



Barriers Along the U.S. Border: Key Authorities and Recent Developments

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On October 5, 2023, Secretary of Homeland Security Alejandro Mayorkas [invoked Section 102\(c\)](#) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), waiving requirements under twenty-six federal statutes to expedite construction of twenty miles of barriers and related infrastructure along the U.S.-Mexico border. Secretary Mayorkas said that the waiver [did not signal](#) a “new Administration policy with respect to border walls.” From “day one,” the [Secretary continued](#), that policy had been that a “border wall is not the answer.”

Secretary Mayorkas’s waiver determination is the latest development in border barrier construction. The Trump Administration [identified more than \\$16 billion](#) to construct barriers from amounts originally available to the Departments of Defense (DOD), Treasury, and Homeland Security (DHS). It also issued several Section 102(c) [waivers to facilitate construction](#). The Biden Administration, by contrast, largely ceased barrier construction, [canceling certain construction contracts](#) while generally [suspending others](#).

Different Congresses have also placed more or less emphasis on barrier construction. Over the years, Congress specified barrier miles that the Secretary of Homeland Security (the Secretary) had to construct, and lawmakers have repeatedly modified the Secretary’s discretion over the location and characteristics of those barriers. Congress has also varied how it makes appropriations for barrier construction, sometimes expressly setting aside funds for fence or barrier system construction. This Sidebar examines the Secretary’s October 2023 waiver in light of the statutes that authorize and fund barrier construction.

Authorization to Construct Barriers

Before 1996, federal immigration statute did not expressly authorize, much less expressly require, construction of barriers to deter unlawful migration. Still, the federal government had erected barriers for this purpose, apparently relying on the Attorney General’s [general statutory responsibility](#) to “guard the boundaries and borders of the United States” against the illegal entry of aliens. (In 2003, Congress [vested this responsibility](#) in the Secretary.) In 1996, Congress passed [IIRIRA](#). Section 102 of the statute (classified to the U.S. Code as a [note to 8 U.S.C. § 1103](#)) expressly instructs immigration authorities to construct barriers along the international land borders to deter unauthorized migration. Congress [last amended](#) Section 102 in 2007. The statute now expressly authorizes border barrier construction; imposes

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minimum construction requirements; and permits the waiver of “all legal requirements” to expedite construction.

Express Authority to Construct Border Barriers

Section 102(a) [states that the Secretary](#) “shall take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.” The statute uses the term “shall,” which [generally conveys](#) a statutory command. However, this statutory command is qualified by the language that follows it. Subject to the minimum construction requirements of Section 102(b), the Secretary may determine the appropriate amount of “additional” barriers to deploy. The Secretary may also determine the appropriate locations, in the “vicinity of the United States Border,” to install barriers. The Secretary may construct barriers and roads to “deter illegal crossings in areas of high illegal entry.” Section 102(b) also authorizes placement of “lighting, cameras, and sensors to gain operational control of the southwest border.”

Minimum Construction Requirements

On its own, Section 102(a) generally permits the construction of “additional physical barriers and roads.” Since IIRIRA’s enactment in 1996, though, Congress has qualified this general discretion in part by imposing minimum mileage requirements.

The original statute required the Attorney General to construct fencing along a [fourteen-mile section of the border](#) extending east from the Pacific Ocean near San Diego, California. In 2006, Congress [expanded the minimum mileage requirement](#) to require barriers along five border segments in California, Arizona, New Mexico, and Texas. According to DHS, meeting the 2006 requirement would have entailed building about 854 miles of fencing because of the topography of the border segments specified in the statute.

Congress [further revised the minimum mileage requirement](#) to its current form in 2007. The [Secretary must](#) “construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.” While the statute continues to mandate minimum barrier mileage, unlike the 1996 and 2006 enactments, it does not require barriers in particular border segments. As of January 2021, the Trump Administration stated that U.S. Customs and Border Protection (CBP) had approximately “[701 miles of primary barriers](#).”

Congress has at times used Section 102(b) to qualify the Secretary’s discretion over the types of barriers to install in an area where the statute required barriers to be constructed. (Appropriations acts can [qualify this discretion](#) as well by, for example, limiting use of appropriations for only “operationally effective designs” deployed as of a certain date or adaptations thereof.) The 1996 statute called for a [second and third layer of fencing](#) along the San Diego-area segment. The 2006 enactment specified “[at least 2 layers of reinforced fencing](#)” in each of the five border segments. [IIRIRA now requires](#) 700 miles of “reinforced fencing,” rather than two or more layers of such fencing.

Waiver Authority

Since its original enactment, IIRIRA has vested immigration authorities with another form of discretion intended to ensure “expeditious construction” of barriers and roads. Though an agency might have statutory authority to undertake a construction project, use of that authority might be [subject to planning and other requirements](#) under other federal statutes.

In 1996, Congress authorized the Attorney General to [waive](#) the provisions of the [Endangered Species Act of 1973](#) (ESA) and the [National Environmental Policy Act of 1969](#) (NEPA) as needed to achieve

expeditious barrier and road construction. In 2005, Congress expanded this waiver authority to its current form. The Secretary now has “sole discretion” to waive “all legal requirements” as needed for expeditious construction. The Secretary’s waivers are effective upon publication in the *Federal Register*. The Secretary has invoked this waiver authority on more than thirty occasions. Only one such waiver—issued in May 2020 for barrier and road projects in Webb County, Texas, and Zapata County, Texas—was later rescinded in June 2023.

The 2005 revision to IIRIRA also restricted judicial review of the Secretary’s waivers. The federal district courts have “exclusive jurisdiction” to hear “all causes or claims” arising from the Secretary’s waiver authority. The statute further restricts the types of claims that may be brought. “A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any [other] claim . . .” IIRIRA limits appellate review of district court action. Judgments and orders are not appealable to a federal circuit court as is normally the case in civil litigation. Instead, they may be reviewed “only upon petition for a writ of certiorari to the Supreme Court of the United States.”

The statute’s restrictions on judicial review concern “all causes or claims arising from” actions or decisions made under the Secretary’s waiver authority. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has reasoned that the restriction does not extend, more broadly, to claims that do not originate or stem from a waiver determination. Relatedly, the D.C. Circuit has asserted appellate jurisdiction over waiver-related claims when a plaintiff brings an “ultra vires claim,” that is, a claim based on an allegation that a waiver-related action is “obviously beyond the terms of the statute.” Plaintiffs have not prevailed on ultra vires claims in this context.

Litigants have challenged Section 102(c) waivers on constitutional grounds. Some have attacked the waiver authority as an impermissible delegation of Congress’s legislative power. Others challenged waivers as executive authority to repeal or amend existing law in violation of the Bicameralism and Presentment Clauses or as a derogation of the President’s Take Care Clause duty. Litigants have also cast waivers as violations of the Tenth Amendment. All such challenges have failed.

Funding DHS Barrier Construction

IIRIRA authorizes barrier construction, but the statute does not provide budget authority for the costs of construction. Budget authority is the authority to enter into obligations. Obligations are definite commitments that create legal liabilities on the federal government’s part to make payments to third parties. An expenditure, the payment of funds from the Treasury to a third party, is what satisfies an obligation. An appropriation is the only form of budget authority that allows an agency to both incur obligations and make expenditures from the Treasury to liquidate those obligations.

By the time President Biden assumed office in January 2021, the Trump Administration had identified more than \$16 billion in appropriations for barrier construction. These appropriations derived from three sources. First, most of the funds came from DOD, which engaged in barrier construction as military construction undertaken in connection with a national emergency or as support for counterdrug activities following transfers from other appropriations (e.g., procurement and National Guard-related accounts). Second, the Trump Administration tapped the Department of the Treasury Forfeiture Fund (TFF), a fund credited with forfeiture receipts and available, in part, for the “law enforcement activities of any Federal agency.” Third, the Trump Administration obligated appropriations available to CBP.

The Biden Administration determined that DOD appropriations and funds transferred to DHS from the TFF should no longer be used for barrier construction. New obligations using these funds ceased, and the government canceled existing contracts supported by the funds. The DOD and TFF funds used for these contracts were not made expressly for barrier construction only, so unobligated balances remaining after

the costs [suspension and cancellation](#) could be put to uses other than barrier construction. Thus, for example, DOD dedicated “[more than \\$2 billion](#)” in military construction appropriations to sixty-six previously deferred, non-barrier projects. Some DOD funds had [expired and could not be used for new obligations](#).

CBP appropriations are different: unlike the relevant DOD and TFF funds, Congress appropriated funds to DHS in certain fiscal years expressly for barrier construction. CBP receives an annual appropriation under the heading “Procurement, Construction, and Improvement” (PC&I) for the necessary expenses of those CBP activities. Congress has constrained [DHS’s allocation discretion](#) over all or part of the CBP PC&I appropriation through line-item appropriations included in statute, sometimes by expressly referencing “fencing” or a “barrier system.” Congress made [\\$1.375 billion of the FY2019 CBP PC&I appropriation](#) available “only” for “the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector.” The same amount of funding, \$1.375 billion, was reserved “only” for “[the construction of barrier system along the southwest border](#)” in the FY2020 CBP PC&I appropriation, a line item [included in the FY2021 appropriation as well](#). Subsequent DHS Appropriations Acts for [FY2022](#) and [FY2023](#) continue to make line-item appropriations for CBP PC&I funds but do not refer to “fencing” or a “barrier system.”

The CBP PC&I appropriation is typically [multiyear budget authority](#), available for the needs of not only the fiscal year for which the appropriation is made but for two to four subsequent fiscal years as well. After that period, the funds [expire](#). Expired funds are not available for new obligations but are available for [five fiscal years](#) after expiration for, among other things, making expenditures to liquidate obligations. After that five-year period, the appropriation’s balances (obligated and unobligated) are [canceled](#). [CBP uses five-year PC&I funds](#) for border barrier construction.

The FY2019 Line Item and the October 2023 Waiver

In June 2021, DHS stated that it had [not deobligated funds](#) for CBP-funded contracts entered into during the prior Administration. Limited, [urgent work](#) “to avert physical dangers” would continue under the contracts in the meantime, using existing Section 102(c) waivers. Otherwise, DHS said that it would suspend CBP-funded border barrier contracts while it engaged in planning and consultation activities. It signaled that “rescinding or revising prior” Section 102(c) waivers “will not be feasible” for “some segments.” Regardless of whether a waiver remained in effect, as of June 2021, DHS intended to engage “in standard environmental planning” under NEPA and other statutes concerning use of FY2019 funds, among others. In July 2022, [DHS further explained](#) that, for the remaining FY2019 funds, it intended to prioritize “remediation and mitigation” from past barrier construction and the installation of “barrier system attributes” (e.g., lighting) for fencing previously constructed using the FY2019 line item.

In June 2023, DHS authorized CBP to “[move forward with the planning and execution of up to approximately 20 miles of border barrier system](#)” in the Rio Grande Valley Sector. DHS explained that it would use FY2019 CBP PC&I appropriations for this purpose, of which there was \$190 million “remaining.” CBP “[began to solicit public input on potential impacts](#)” of this project in August 2023. The comment period closed in September 2023. On September 28, two days before expiration of the FY2019 PC&I line item, CBP awarded a construction contract for the project. On October 5, Secretary Mayorkas issued a [Section 102\(c\) waiver for the twenty miles of barrier systems](#). That same day, Secretary Mayorkas [stated](#) that the “construction project reported today was appropriated during the prior administration in 2019 and the law requires the government to use these funds for this purpose.”

As noted above, \$1.375 billion of the FY2019 CBP PC&I appropriation is available “only” for “the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector.” GAO has [said that a line item of this form](#) “presumptively ‘fences in’ the earmarked sum” by setting both a “maximum and minimum” amount of budget authority that must be obligated for that

purpose. Though CBP was thus required to obligate this amount, it had some discretion to decide the particular expenses that would fit the object of fence construction. As [future Supreme Court Justice Brett Kavanaugh explained](#), an “appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for.” An agency has discretion, in the first instance, to decide an “[expenditure is reasonably necessary to accomplish the agency’s mission](#).” Projects such as installing lighting for existing fencing previously constructed using the FY2019 line item would seem to be incident to fence construction as much as the erection of new fencing.

However, CBP could not decline to obligate the FY2019 PC&I fencing because it disagreed with the object for which that appropriation had been made. Agencies cannot defer use of “[budget authority for general policy reasons](#).” Unless Congress rescinds budget authority, an agency must [take steps to “prudently” obligate](#) an appropriation before it expires. The Biden Administration [proposed rescission](#) of CBP PC&I funds, but Congress did not enact these proposals. Thus, CBP’s duty was to take steps to prudently obligate the FY2019 CBP PC&I appropriation for fence construction before it expired.

The 2019 CBP funds obligated by September 30, 2023, remain available for expenditure through September 30, 2028, to complete contract activities. Because of Secretary Mayorkas’s waiver, “[construction of roads and physical barriers](#)” in the project area will not be affected by requirements stemming from the twenty-six federal statutes identified in the waiver. While a litigant might try to challenge the waiver, to date such challenges have not succeeded.

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