

Congress of the United States
Washington, DC 20515

March 7, 2019

The Honorable Patrick Shanahan
Acting Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Mr. Secretary:

As you know, the President declared a national emergency at the southern border of the United States and issued a proclamation on February 15, 2019, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.). In issuing this proclamation, the President directed the use of the military construction authority provided to the Department of Defense in section 2808 of title 10, United States Code.

We have significant concerns about the use of section 2808 authority, and up to \$3.6 billion of unobligated military construction funding, to construct a border wall or barrier. Given that section 2808 requires a notification to the appropriate congressional committees, including the congressional defense committees, when a decision is made to undertake a military construction project, we ask for your commitment to inform the congressional defense committees at least sixty (60) days prior to allocating, obligating, or expending any funds under section 2808 for the construction of a border wall or barrier. We ask that you provide a response to this request in writing by no later than March 14, 2019. If you cannot commit to providing at least sixty (60) days notice, please state specifically in writing the precise amount of notice you will give the committees.

In addition, we are frustrated by the lack of transparency from the Department of Defense with respect to the planning and use of section 2808 authority. To that end, we request that you provide the following documents and information:

- (1) Documents that show a list of all unobligated military construction projects that have been authorized and appropriated, but the Department of Defense could defer in order to undertake military construction projects pursuant to section 2808 and the February 15, 2019 emergency proclamation;
- (2) Documents that show guidance or direction given to the military departments, or offices or individuals under the jurisdiction of the Secretary of Defense, regarding the process and criteria used to determine which authorized and appropriated military construction projects to defer;
- (3) Documents reflecting the Department of Defense or military departments' objections or concerns with deferring authorized and appropriated military construction projects in order to carry out military construction projects pursuant to section 2808 and the February 15, 2019 emergency proclamation;

- (4) Documents that show the amount and source of funds that have been or will be obligated for planning and design of each military construction project that would be undertaken pursuant to section 2808 and the February 15, 2019 emergency proclamation;
- (5) Documents that show the location, scope, cost, anticipated award date, and construction timeline for each military construction project that would be undertaken pursuant to section 2808 and the February 15, 2019 emergency proclamation;
- (6) Documents related to the application of Section 102 (c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208 as amended by Public Law 109-13 and Public Law 109-367) to projects carried out pursuant to section 2808;
- (7) Documents showing any and all Department of Defense regulations, instructions, and policies applicable to military construction projects that would be undertaken pursuant to section 2808 and the February 15, 2019 emergency proclamation;
- (8) Documents, to include correspondence between the Department of Defense and Department of Homeland Security, related to the development of any Requests for Assistance with regard to projects or activities related to the construction of border wall or barrier on the southern border;
- (9) Documents, correspondence, summaries, meeting minutes and/or any other related material for the Department's border security coordination or working group meetings, including the Border Security Cell;
- (10) Documents relating to a determination by the Secretary of Defense or any Secretary of a military department that the situation at the southern border constitutes a national emergency, including:
 - Any document reflecting the Secretary's determination that the situation constitutes a national emergency;
 - Any document reflecting a request from the Department of Defense to the President for authority to undertake military construction projects under section 2808;
 - All documents or facts on which the Secretary's determination that the situation constitutes a national emergency was based;
 - Any document reflecting a prior determination or supporting the proposition that there is no national emergency at the southern border.
- (11) All documents relating to a determination by the Secretary of Defense or any Secretary of a military department that the national emergency requires the use of the armed forces, including:
 - Any document reflecting the Secretary's determination that the national emergency requires the use of the armed forces;

- All documents or facts on which the Secretary's determination that the national emergency requires the use of the armed forces was based;
 - All documents relating to communication with the Department of Homeland Security or Customs and Border Patrol regarding whether the national emergency requires the use of the armed forces;
 - Any document reflecting a prior determination or supporting the proposition that the national emergency does not require the use of the armed forces.
- (12) Documents relating to the determination by the Secretary of Defense, Geographic Combatant Commander, or military department that the military construction projects being undertaken are necessary to support the use of the armed forces, including:
- Any document reflecting the Secretary's determination that a border wall or barrier is necessary to support the use of the armed forces;
 - All documents or facts on which the Secretary's determination that a border wall or barrier is necessary to support the use of the armed forces was based, including any and all specific instances of the military's mission at the border being impeded by the lack of a border wall or border barrier;
 - All documents relating to communication with the Department of Homeland Security or Customs and Border Patrol regarding whether a border wall or barrier is necessary to support the use of the armed forces;
 - Any documents reflecting a prior determination or supporting the proposition that a border wall or barrier is not necessary to support the use of the armed forces.
- (13) Documents relating to whether the construction of a border wall or barrier is a "military construction project," as that term is defined by section 2801 of title 10, United States Code, to include:
- All documents or facts that support the Department's determination that the construction of a border wall or barrier is a military construction project; and
 - Any document reflecting a prior determination or supporting the proposition that the construction of a border wall or barrier is not a military construction project.
- (14) Documents relating to whether the construction of a border wall or barrier is being "carried out with respect to a military installation," as that term is defined in section 2801 of title 10, United States Code, to include:
- All documents or facts that support the Department of Defense's determination that the southern border is a military installation;

- All documents or communications with any other federal agency relating to whether the southern border is an activity under the jurisdiction of the Secretary of a military department, including any discussions relating to a potential transfer of jurisdiction to the military of land relating to the border wall or barrier or acquisition of real property interests by the Department of Defense;
 - Any document reflecting a prior determination or supporting the proposition that the southern border, or any portion of the southern border, is not a military installation.
- (15) Documents related to whether the construction of a border wall or barrier would be exempt from environmental review requirements and, if determined to be exempt from such review requirements, the justification for the exemption;
- (16) Documents relating to communications with third parties with respect to the Department of Defense's potential use of funds under section 2808 for the construction of a border wall or border barrier;

Separately, the President also directed the use of a counterdrug authority provided to the Department of Defense in section 284 of title 10, United States Code, to construct fences and roads and install lighting along the southern border to block purported drug smuggling corridors.

We have significant concerns about the use of the section 284 authority to construct or support the construction of a border wall or border barriers, and specifically with the Department's plans to transfer up to \$2.5 billion in unobligated funds to the counterdrug transfer account from other Department accounts. While section 284 requires a notification to the appropriate congressional committees, including the congressional defense committees, before providing support for an activity, we ask for your commitment to inform the congressional defense committees when a decision is made to support an activity and at least sixty (60) days prior to transferring funds into, or allocating, obligating, or expending any funds originating from the counterdrug transfer account for the construction of a border wall or barrier. We ask that you provide a response to this request in writing by no later than March 14, 2019. If you cannot commit to providing at least sixty (60) days notice, please state specifically in writing the precise amount of notice you will give the committees.

We are similarly frustrated by the lack of transparency from the Department of Defense with respect to the planning and use of section 284 authority, as well as the disregard for decades of precedent with regard to congressional oversight of the transfer of authorized and appropriated funds. To that end, we request that you provide the following documents and information:

- (1) Documents that show the location, scope, anticipated award date, and construction timeline for each project or activity that would be undertaken at the southern border pursuant to section 284;
- (2) Documents or guidance referring or relating to decision making for counterdrug activities undertaken at locations other than the southern border, including any delays or deferments, prior to any determination(s) by the Secretary of Defense that funds are necessary under section 284 to support activities at the southern border;

- (3) Documents referring to or related to the transfer of funds under section 8005 of Public Law 115-245 for the purpose of building a border wall or barrier, including related roads or installation of lighting, on the southern border, to include:
- Documents that show the timing as to when the Department of Defense will transfer funding to the counterdrug transfer account, or allocate, obligate, and expend funds under section 284;
 - Documents that show the amount and sources of authorized and appropriated funds that are proposed for transferring to the counterdrug transfer account for use under section 284;
 - All documents referring or relating to any determination(s) by the Secretary of Defense necessary under either section 8005 or section 284;
 - All documents relating to a determination by the Secretary of Defense that section 8005 transfers for section 284 projects or activities are based on unforeseen military requirements;
 - All documents between the Department of Defense and the Office of Management and Budget referring or related to either the transfer of funds pursuant to section 8005 and/or the use of authority under section 284;
- (4) Documents relating to the application of Section 102 (c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208 as amended by Public Law 109-13 and Public Law 109-367) to projects or activities carried out pursuant to section 284;
- (5) Documents, to include correspondence between the Department of Defense and Department of Homeland Security, related to the development of any Requests for Assistance with regard to projects or activities related to the construction of border wall or barrier, including related roads or installation of lighting, on the southern border;
- (6) Documents, to include correspondence between the Department of Defense and Department of Homeland Security, used to justify or substantiate the use of section 284 and each of the specific projects or activities with respect to the designation of drug smuggling corridors;
- (7) Documents, correspondence, summaries, meeting minutes, and/or any other related material for the Department's border security coordination or working group meetings, including the Border Security Cell;
- (8) Documents relating to a determination by the Secretary of Defense or any Secretary of a military department that the projects or activities pursuant to section 284 are in a drug smuggling corridor, including:
- Any document reflecting the Secretary's determination that the locations are drug smuggling corridors;

- Any document reflecting a request from the Department of Defense to the President for authority to undertake projects or activities under section 284;
- All documents, intelligence information, or facts on which the Secretary's determination that locations are drug smuggling corridors was based;
- Any document reflecting a prior determination or supporting the proposition that the locations are not drug smuggling corridors.

(9) Documents relating to communication with third parties with respect to the Department of Defense's potential use of funds under section 284 for the construction of a border wall or border barrier, to include the Department of Defense's ability to use funds under section 284.

While the President has issued a national emergency proclamation, our committees are still responsible for performing their constitutional oversight responsibilities. As such, given the speed with which we believe the Department of Defense may be acting in response to the emergency proclamation, we request that you produce the requested documents and information no later than March 21, 2019.

We appreciate your time and attention to this urgent matter.

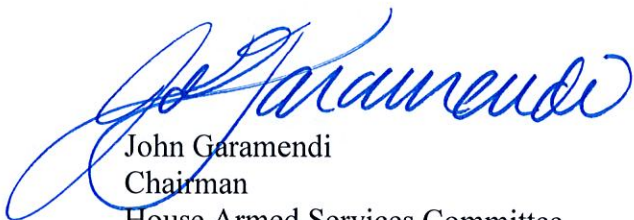
Sincerely,



Adam Smith
Chairman
House Armed Services Committee



Nita M. Lowey
Chairwoman
House Appropriations Committee



John Garamendi
Chairman
House Armed Services Committee
Subcommittee on Readiness



Peter J. Visclosky
Chairman
House Appropriations Committee
Subcommittee on Defense



Debbie Wasserman Schultz
Chairwoman
House Appropriations Committee
Subcommittee on Military Construction,
Veterans Affairs, and Related Agencies