

Possible Use of FY2020 Defense Funds for Border Barrier Construction: Context and Questions

January 16, 2020

On January 13, 2020, the *Washington Post* [reported](#) that the Trump Administration plans to reallocate \$7.2 billion in Department of Defense (DOD) appropriations to construct barriers along the U.S.-Mexico border. Of this amount, \$3.7 billion would reportedly come from deferring congressionally approved military construction (MILCON) projects. An additional \$3.5 billion would be redirected through DOD's Drug Interdiction and Counter-Drug Activities account (hereinafter *counter-drug transfer account*). If the Administration were to carry out the actions as described by the *Washington Post*, DOD would be using the same authorities [it exercised in FY2019](#), when it transferred \$6.1 billion in defense funds for border barriers. In this case, FY2019 and FY2020 defense funding for border barriers would total \$13.3 billion.

Background

On February 15, 2019, the Trump Administration announced plans for redirecting up to \$6.1 billion from existing FY2019 DOD programs and projects to border wall construction, using a complex mix of emergency- and nonemergency-related authorities. These actions were challenged in [litigation that remains ongoing](#).

During FY2020 budget deliberations, Congress considered a number of legislative provisions that would have constrained the Administration's use of similar authorities. These included provisions to

- reduce annual defense transfer thresholds,
- limit DOD's emergency construction authority, and
- prohibit the use of defense funds for physical border barriers in general.

In late July 2019, congressional leadership announced they had come to an [informal understanding](#), as part of a budget agreement that excluded "poison pills" and limited changes to transfer funding levels and authorities from annual appropriations measures.

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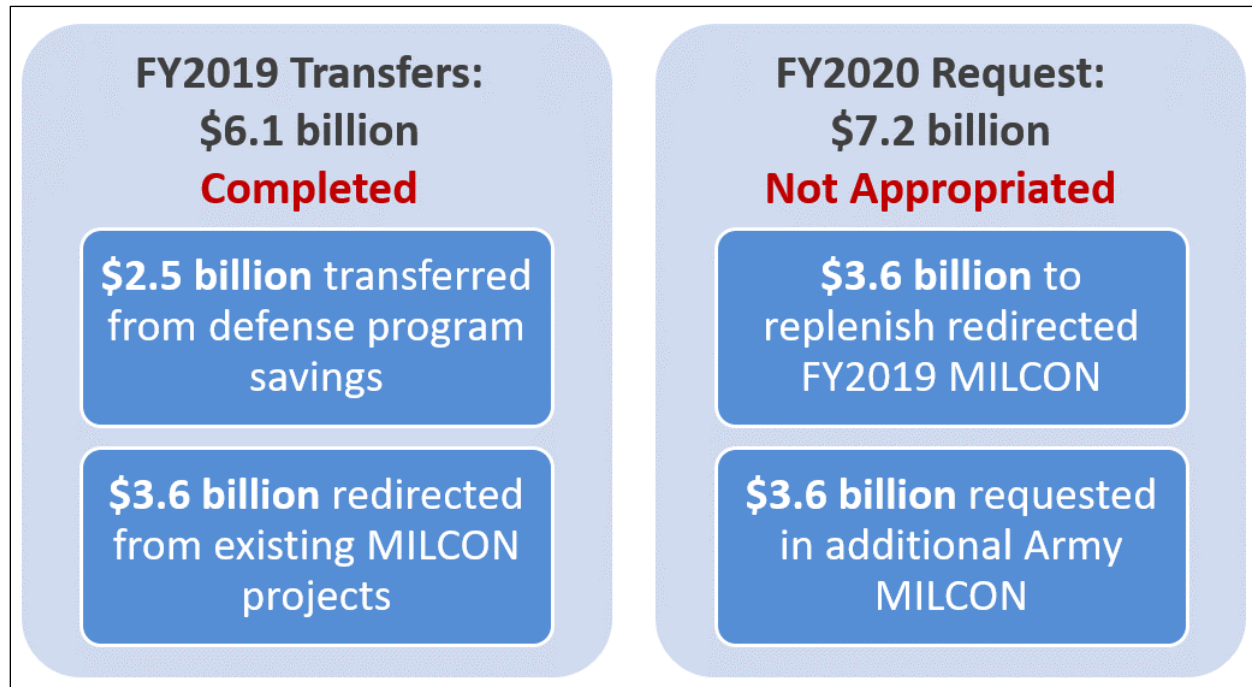
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Ultimately, Congress refrained from including legislative language in the FY2020 appropriations and authorization acts that would have reduced transfer thresholds or prohibited the Administration from repeating the transfer actions it had undertaken in FY2019 to support border barrier construction.

At the same time, Congress declined to support the Administration's FY2020 budget request to provide an additional \$7.2 billion in [MILCON appropriations](#). Of this amount, \$3.6 billion would have replenished military construction projects depleted by emergency transfers in FY2019 and \$3.6 billion would have directly supported additional border barrier construction.

Figure 1. Recent Border Barrier Funding Actions (Defense Only)



Source: CRS.

Authorities Used in Previous Transfers

In FY2019 the Administration redirected \$6.1 billion from defense projects and programs using a combination of authorities (including 10 U.S.C. §2808 and 10 U.S.C. §284) that it could again employ using FY2020 appropriations. See **Figure 2**.

Figure 2. Comparison of Authorities Used in FY2019 to Transfer Defense Funds for Border Barrier Construction

10 U.S.C. §2808 (Emergency)	10 U.S.C. §284 (Drug Interdiction)	General/Special Transfer Authority
Requires Declaration of a National Emergency	Routinely used central transfer account	Routine funding thresholds for DOD base (General) and OCO (Special) transfers
MILCON projects deferred or cancelled	No MILCON projects affected	No MILCON projects affected
Total funds limited to amount of unobligated military construction funds	Funds limited directly by appropriations provisos and indirectly by transfer thresholds in appropriations acts	Thresholds set annually by provisions in defense authorization and appropriations acts
Allows any type of military construction	Allows construction of roads, fences, and lighting; funds aerial and ground surveillance and other specified activities	Allows DOD to reprogram or transfer funds for purposes other than originally approved (may not be used for MILCON)
President must find that the emergency requires use of armed forces; construction must support use of troops.	Authorized construction limited to drug smuggling corridors	Transferred funds must be for a higher priority item or to address unforeseen military requirements; may not be used for items denied by Congress

Source: CRS graphic based on analysis of identified statutes.

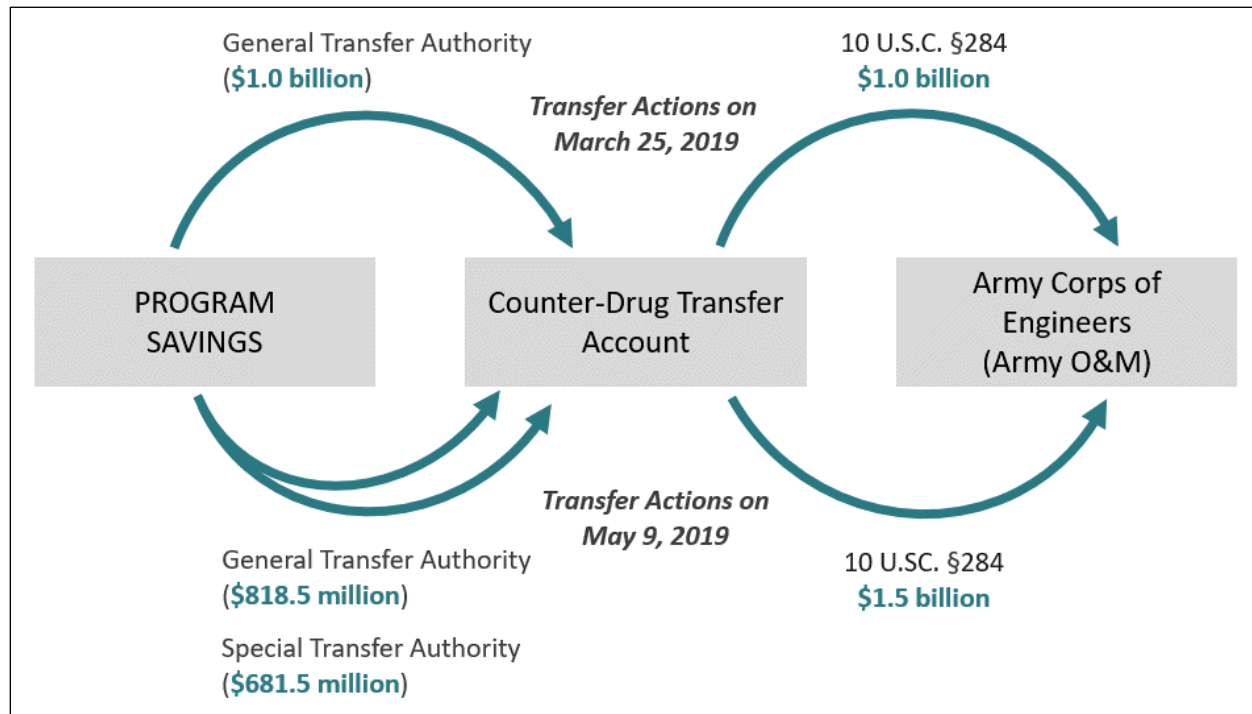
Notes: Emergency authority colored orange. Nonemergency colored blue. National emergencies [may be terminated](#) by Joint Resolution, subject to presidential veto. There are [currently 34](#) national emergencies in effect. Drug smuggling corridors are not defined in law, but [Customs and Border Protection](#) considers the southern border to encompass in its entirety a series of drug smuggling corridors. Separate reprogramming authorities and processes are used for military construction appropriations.

10 U.S.C. §284 Counterdrug Transfers for Border Barriers in FY2019

In FY2019, DOD reprogrammed \$2.5 billion from a variety of nondrug defense programs into the *counter-drug transfer account* and then out to the U.S. Army Corps of Engineers (USACE) for border barrier construction.

The Administration relied on two authorities to reprogram funds into the *counter-drug transfer account*: the [General Transfer Authority](#) (for base appropriations) and the [Special Transfer Authority](#) (for overseas contingency operations, or OCO, appropriations). In turn, funds in the *counter-drug transfer account* may be used for a variety of counternarcotics activities, including those pursuant to 10 U.S.C. §284.

DOD used this combination of reprogramming and transfer actions twice in 2019: first in March (\$1 billion) and again in May (\$1.5 billion). See [Figure 3](#).

Figure 3. How DOD Reprogrammed FY2019 Defense Program Savings

Source: Under Secretary of Defense (Comptroller), Reprogramming Action FY2019-01 RA (March 25, 2019) and FY2019-02 RA (May 9, 2019).

10 U.S.C. §2808 Emergency MILCON Deferrals

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

DOD developed the following criteria to identify projects with unobligated balances it would not consider deferring under 10 U.S.C. §2808:

- No military housing projects.
- No projects that were already awarded a contract.
- No projects with projected award dates before FY2020.

The Department’s final selection indefinitely deferred 127 previously authorized MILCON projects. **Figure 4** below shows the distribution by location.

Figure 4. MILCON Projects Deferred in FY2019, Pursuant to 10 U.S.C. §2808 (\$3.6 billion)

Percentage of appropriations by location

U.S. Affiliated Locations \$687 million	U.S. States \$1.1 billion	Foreign Locations \$1.8 billion
• Puerto Rico 59% • Guam 37% • Virgin Islands 4%	• New York 15 % • New Mexico 12% • Alaska 10% • Virginia 8% • Others 55%	• Germany 25 % • Japan 22% • United Kingdom 14% • Poland 7% • Others 32%

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.

Notes: Percentages represent amount by category. For example, projects deferred in Germany represent 25% (approximately \$468 million) of the “Foreign Locations” category total of \$1.8 billion. Similarly, projects deferred in Puerto Rico represent 59% (approximately \$402 million) of the \$687 million in the “U.S.-Affiliated Locations” category.

Issues for Congress

- Are there plans to redirect defense funds to border barriers in FY2020? If so
 - When were they developed? Why was Congress not informed of them during negotiations on the FY2020 funding bills in order to ensure defense funding patterns reflect Congressional priorities?
- What portion of FY2019 funds redirected for border barriers has been obligated?
- Will Congress consider limiting DOD’s authority to redirect additional defense funds for border barrier construction? What happens if the emergency declaration is revoked?
- Will Congress replenish funds for any MILCON projects deferred pursuant to 10 U.S.C. §2808?
- What criteria might DOD use to identify MILCON projects eligible for deferral under 10 U.S.C. §2808 in FY2020?
- How much are the estimated future costs to DOD for operating and maintaining completed barrier construction, and from which appropriation account will the funds be derived?
- How might anticipated new transfers affect overall defense readiness?
- How is DOD selecting border barrier projects to undertake? Is it based on potential speed of construction or CBP analysis of need?

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