



## U.S. House of Representatives

COMMITTEE ON THE BUDGET

Washington, DC 20515

July 16, 2021

The Honorable Karl A. Racine  
President  
National Association of Attorneys General  
1850 M Street, NW  
12<sup>th</sup> Floor  
Washington, DC 20036

Dear Mr. Racine:

I am writing to you today to call for legal action against the Biden Administration due to the Administration's failure to adhere to federal law by withholding congressionally appropriated funds for construction of the southern border wall.

As you may know, Congress has appropriated nearly \$5 billion in federal funds specifically for constructing of fencing or barrier systems at the southern border, commonly referred to as the southern border wall. But, on January 20, 2021, President Biden issued a proclamation<sup>1</sup> ordering a pause in construction of the border wall and a pause in obligation of all funds related to construction of the wall, effectively cancelling the border wall project based on his opposition to the border wall policy. In his proclamation, the President even announced that “[i]t shall be the policy of my Administration that no more American taxpayer dollars be diverted to construct a border wall.” However, as previous legal opinions from the Government Accountability Office (GAO) on similar matters have noted, the withholding of congressionally appropriated federal funds for a policy reason may result in a violation of the Impoundment Control Act of 1974 (ICA), which suggests that President Biden's withholding of congressionally appropriated federal funds for construction of the southern border wall resulted in a violation of the ICA as well. Accordingly, I ask that you and your fellow attorneys general swiftly take legal action – either jointly or individually – in order to hold the Biden Administration accountable for violating federal law.

---

<sup>1</sup> *Proclamation on the Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/>.

Last month, GAO authored an opinion regarding President Biden’s decision to withhold federal funds previously appropriated for construction of the southern border wall. As GAO’s opinion<sup>2</sup> states, it is clear that Congress appropriated, and President Trump signed into law, funds specifically for the purpose of constructing a border barrier on multiple occasions: March 23, 2018; February 15, 2019; December 20, 2019; and December 27, 2020.<sup>3</sup> Within its decision, GAO also concedes that withholding funds to “ensure that the funds were not spent ‘in a manner that could conflict with the President’s foreign policy’” may amount to a violation of the ICA and federal law. However, GAO also acknowledges that when President Biden issued the proclamation to suspend funding for border barrier construction, this amounted to a “policy choice”<sup>4</sup> – even noting that “President Biden announced a policy choice through the Proclamation that funding not be diverted for border barrier construction” – which in previous cases has been found to be a violation of the ICA by the GAO.<sup>5</sup> Even more, GAO went on to state in addition to his proclamation, President Biden’s Budget Request – that proposed cancellation of any other unobligated border barrier funding –amounted to a policy choice.

While I value the legal opinions of the GAO, the agency’s failure to find President Biden’s proclamation to suspend construction of the U.S. southern border wall – and withhold all congressionally appropriated funds dedicated to this project – in violation of the ICA should be regarded as a non-binding recommendation, not legal precedent. Given GAO’s apparent reversal of its previously held position that a policy choice constitutes a violation of the ICA, and inconsistent legal interpretations of the ICA when presented with similar fact patterns, there is a need for independent judicial determination on this matter.

In addition to these inconsistencies in judgment, of equal concern is the timing of GAO’s decision. Only a few days after the Biden Administration announced its justification for repurposing and reallocating funds for construction of the border wall<sup>6</sup> – a key issue in this matter – GAO issued a decision supporting President Biden’s actions. This quick turnaround by GAO comes after it had taken more than five months – since its initial investigation in January of 2021 – to review the President’s actions. This is worth noting because GAO only needed about one month to prepare a decision regarding former President Trump’s actions in 2019, which were similar in nature. This lack of a consistent timetable to produce consistent decisions based on similar fact patterns, coupled with GAO’s expediency in rendering a legal opinion only days after President Biden’s announcement related to the matter, is especially concerning.

---

<sup>2</sup> *Office of Management and Budget and U.S. Department of Homeland Security – Pause of Border Barrier Construction and Obligations*, B-333110, Government Accountability Office, June 15, 2021, <https://www.gao.gov/assets/b-333110.pdf>.

<sup>3</sup> See P.L. 115-141; P.L. 116-6; P.L. 116-93; and P.L. 116-260 (appropriating public funds for the construction of a border wall and barrier system along the southern border).

<sup>4</sup> See GAO Opinion, B-333110, at 17.

<sup>5</sup> *Office of Management and Budget – Withholding of Ukraine Security Assistance*, B-331564, Government Accountability Office, January 16, 2020, <https://www.gao.gov/assets/b-331564.pdf> (finding that “OMB withheld funds for a policy reason, which is not permitted under the Impoundment Control Act (ICA)”).


<sup>6</sup> *Biden to Return \$2.2 Billion in Diverted Border Wall Funds to Defense Department*, Claire Hansen, U.S. News, June 11, 2021, <https://www.usnews.com/news/national-news/articles/2021-06-11/biden-to-return-22-billion-in-diverted-border-wall-funds-to-defense-department>.

Given GAO's contradictions, it has created at the very least an appearance of failing to act impartially. As such, I believe your organization can and should utilize the judicial system to hold the Biden Administration accountable by filing legal action.

Not only did President Biden's actions directly violate the ICA, but they also circumvented the intent of Congress and broke trust with the American people. Suspending construction of the border wall and pausing all federal funding approved by Congress for construction of the border wall are among several harmful decisions made by the Administration that have directly resulted in the national security and humanitarian crisis we are now witnessing at our southern border. Since January, U.S. Customs and Border Protection (CBP) agents have apprehended 711,533 people illegally crossing the border; and in May alone CBP apprehended 180,034 people trying to enter the U.S. illegally – the highest in two decades.<sup>7</sup> Allowing the Executive Branch to overreach and abuse the separation of powers by taking actions to circumvent congressional intent not only carries negative short-term effects, but the potential for long-term abuses as well.

I hope you share my concern with the Biden Administration's actions regarding the withholding of congressionally appropriated funds, along with the suspicious nature of GAO's non-binding legal opinion, and will work to hold this Administration accountable to the American people and Congress.

Sincerely,



Jason Smith  
Ranking Member  
House Committee on the Budget

Cc: The Honorable Alan Wilson, Chairman, Republic Attorneys General Association  
The Honorable Aaron Ford, Co-Chair, Democratic Attorneys General Association  
The Honorable Maura Healey, Co-Chair, Democratic Attorneys General Association

---

<sup>7</sup> *Illegal border crossing attempts reach new high under Biden: 180,000 in May*, Anna Giaritelli, Washington Examiner, June 9, 2021, <https://www.washingtonexaminer.com/news/illegal-border-crossing-attempts-reach-new-high-under-biden-180-034-may>; *Southwest Land Border Encounters*, U.S. Customs and Border Protection, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; see also *Total Illegal Alien Apprehensions by Month: FY 2000 – FY 2019*, United States Border Patrol, [https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf).