

United States Senate

WASHINGTON, DC 20510

April 2, 2018

The Honorable James Mattis
Secretary of Defense
The Pentagon
Washington, DC 20301

Dear Secretary Mattis:

Recent press reports have indicated that the President has instructed the Department of Defense to examine diverting billions of dollars appropriated to the Armed Forces to the construction of a wall along the U.S.-Mexico border. Such a controversial move could only be funded by cutting other vital priorities for our service members, mere weeks after the Department communicated its needs to the Senate Defense Appropriations Subcommittee during omnibus appropriation negotiations. We request your views on the legal authority of the Department to use funds appropriated for specific purposes in the Department of Defense Appropriations Act, 2018, for such a construction project.

As you are aware, appropriations made by the Congress are limited to the purpose for which they were intended, according to the Purpose Statute (31 U.S.C. §1301(a)). The Department of Defense Appropriations Act, 2018, provides for the pay, operations, and equipping of the Armed Forces, but contains no provision making appropriations for constructing a wall along the U.S. border.

While the Act also provides for the transfer or reprogramming of funds among appropriation accounts, this reprogramming authority (section 8005) specifically requires that any funds so transferred shall “be available for the same purposes... as the appropriation or fund to which transferred,” and that any transfer of funds shall be for “higher priority items, based on unforeseen military requirements,” and “in no case where the item for which funds are requested has been denied by the Congress.” In other words, a reprogramming request cannot create a new purpose for any funds, all reprogrammings must be for unforeseen military requirements, and a reprogramming cannot undo a rejection by the Congress of funds for a certain purpose.

Furthermore, in 2006 and 2008, the Bush Administration requested funding from the Congress to support Operation Jump Start, in which the National Guard assisted the Department of Homeland Security in the construction of roads and fences along the Southwest border. In each of those years, the Congress specifically appropriated \$708 million and \$247 million, respectively, for “National Guard support to the Department of Homeland Security, including operating surveillance systems, analyzing intelligence, installing fences and vehicle barriers, building patrol roads, and providing training.” This specific language that was requested in a budget amendment signed by President Bush on May 18, 2006, indicated that the Department of

Defense had no inherent legal authority to use appropriations for those more limited purposes at the time the President made the request.

Based on a thorough review of appropriations law, the text of the Department of Defense Appropriations Act, 2018, and the 2006 and 2008 appropriations made for the National Guard to conduct specific construction activities near the border, we conclude that the Department of Defense has no legal authority, with or without a reprogramming request, to use appropriated funds for the construction of a border wall. Further, since no funds have been appropriated for that purpose, we conclude that an expenditure of funds by the Department of Defense for the construction of a border wall would very likely violate the Antideficiency Act (31 U.S.C. §1341).

We ask that you review the availability of appropriations relating to diverting funds from the Department of Defense for the construction of a border wall, and apprise us of your views as soon as possible.

Sincerely,



Richard J. Durbin
Vice Chairman
Subcommittee on Defense



Jack Reed
Ranking Member
Armed Services Committee