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United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, DC 20510-6025

<http://appropriations.senate.gov>

March 11, 2019

The Honorable Gene Dodaro
Comptroller General of the United States
Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Mr. Dodaro:

We are writing to request a legal opinion on the authorities of the U.S. Department of Defense to transfer funds among appropriations provided in the Department of Defense Appropriations Act, 2019, for the purpose of building a wall on the southern border of the United States.

On February 15, 2019, President Trump announced his intention to direct the Department of Defense to build barriers on the southern border, after Congress approved only \$1.375 billion in the Department of Homeland Security Appropriations Act, 2019, for that purpose. This legislation also includes significant restrictions on the types of barriers that may be constructed, as well as substantial limitations on the areas in which the barriers may be built.

According to a fact sheet distributed by the White House at the time of the President's remarks, the Administration intends to use up to \$2.5 billion in funds appropriated to the Department of Defense to build a border wall, "once a national emergency is declared and additional funds have been reprogrammed." This activity would be conducted under 10 U.S.C. 284, which generally pertains to the counter-narcotics authorities of the Department of Defense.

Limitations on Transfer Authority

Defense officials have informed members of Congress that they are preparing a transfer of funds into the Drug Interdiction and Counter-Narcotics Activities, Defense account. This is necessary because the Department has obligated in excess of 90 percent of the \$881.5 million appropriated for that purpose in fiscal year 2019. The ability to transfer funds among appropriations is provided in section 8005 of the Department of Defense Appropriations Act, 2019, and that section – as well as 10 U.S.C. 2214 – contain restrictions that we believe prevent the Secretary of Defense from executing, or even preparing, such a proposal.

Both section 8005 and 10 U.S.C. 2214 prohibit the transfer of funds among appropriations unless the funds are for "higher priority items, **based on unforeseen military**

requirements....” We believe that a wall on the southern border can in no way be characterized as unforeseen as this proposal was a central feature of candidate Trump’s campaign speeches, and has been regularly proposed in speeches and budget requests by President Trump and his Administration since his inauguration. Further, we question whether the wall can be considered a “military requirement,” as 10 U.S.C. 124 designates the Department of Defense as the lead agency only for “detection and monitoring of **aerial and maritime** transit of illegal drugs into the United States,” with no mention of military responsibilities for enforcement of land borders. Further, we understand that the U.S. Department of Homeland Security has such statutory responsibilities, and is executing its authorized mission by preparing the requirements and priority lists for wall construction.

Sections 8005 and 10 U.S.C. 2214 also state that the use of transfer authority is limited to “higher priority items... than those for which originally appropriated **and in no case where the item for which funds are requested has been denied by the Congress.**” It is self-evident that Congress has denied funding for the Administration’s request for a higher level of border wall funding. In a January 6, 2019, letter from Russell Vought, Acting Director of the Office of the Management and Budget, the Administration sought \$5.7 billion for 234 miles of border wall. The Department of Homeland Security Appropriations Act, 2019, in sections 230, 231, and 232, provides only \$1.375 billion for barrier construction, and specifically prohibits certain designs and construction in certain areas. It is clear that the President is directing the Department of Defense to pursue wall construction specifically because Congress rejected the Administration’s request.

Additionally, we call your attention to section (d) of 10 U.S.C. 2214, which prohibits the Secretary of Defense from either preparing or presenting to Congress a request which violates these limitations.

Transfer of Administrative Responsibilities

In addition, section 8113 of the Department of Defense Appropriations Act, 2019, prohibits the payment of salary to any officer or employee of the Department of Defense who “approves or implements the **transfer of administrative responsibilities or budget resources... to the jurisdiction of another Federal agency not financed by this Act without the express authorization of Congress.**” According to briefings by Department of Defense officials to staff of the House and Senate Committees on Appropriations, the Department intends to rely upon certain authorities of the Department of Homeland Security to waive environmental studies that would be required of the Department of Defense.

We are aware that section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (P.L. 104-208), as amended, includes a provision allowing the Secretary of Homeland Security to “waive all legal requirements” that the Secretary believes would impair the construction of border barriers. However, we can find no provision of law that allows the Secretary of Homeland Security to issue such a waiver to another agency of the

Federal Government which may seek to construct a border barrier using its own appropriation and authorities, as the Department of Defense seeks to do under 10 U.S.C. 284.

It appears the Department of Defense is seeking to transfer its own administrative responsibilities – specifically, the requirement to abide by environmental and acquisition statutes and policies that apply to the Department of Defense – to the Department of Homeland Security for the purposes of obtaining an environmental waiver to speed construction of a wall. In the absence of the express authorization of Congress, we believe that this delegation of responsibilities is impermissible, and that the Antideficiency Act would apply to any salary payments to any officials at the Department of Defense involved in such a delegation.

Pick and Stick

According to a prior legal opinion by the Government Accountability Office, (B-307382), Federal agencies at times may have more than one appropriation with overlapping purposes. Under the so-called “pick and stick rule,” the agency must make a determination as to which appropriation may be charged for a particular activity. Once that determination has been made, the agency is bound to use that appropriation for the purpose of that activity, unless the agency “informs Congress of its intent to change for the next fiscal year.”

In fiscal years 2006 and 2008, in Public Laws 109-234 and 110-116, Congress provided specific sub-appropriations for Southwest border activities, which provided specific sums for activities that included “installing fences and vehicle barriers.” Not only have these specific appropriations lapsed, but they are the same activities that the Department now seeks to charge to the Drug Interdiction and Counter-narcotics Activities, Defense appropriation. The fiscal year 2019 budget justification for this appropriation includes no mention of any plans to use the appropriation for walls or fences. In keeping with your precedent, we believe that charging these activities to the Drug Interdiction and Counter-narcotics Activities, Defense appropriation would constitute a clear violation of the “pick and stick rule,” because the Department failed to notify Congress of any change to how such activities would be charged in fiscal year 2019.

Conclusion

While we have strong constitutional concerns about a wanton abuse of emergency powers claimed by the President, we believe that the end-run around the appropriations process by the Administration to direct the Department of Defense to build a wall also fails to comply with long-standing provisions of fiscal law. Quite simply, the path proposed by the Department of Defense is blocked by annual appropriation provisions as well as permanent statutory law.

Should your legal opinion substantiate the issues raised in this letter, we further request that you provide the necessary oversight to determine whether any violations of the

Antideficiency Act may occur in the Department of Defense in relation to this matter, and promptly inform the congressional oversight committees of the start of any inquiry into possible wrongdoing.

Sincerely,



Patrick Leahy
Vice Chairman
Committee on Appropriations



Richard J. Durbin
Vice Chairman
Subcommittee on Defense



Brian Schatz
Ranking Member
Subcommittee on Military Construction and VA