and directed construction of 11 requested projects.
9/3/2019	DOD	Congress	SecDef notifies defense committees of 10 U.S.C.2808 actions, provides list of deferred projects, and describes additional selection criteria applied; deferred projects outside of the United States will be prioritized for execution, and total amount will be split 50%-50% with domestic projects (\$1.8 billion US/\$1.8billion non-U.S.).
9/18/2019	DOI		Public Land Orders transferring for three years the jurisdiction of land required for: El Paso Sector Project 2; El Paso Sector Project 8; San Diego Sector Project 4; Yuma Sector Project 3; and Yuma Sector Project 6.

Source: U.S. District Court, Northern District of California filings in *California v. Trump*, No. 19-cv-00872 (N.D. Cal. filed Feb. 18, 2019) and *Sierra Club v. Trump*, No. 19-cv-00892 (N.D. Cal. filed Feb. 19, 2019). For Department of Interior (DOI) Public Land Orders, see <https://www.blm.gov/press-release/interior-secretary-transfers-five-parcels-land-department-army>.

Notes: SecDef – Secretary of Defense; Congress – Congressional defense committees

This section is intended to identify milestones in the decision-making process.

APPENDIX B. 10 U.S.C. 284 REPROGRAMMING REQUESTS

DOD has submitted two reprogramming notifications to defense committees transferring a total of \$2.5 billion to the Drug Interdiction and Counterdrug Activities account.

The Department's first action, on March 25, 2019, used general transfer authority to reallocate \$1 billion.¹⁴⁹ Approximately 82% of this total was taken from the active duty army pay and allowances (for officers and enlisted personnel), savings realized from service recruiting shortfalls.¹⁵⁰

DOD's second action, on May 9, 2019, used a mix of \$818.465 million in general transfer authority (base) and \$881.535 in special transfer authority (OCO); a total of \$2.5 billion.¹⁵¹

Table B-1. DOD's First Reprogramming Action Supporting DHS Counter Drug Activity

March 25, 2019		
Account / BA: BA Title	Amount	Percentage
Military Personnel, Army	993,627,000	99.36%
02: Pay and Allowances of Enlisted	754,212,000	75.90%
05: Permanent Change of Station Travel	115,726,000	11.65%
04: Subsistence of Enlisted Personnel	57,420,000	5.78%
01: Pay and Allowances of Officers	56,440,000	5.68%
06: Other Military Personnel Costs	9,829,000	0.99%
Reserve Personnel, Army	6,373,000	0.64%
01: Reserve Component Training and Support	6,373,000	100.00%
Total	1,000,000,000	100.00%

Source: Under Secretary of Defense (Comptroller), 19-01_RA_Support_for_DHS_Counter_Drug_Activity (DD 1415-1), March 25, 2019.

¹⁴⁹ Serial number FY 19-01-RA.

¹⁵⁰ Under Secretary of Defense (Comptroller), 19-01 RA: Support for DHS Counter Drug Activity (DD 1415-1), March 25, 2019, available at: <https://comptroller.defense.gov/Budget-Execution/ReprogrammingFY2019/>.

¹⁵¹ Serial number FY 19-02-RA.

In the table below, reprogramming actions that use special transfer authority are indicated parenthetically with the (OCO) designation.¹⁵²

Table B-2. DOD’s Second Reprogramming Action Supporting DHS Counter Drug Activity

May 9, 2019		
Account/BA: BA Title	Amount	Percentage
Afghanistan Security Forces Fund (OCO)	604,000,000	40.27%
06: Afghan National Army	279,000,000	46.19%
Afghan Special Security Forces	135,900,000	22.50%
07: Afghan National Police	117,200,000	19.40%
08: Afghan Air Force	71,900,000	11.90%
Aircraft Procurement, Air Force	57,000,000	3.80%
05: Modification of In-Service Aircraft	57,000,000	100.00%
Chemical Agent and Munitions Destruction, Defense	251,000,000	16.73%
02: Chemical Agents - RDT&E	251,000,000	100.00%
Military Personnel, Air Force	45,249,000	3.02%
01: Pay and Allowances of Officers	45,249,000	100.00%
Military Personnel, Marine Corps	36,653,000	2.44%
02: Pay and Allowances of Enlisted	24,623,000	67.18%
01: Pay and Allowances of Officers	12,030,000	32.82%
Military Personnel, Navy	88,503,000	5.90%
02: Pay and Allowances of Enlisted	55,501,000	62.71%
01: Pay and Allowances of Officers	33,002,000	37.29%
Missile Procurement, Air Force	76,900,000	5.13%
03: Modification of In-Service Missiles	53,900,000	70.09%
02: Other Missiles	23,000,000	29.91%
National Guard Personnel, Air Force	8,571,000	0.57%
01: Reserve Component Training and Support	8,571,000	100.00%
National Guard Personnel, Army	25,360,000	1.69%
01: Reserve Component Training and Support	25,360,000	100.00%
Operation and Maintenance, Defense-Wide (OCO)	77,535,000	5.17%
04: Administration and Service-wide Activities	77,535,000	100.00%
Reserve Personnel, Air Force	4,835,000	0.32%
01: Reserve Component Training and Support	4,835,000	100.00%
Reserve Personnel, Army	10,599,000	0.71%
01: Reserve Component Training and Support	10,599,000	100.00%
Reserve Personnel, Navy	4,095,000	0.27%
01: Reserve Component Training and Support	4,095,000	100.00%
Space Procurement, Air Force	209,700,000	13.98%
01: Space Procurement, Air Force	209,700,000	100.00%
Total	1,500,000,000	100.00%

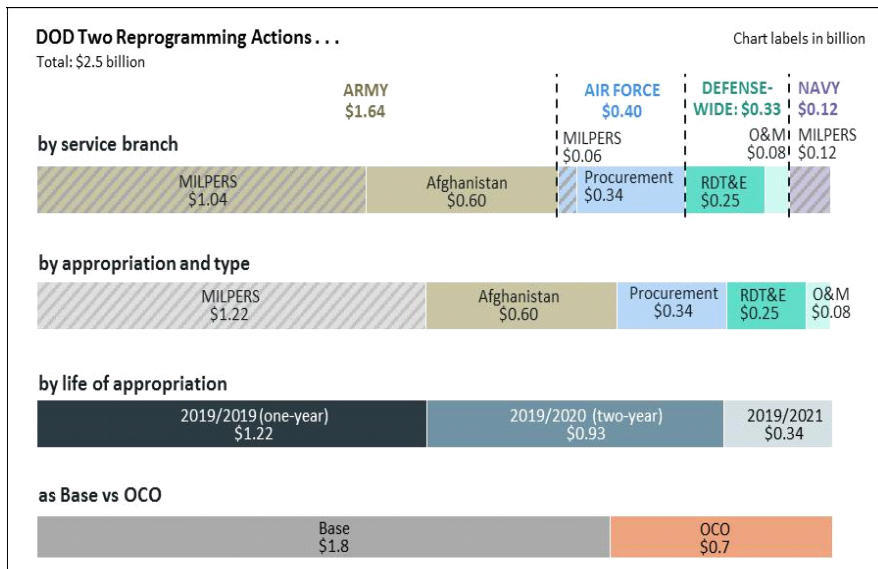
Source: Under Secretary of Defense (Comptroller), 19-02-RA Support for DHS Counter Drug Activity (DD 1415-1), May 9, 2019. Notes: Account titles sorted alphabetically. BA titles sorted in descending order by amount.

¹⁵² Under Secretary of Defense (Comptroller), 19-02 RA: Support for DHS Counter Drug Activity (DD 1415-1), March 25, 2019, available at: <https://comptroller.defense.gov/Budget-Execution/ReprogrammingFY2019/>.

Together, both reprogramming actions reallocated \$1.8 billion from base and \$.7 billion from OCO defense funds. The majority of these funds were derived from Army personnel accounts and programs supporting the Afghanistan Security Forces.

The Department’s two actions were sourced exclusively from appropriations that began in FY2019 and had a one- to three-year lifespan, or *period of availability*.

When these program savings were transferred to the Drug Interdiction and Counter-drug activities FY2019 appropriations, they became one-year appropriations. Following additional transfer actions, all appropriations were merged with an FY2019 Army Operations and Maintenance appropriations account, another one-year account.



Source: CRS Analysis of Reprogramming actions 19-01-RA and 19-02-RA.

Notes: *Life-of-Appropriation* indicates the beginning and end years of an appropriation’s period of availability. For example, 2019/2019 represents an appropriation that became available for obligation on October 1, 2018 (the first day of the fiscal year) and expires on September 30, 2019 (last day of the fiscal year). The appropriation in this example may be referred to colloquially as “one-year money.”

Figure B-1. Analysis of DOD two reprogramming actions.

APPENDIX C. WALL PROJECTS REQUESTED BY DHS PURSUANT TO 10 U.S.C. 284

On February 25, 2019, DHS formally requested DOD support its ability to impede and deny illegal entry and drug smuggling activities along the southwest U.S.-Mexico border by assisting with the construction (or replacement) of fences, roads, and lighting. DHS summarized the work required:

The new pedestrian fencing includes a Linear Ground Detection System, which is intended to, among other functions, alert Border Patrol agents when individuals attempt to damage, destroy or otherwise harm the barrier. The road construction includes the construction of new roads and the improvement of existing roads. The lighting that is requested has an imbedded camera that works in conjunction with the pedestrian fence. The lighting must be supported by grid power.... DHS will provide DoD with more precise technical specifications as contract and project planning moves forward.¹⁵³

DHS requested DOD undertake a total of 11 projects on federal lands, which the agency identified by geographic location and unique numeric id. The Border Patrol divides responsibility for its operations along the Southwest border into nine geographic sectors. Four of these were included as part of the DHS request:

- Yuma Sector Arizona. Composed primarily of desert terrain with vast deserts, mountain ranges, and sand dunes, the area encompasses 126 miles of U.S.-Mexico borderland (181,670 square miles) between California and Arizona.¹⁵⁴ DHS requested DOD undertake

¹⁵³ First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, "Request for Assistance Pursuant to 10 U.S.C. 284," February 25, 2019).

¹⁵⁴ See U.S. Customs and Border Patrol official website, Border Security Along U.S. Border, Border Patrol Sectors, Yuma Sector Arizona, available at: <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/yuma-sector-arizona>.

36 miles of vehicle barrier replacement, 6 miles of pedestrian fencing, and lighting in this sector.¹⁵⁵

- El Paso Sector Texas. This sector covers the entire state of New Mexico and two counties in western Texas; 268 miles of U.S.-Mexico borderland (125,500 square miles).¹⁵⁶ DHS requested 70 miles of vehicle barrier (with pedestrian fencing) and lighting in this sector.¹⁵⁷
- El Centro California. Located in Southern California, the sector is characterized primarily by agricultural lands, eastern desert areas (where summer temperatures can exceed 120 degrees), and western mountain ranges. The sector stretches for 71 miles along the U.S.-Mexico border.¹⁵⁸ DHS requested DOD undertake a mix of projects along 15 miles in this sector (vehicle, pedestrian, and lighting).¹⁵⁹
- Tucson Sector Arizona. Encompassing nearly all of Arizona, this area—a particularly active one for illegal alien apprehension and marijuana seizures— covers 262 miles.¹⁶⁰ DHS requested road

¹⁵⁵ First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, “Request for Assistance Pursuant to 10 U.S.C. 284,” February 25, 2019).

¹⁵⁶ See U.S. Customs and Border Patrol official website, Border Security Along U.S. Border, Border Patrol Sectors, El Paso, available at: <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/el-paso-sector-texas>.

¹⁵⁷ First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, “Request for Assistance Pursuant to 10 U.S.C. 284,” February 25, 2019).

¹⁵⁸ See U.S. Customs and Border Patrol official website, Border Security Along U.S. Border, Border Patrol Sectors, El Centro Sector California, available at: <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/el-centro-sector-california>.

¹⁵⁹ First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, “Request for Assistance Pursuant to 10 U.S.C. 284,” February 25, 2019).

¹⁶⁰ See U.S. Customs and Border Patrol official website, Border Security Along U.S. Border, Border Patrol Sectors, Tucson Sector Arizona, available at: <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/tucson-sector-arizona>.

construction, 86 miles of vehicle barrier (with pedestrian fencing), and lighting in this sector.¹⁶¹

Between March and April 2019, DOD approved seven of the eleven requested projects, funding them in two tranches. One of the approved projects, Yuma 2, was subsequently terminated due to contract complications.

In August 2019, DHS notified DOD of anticipated contract savings and requested surplus 10 U.S.C. 284 funds be applied to the execution of three additional projects (Yuma 3-5). After evaluating the request, DOD agreed to undertake a modified set of projects (Yuma 4-5, Tucson 4). In September, the Department terminated the new projects after new estimates revealed the anticipated contract savings would be insufficient to undertake additional construction.

The list below shows projects initially requested by DHS and those added by DOD in subsequent modified requests. The geographic sector is indicated in the “Project Name” column, along with the project’s numeric designation. Several projects not funded by the use of 10 U.S.C. 284 funds were later funded by 10 U.S.C. 2808.

For those approved for action by DOD, the funding tranche is also indicated.

In a letter to Acting DHS Secretary Kirstjen Nielsen, Acting Secretary of Defense Shanahan stated the U.S. Army Corps of Engineers would undertake the planning and construction of approved projects and, upon completion, would hand over custody of all new infrastructure to DHS.¹⁶²

¹⁶¹ First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, “Request for Assistance Pursuant to 10 U.S.C. 284,” February 25, 2019).

¹⁶² First Declaration of Kenneth Rapuano at Ex. B, (Letter from Acting Secretary of Defense Patrick Shanahan to Acting Secretary of Homeland Security Kirstjen Nielsen, March 25, 2019).

Table C-1. DHS Projects Request, by DOD Funding Tranche and Project Name

Projects may not be contiguous			
Funding Tranche	Project Name	Description	Funding Actions Summary
First	Yuma Sector Project 1	Involves the replacement of 5 miles of vehicle fencing.	Funded by 10 U.S.C. 284 in Tranche 1
First	Yuma Sector Project 2	Construction of an 18 foot fence for 6 miles.	Funded by 10 U.S.C. 284 in Tranche 1, but contract terminated. (Later funded by 10 U.S.C. 2808.)
First	El Paso Sector Project 1	46 miles of vehicle fence (with pedestrian fencing).	Funded by 10 U.S.C. 284 in Tranche 1
Second	El Centro Sector Project 1	15 miles of vehicle fencing (replacement).	Funded by 10 U.S.C. 284 in Tranche 2
Second	Tucson Sector Project 1	63 miles of vehicle and pedestrian fencing mix (Tucson 1-3).	Funded by 10 U.S.C. 284 in Tranche 2
Second	Tucson Sector Project 2	See above.	Funded by 10 U.S.C. 284 in Tranche 2
Second	Tucson Sector Project 3	See above.	Funded by 10 U.S.C. 284 in Tranche 2
Not funded	El Paso Sector Project 2	24 miles of vehicle barrier replacement (non-contiguous).	Unfunded by 10 U.S.C. 284 (later funded by 10 U.S.C.2808).
Not funded	Tucson Sector Project 4	26 miles of non-contiguous vehicle barrier replacement.	Not initially funded. Later, added/Removed due to misestimate of 10 U.S.C.284 surplus from project savings. Project remains unfunded.
Not funded	Tucson Sector Project 5	2 miles of vehicle barrier replacement (non-contiguous) along 15 miles.	Unfunded. (Considered but rejected by DOD during consideration of potential project savings surplus.)
Not funded	Yuma Sector Project 3	39 miles through Cabeza Prieta National Wildlife Refuge.	Unfunded by 10 U.S.C. 284 (later funded by 10 U.S.C.2808).
Not Funded	Yuma Sector Project 4	1.1 miles of new primary pedestrian fencing.	Added/Removed due to estimates of 10 U.S.C.284 surplus from project savings. Project remains unfunded.
Not Funded	Yuma Sector Project 5	5 miles of pedestrian fencing replacement.	Added/Removed due to estimates of 10 U.S.C. 284 surplus from project savings. Project remains unfunded.

Source: For first tranche, see First Declaration of Eric McFadden, for second tranche, see Second Declaration of Eric McFadden; for remaining projects, see First Declaration of Kenneth Rapuano at Ex. A, (Memorandum from Christina Bobb, Executive Secretary of Homeland Security to Captain Hallock N. Mohler, Executive Secretary of the Department of Defense, "Request for Assistance Pursuant to 10 U.S.C. 284," February 25, 2019).

Notes: Sorted by funding tranche and priority (as identified in DHS correspondence).

Court Injunctions Temporarily Suspended Construction

On May 24, 2019, the U.S. District Court for the Northern District of California issued a temporary injunction in *Sierra Club v. Trump*, barring use of DOD's first funding tranche of \$1 billion.¹⁶³ In compliance with the court's order, USACE immediately suspended ongoing operations for the two active border barrier projects. At the time of the suspension, \$423,999,999 remained unobligated (of the original \$1 billion):

- El Paso 1: An *undefinitized* contract was awarded on April 9, 2019. At the time of the court's injunction, \$389,999,999 remained unobligated.
- Yuma 1: An *undefinitized* contract was awarded on awarded May 15. At the time of the court's injunction, \$35,000,000 remained unobligated.¹⁶⁴

On May 25, 2019, DOD executed a second reprogramming action of \$1.5 billion. On June 28, 2019, the California district court issued a second injunction that prohibited DOD from using either of the two funding tranches (\$2.5 billion total).¹⁶⁵ Again, USACE project managers suspended ongoing operations.

At the time of the new suspension, approximately \$752,750,000 remained unobligated from the second funding tranche (\$1.5 billion):¹⁶⁶

- Tucson Sector Projects 1-3: An *undefinitized* contract was awarded on May 15, 2019. At the time of the court's injunction, \$646,000,000 remained unobligated.

¹⁶³ *Sierra Club v. Trump*, No. 19-cv-00892, 2019 U.S. Dist. LEXIS 88210 (N.D. Cal. May 24, 2019).

¹⁶⁴ First Declaration of Eric McFadden.

¹⁶⁵ *Sierra Club v. Trump*, No. 19-cv-00892, 2019 U.S. Dist. LEXIS 108933 (N.D. Cal. June 28, 2019).

¹⁶⁶ See Second Declaration of Eric McFadden, CO for Task Force Barrier, U.S. Army Corps of Engineers, South Pacific Division, June 18, 2019. An injunction was imposed 10 days after McFadden's estimate; so, final totals may differ somewhat. *Sierra Club v. Trump*, No. 19-cv-00892, 2019 U.S. Dist. LEXIS 108933 (N.D. Cal. June 28, 2019).

- El Centro Sector Project 1: An *undefinitized* contract was awarded on May 15, 2019. At the time of the court’s injunction, \$106,750,000 remained unobligated.

Project delays have resulted in some additional costs to the government. DOD financial regulations recognize contractors are entitled to compensation for unreasonable contract suspensions, since costs continue to be incurred by idling equipment, site security, contract labor, material storage, or market fluctuations. The government is charged additional penalties for late payment (3.625% per annum). In the event an active contract is terminated, DOD would be held responsible for compensating contractors for sunk costs.

On July 26, 2019, the U.S. Supreme Court lifted the lower court injunctions, allowing construction to proceed.¹⁶⁷

APPENDIX D. WALL PROJECTS REQUESTED BY DHS PURSUANT TO 10 U.S.C. 2808

On September 3, 2019, the Secretary of Defense, having determined that border barrier construction would serve as a “force multiplier” for reducing DHS’s demand for DOD personnel and assets, directed the Acting Secretary of the Army to proceed with the construction of 11 border barrier projects. In a memorandum to the Department, the Secretary stated:

Based on analysis and advice from the Chairman of the Joint Chiefs of Staff and input from the Commander, U.S. Army Corps of Engineers, the Department of Homeland Security (DHS), and the Department of the Interior and pursuant to the authority granted to me in Section 2808, I have determined that 11 military construction projects along the international border with Mexico with an estimated total cost of \$3.6 billion, are necessary to support the use of the armed forces in connection with the national emergency. These projects

¹⁶⁷ *Trump v. Sierra Club*, No. 19A60, 2019 U.S. LEXIS 4491 (July 26, 2019).

will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry. They will reduce the demand for DoD personnel and assets at the locations where the barriers are constructed and allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers. In short, these barriers will allow DoD to provide support to DHS more efficiently and effectively. In this respect, the contemplated construction projects are force multipliers.¹⁶⁸

Of the eleven projects DOD selected for execution, seven were located (in whole or in part) on land under the jurisdiction of the Department of the Interior (DOI) that required an administrative transfer to the Department of Defense before construction could proceed.¹⁶⁹ On September 18, 2019, DOI issued Public Land Orders that temporarily transferred jurisdiction of land required for five of these projects for a period of three years.¹⁷⁰ In the table below, DOI-transferred lands have been indicated with an asterisk (see column marked “Jurisdiction”).

Two of the eleven projects selected by DOD (El Centro 5 and Laredo 7) were located on non-public lands that will require either purchase or condemnation before construction may proceed. USACE representatives have stated that such a process would not be completed before April 2020.

¹⁶⁸ Memorandum from Secretary of Defense Mark Esper to Military Departments, September 3, 2019. Available in court records as: Notice of Decision by the Department of Defense to Authorize Border Barrier Projects Pursuant to 10 U.S.C. 2808, No. 19-cv-00872, ECF. No. 206-1 (“Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code”).

¹⁶⁹ This section summarizes a declaration made to the U.S. District Court of Northern California by Brigadier General Glenn A. Goddard, Deputy Director for Military Programs at the Headquarters of the U.S. Army Corps of Engineers on September 3, 2019. Notice of Decision by the Department of Defense to Authorize Border Barrier Projects Pursuant to 10 U.S.C. 2808, No. 19-cv-00872, ECF. No. 206-3 (“Declaration of Brigadier General Glenn Goddard”)[hereafter referred to as *Declaration of Brigadier General Glenn Goddard, USACE*].

¹⁷⁰ Bureau of Land Management, Department of the Interior press release, Secretary of the Interior Transfers Jurisdiction of Five Parcels of Land to the Department of the Army to Secure the Southwest Border, September 18, 2019. Available at <https://www.blm.gov/press-release/interior-secretary-transfers-five-parcels-land-department-army>.

The remaining two projects (Yuma 2 and Yuma 10/27), are located exclusively on the Barry M. Goldwater Range (BMGR), a military installation under the jurisdiction of the U.S. Navy where construction may begin immediately.

The table below indicates the eleven projects DOD has agreed to fund using 10 U.S.C. 2808 funds, and describes the estimated cost of construction, the jurisdiction of associated lands, and a description of the parcel.

Table D-1. 10 U.S.C. 2808 Funded Border Barrier Projects

Project	Project Amount	Jurisdiction	Jurisdiction Description	Parcel Description
Yuma 2	40,000,000	DOD	Department of the Navy	Exclusively Navy
Yuma 10/27	527,000,000	DOD	Department of the Navy	Exclusively Navy
Yuma 3	630,000,000	DOI*	Federal public domain land	Exclusively Federal
Yuma 6	65,000,000	DOI*	Federal public domain land	Mixed Federal public domain land
San Diego 4	67,000,000	DOI*	Federal public domain land	Exclusively Federal
San Diego 11	57,000,000	DOI	Federal public domain land	Mixed Federal public domain land
El Paso 2	476,000,000	DOI*	Federal public domain land	Mixed Federal public domain land
El Paso 8	164,000,000	DOI*	Federal public domain land	Mixed Federal public domain land
El Centro 9	286,000,000	DOI	Federal public domain land	Mixed Federal public domain land
El Centro 5	20,000,000	Other	Non-public land	Federal non-public or non-public
Laredo 7	1,268,000,000	Other	Non-public land	Federal non-public or non-public

Source: Declaration of Brigadier General Glenn Goddard, USACE.

Notes: Lands transferred from the jurisdiction of DOI to DOD on September 18, 2019 are indicated by an asterisk.

APPENDIX E. MILITARY CONSTRUCTION PROJECTS DEFERRED PURSUANT TO 10 U.S.C. 2808

On September 3, 2019, DOD delivered to congressional defense committees a list of ongoing military construction projects the Department had selected for deferral pursuant to 10 U.S.C. 2808. The list had been preceded by two additional notifications that identified *potential* military construction projects that might be affected by use of the statute.

The first of these three lists of military construction projects, delivered to defense committees in March 2019, identified all military construction projects that had not yet received contract awards—making them vulnerable for selection under 10 U.S.C. and the Department’s independent internal criteria.¹⁷¹ A second list, which DOD delivered to defense committees in late May 2019, selectively updated the contract award dates of some military construction projects. The final list, comprised of approximately 127 projects (\$3.6 billion), updated the contract award dates for six projects (\$209 million) located outside of the United States, making them newly eligible for selection.¹⁷² Additionally, the Department’s final list included one planning and design project (\$13.6 million) not included in previous notifications. The table below summarizes this final list.

¹⁷¹ The criteria, described in prior sections of this chapter, included: no military housing projects; no projects with award dates prior to FY2020.

¹⁷² Previous notifications indicated the projects would be awarded contracts in FY2019, making them ineligible for selection under DOD’s internal 10 U.S.C. criteria. In the final update on September 3, 2019, DOD indicated the projects would be awarded contracts in FY2020 and selected them for deferral.

Table E-1. Military Construction Project in DOD 10 U.S.C. 2808 Funding Pool

By Fiscal Year Appropriated (amounts in millions)						
State or Country	Site	Project (Award Date)	FY2016	FY2017	FY2018	FY2019
United States						
Alabama (\$5.2 total)	Anniston Army Depot	Weapon Maintenance Shop (Mar 2020)				5.2
Alaska (\$102.4 total)	Eielson AFB	F-35A CATM Range (Jan 2020)				19.0
		Repair Central Heat & Power Plant Boiler Ph3 (Jan 2020)	34.4			
		Repair Central Heat/Power Plant Boiler PH 4 (Feb 2021)			41.0	
	Fort Greely	Missile Field #1 Expansion (Jan 2021)				8.0
Arizona (\$30.0 total)	Fort Huachuca	Ground Transport Equipment Building (May 2020)			30.0	
California (\$8.0 total)	Channel Islands ANGS	Construct C-130J Flight Simulator Facility (Jul 2020)				8.0
Colorado (\$8.0 total)	Peterson AFB	Space Control Facility (Sep 2020)			8.0	
Florida (\$17.0 total)	Tyndall AFB	Fire/Crash Rescue Station (Jan 2020)			17.0	
Hawaii (\$32.0 total)	Joint Base Pearl Harbor- Hickam	Consolidated Training Facility (Sep 2020)			5.5	
	Kaneohe Bay	Security Improvements Mokapu Gate (May 2020)			26.5	
Indiana (\$24.0 total)	Crane Army Ammunition Plant	Railcar Holding Area (Mar 2020)				16.0
	Hulman Regional Airport	Construct Small Arms Range (Feb 2020)			8.0	
Kentucky (\$62.6 total)	Fort Campbell	Ft Campbell Middle School (Feb 2020)				62.6
Louisiana (\$39.0 total)	Joint Reserve Base New Orleans	NORTHCOM - Construct Alert Apron (Jan 2020)				15.0
		NORTHCOM - Construct Alert Facilities (Jan 2020)				24.0
Maryland (\$66.5 total)	Fort Meade	Cantonment Area Roads (Jun 2020)				16.5
	Joint Base Andrews	Child Development Center (Jan 2020)				13.0
		PAR Relocate Haz Cargo Pad and EOD Range (Jun 2020)				37.0
Mississippi (\$8.0 total)	Jackson IAP	Construct Small Arms Range (Aug 2020)			8.0	
New Mexico (\$125.0 total)	Holloman AFB	MQ-9 FTU Ops Facility (Mar 2020)				85.0
	White Sands	Information Systems Facility (Feb 2020)				40.0
New York (\$160.0 total)	U.S. Military Academy	Engineering Center (Jun 2020)				95.0
		Parking Structure (Jun 2020)				65.0
North Carolina (\$80.3 total)	Camp Lejeune	Ambulatory Care Center Addition/Alteration (Jan 2020)			15.3	
		2nd Radio BN Complex, Phase 2 (Apr 2020)				25.7
	Fort Bragg	Butner Elementary School Replacement (Cancelled)	32.9			
	Seymour Johnson AFB	KC-46A ADAL for Alt Mission Storage (Apr 2020)			6.4	

By Fiscal Year Appropriated (amounts in millions)						
State or Country	Site	Project (Award Date)	FY2016	FY2017	FY2018	FY2019
	Fort Bragg	Butner Elementary School Replacement (Cancelled)	32.9			
	Seymour Johnson AFB	KC-46A ADAL for Alt Mission Storage (Apr 2020)			6.4	
Oklahoma (\$8.0 total)	Tulsa Iap	Construct Small Arms Range (May 2020)			8.0	
Oregon (\$10.5 total)	Klamath Falls IAP	Construct Indoor Range (Feb 2020)			8.0	
		Replace Fuel Facilities (Jan 2020)	2.5			
South Carolina (\$10.8 total)	Beaufort	Laurel Bay Fire Station Replacement (Apr 2020)				10.8
Texas (\$38.5 total)	Fort Bliss	Defense Access Roads (Jan 2020)			20.0	
	Joint Base San Antonio	Camp Bullis Dining Facility (Feb 2020)			18.5	
Utah (\$54.0 total)	Hill AFB	Composite Aircraft Antenna Calibration Fac (Aug 2020)				26.0
		UTTR Consolidated Mission Control Center (Jan 2020)			28.0	
Virginia (\$89.2 total)	Joint Base Langley-Eustis	Construct Cyber Ops Facility (Jan 2020)				10.0
	Norfolk	Replace Hazardous Materials Warehouse (Jan 2020)			18.5	
	Pentagon	Pentagon Metro Entrance Facility ()		12.1		
	Portsmouth	Replace Harardous Materials Warehouse (Jan 2020) Ships Maintenance Facility (Jan 2020)			22.5	26.1
Washington (\$89.0 total)	Bangor	Pier and Maintenance Facility (Feb 2021)				89.0
Wisconsin (\$8.0 total)	Truax Field	Construct Small Arms Range (Mar 2020)			8.0	
U.S. Affiliated						
Guam (\$257.3 total)	Joint Region Marianas	APR - Munitions Storage Igloos, Ph 2 (Feb 2020)		35.3		
		APR - SATCOM C4I Facility (Jan 2020)		14.2		
		Earth Covered Magazines (Dec 2020)				52.3
		Hayman Munitions Storage Igloos MSA 2 (Feb 2020)				9.8
		Machine Gun Range (INC) (Mar 2020)				50.0
		Navy-Commercial Tie-In Hardening (Jun 2020)			37.2	
		PRTC Roads (Sep 2020)	2.5			
		Water Well Field (Jul 2020)			56.1	
Puerto Rico (\$402.6 total)	Arroyo	Readiness Center (Jan 2021)			30.0	
	Camp Santiago	Company Headquarters Bldg -Transient Training (Mar 2021)			47.0	
		Dining Facility, Transient Training (Mar 2021)			13.0	

(Table E-1 continued on next page.)

By Fiscal Year Appropriated (amounts in millions)						
State or Country	Site	Project (Award Date)	FY2016	FY2017	FY2018	FY2019
		Engineering/Housing Maintenance Shops (DPW) (Sep 2020)			11.0	
		Maneuver Area Training Equipment Site (Sep 2020)			80.0	
		National Guard Readiness Center (Sep 2020)			50.0	
		Power Substation/Switching Station Building (Sep 2020)			18.5	
	Gurabo	Vehicle Maintenance Shop (Jan 2021)			28.0	
	Punta Borinquen	Ramey Unit School Replacement (Dec 2019)			61.1	
	San Juan	Aircraft Maintenance Hangar (AASF) (Jan 2021)			64.0	
Virgin Islands (\$27.4 total)	St. Croix	Power Substation/Switching Station Building (Sep 2020)			3.5	
		Vehicle Maintenance Shop (Jan 2021)			20.0	
	St. Thomas	National Guard Vehicle Maintenance Shop Add/A (Sep 2020)			3.9	
Non-U.S.						
Bahrain Island (\$26.3 total)	SW Asia	Fleet Maintenance Facility & TOC (Feb 2020)				26.3
Belgium (\$14.3 total)	Chievres AB	Europe West District Superintendent's Office (Sep 2020)				14.3
Bulgaria (\$5.2 total)	Nevo Selo Fos	EDI: Ammunition Holding Area (Oct 2020)				5.2
Estonia (\$15.7 total)	Unspecified Estonia	EDI: SOF Operations Facility (Dec 2020)				6.1
		EDI: SOF Training Facility (Dec 2020)				9.6
Germany (\$467.6 total)	Baumholder	SOF Joint Parachute Rigging Facility (Apr 2021)				11.5
	East Camp Grafenwoehr	Mission Training Complex (Jan 2020)				31.0
	Panzer Kaserne	MARFOREUR HQ Modernization and Expansion (Jun 2021)				44.0
		37 AS Squadron Operations/AMU (Sep 2020)		13.4		
	Ramstein AB	EDI - KMC DABS-FEV/RH Storage Warehouses (Sep 2020)				119.0
		EIC - Site Development and Infrastructure (Aug 2021)		43.5		
	Spangdahlem AB	F/A-22 Low Observable/Composite Repair Fac (Jul 2020)		18.0		
		Spangdahlem Elementary School Replacement (Mar 2020)			79.1	
		Upgrade Hardened Aircraft Shelters for F/A-22 (Mar 2020)		2.7		
	Stuttgart	Robinson Barracks Elem. School Replacement (Jun 2022)			46.6	
Weisbaden	Clay Kaserne Elementary School (Dec 2022)				56.0	
Wiesbaden Army Airfield	Hazardous Material Storage Building (Nov 2019)		2.7			

By Fiscal Year Appropriated (amounts in millions)							
State or Country	Site	Project (Award Date)	FY2016	FY2017	FY2018	FY2019	
Greece (\$47.9 total)	Souda Bay	EDI: Joint Mobility Processing Center (Oct 2019)				41.7	
		EDI: Marathi Logistics Support Center (Nov 2019)				6.2	
Guantanamo Bay, Cuba (\$9.1 total)	Guantanamo Bay Naval Station	*Working Dog Treatment Facility Replacement (Changed from Sep 2019 to Feb 2020)				9.1	
Hungary (\$55.4 total)	Keckskemet AB	ERI: Airfield Upgrades (Oct 2020)			12.9		
		ERI: Construct Parallel Taxiway (Oct 2020)			30.0		
		ERI: Increase POL Storage Capacity (Apr 2020)			12.5		
Italy (\$66.1 total)	Sigonella	EDI: P-8A Taxiway and Apron Upgrades (Aug 2020)				66.1	
Japan (\$405.7 total)	Iwakuni	*Fuel Pier (Changed from Sep 2019 to March 2020)				33.2	
	Kadena AB	*APR - Replace Munitions Structures (Changed from Jun 2019 to January 2020)		19.8			
	Yokosuka	*Kinnick High School Inc 1 (Changed from Sep 2019 to March 2020)				40.0	
	Camp Mctureous	Bechtel Elementary School (Apr 2020)				94.9	
	Iwakuni	Construct Bulk Storage Tanks PH 1 (Jan 2020)			30.8		
	Kadena AB	SOF Maintenance Hangar (May 2020)		42.8	4.0		
		Truck Unload Facilities (Jun 2020)					21.4
	Yokota AB	C-130J Corrosion Control Hangar (Feb 2020)			23.8		
		Construct CATM Facility (Jan 2020)			8.2		
		Hangar/Aircraft Maintenance Unit (Dec 2019)				12.0	
Hangar/AMU (Dec 2019)				39.5			
		Operations and Warehouse Facilities (Dec 2019)		26.7	8.6		
Korea (\$70.5 total)	Camp Tango	Command and Control Facility (Dec 2020)				17.5	
	Kunsan AB	Unmanned Aerial Vehicle Hangar (Dec 2019)			53.0		
Luxembourg (\$67.4 total)	Sanem	ERI: ECAOS Deployable Airbase System Storage (Apr 2021)			67.4		
Norway (\$10.3 total)	Rygge	ERI: Replace/Expand Quick Reaction Alert Pad (Nov 2020)			10.3		
Poland (\$130.4 total)	Poland	EDI: Rail Extension and Railhead (Apr 2020)				6.4	
		EDI: Ammunition Storage Facility (Jun 2020)				52.0	
		EDI: Staging Areas (Sep 2020)				51.0	

(Table E-1 continued on next page.)

By Fiscal Year Appropriated (amounts in millions)						
State or Country	Site	Project (Award Date)	FY2016	FY2017	FY2018	FY2019
	Powidz Air Base	EDI: Bulk Fuel Storage (Nov 2020)				21.0
Romania (\$21.7 total)	Mihail Kogalniceanu	EDI: Explosives & Ammo Load/Unload Apron (Nov 2019)				21.7
Slovakia (\$105.0 total)	Malacky	EDI - Regional Munitions Storage Area (Dec 2020)				59.0
		ERI: Airfield Upgrades (Nov 2019)			4.0	
		ERI: Increase POL Storage Capacity (Feb 2020)			20.0	
	Sliac Airport	ERI: Airfield Upgrades (Nov 2019)			22.0	
Spain (\$21.6 total)	Rota	EDI: Port Operations Facilities (Jan 2020)				21.6
Turkey (\$14.6 total)	Incirlik AB	OCO: Relocate Base Main Access Control Point (Aug 2020)			14.6	
United Kingdom (\$250.6 total)	Raf Fairford	*EDI - Munitions Holding Area (Changed from Sep 2019 to Sep 2020)				19.0
		*EDI - Construct DABS-FEV Storage (Changed from Sep 2019 to Sep 2020)				87.0
	Croughton RAF	Croughton Elem/Middle/High School Replacement (Jan 2020)		71.4		
		Main Gate Complex (Oct 2019)		16.5		
	Menwith Hill Station	RAFMH Main Gate Rehabilitation (Feb 2020)			11.0	
	Royal Air Force Fairford	EIC RC-135 Infrastructure (Nov 2019)			2.2	
EIC RC-135 Intel and Squad Ops Facility (Nov 2019)				38.0		
		EIC RC-135 Runway Overrun Reconfiguration (Nov 2019)			5.5	
Worldwide Classified (\$18.0 total)	Classified Location	TACMOR - Utilities and Infrastructure Support (Jan 2020)				18.0
Unspecified (\$13.6 total)	WORLDWIDE UNSPECIFIED	Planning and Design (Feb 2021)			13.6	
TOTAL: \$3.6 billion			72.3	390.7	1,318.5	1,818.5

Source: Department of Defense, 2808 Deferrals (Public Territories and 50 States; Public Overseas), as distributed to congressional defense committees, September 3, 2019.

Notes: The total count of this list (127) may be cited with some variation due to two identically named projects (Poland "EDI: Staging Areas"), and two projects with deferred amounts in multiple years, both located in Japan: "SOF Maintenance Hanger" at Kadena Airbase and "Operations and Warehouse Facilities" at Yakota Airbase. Moreover, DOD's final list of deferred projects varies somewhat from earlier information provided to congressional defense committees about the potential 10 U.S.C. funding pool. Specifically, the contract award dates for six non-U.S. projects with a value of \$208 million have been updated to make them eligible for deferral. DOD has also added a "planning and design" project at an unspecified location not previously disclosed. Finally, earlier versions of this data referred to a single project in Poland called "EDI Staging Areas" while the current version refers to two projects (with a combined identical sum).

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