

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515-6216
One Hundred Sixteenth Congress

April 16, 2019

The Honorable Kevin McAleenan
Acting Secretary
Department of Homeland Security
300 7th Street SW
Washington, D.C. 20528

Dear Acting Secretary McAleenan:

We write to request information you or Department of Homeland Security (DHS) personnel possess regarding President Donald Trump's reported offering of a pardon to you in the event you closed the southern border and thereby faced criminal liability. Given the Committee's continuing concerns relating to the Administration's compliance with the nation's immigration laws, as well as possible misuses of the pardon power that is part of the Committee's ongoing inquiry into whether President Trump may have engaged in obstruction of justice or abuses of power, we request that you promptly provide details concerning this reported directive to close the border and the related offer of a pardon.

According to recent reports, during a visit to the border at Calexico, California and after having been advised that closing the border would be illegal, President Trump allegedly said he would pardon you if you "ever went to jail for denying US entry to migrants."¹ These same reports also state that President Trump personally directed DHS personnel to not let migrants into to the country, stating "tell them we don't have the capacity. . . . If judges give you trouble, say, 'Sorry, judge, I can't do it. We don't have the room.'"² We understand, agents were sufficiently concerned about the President instructing them to violate the law that they sought guidance from Department leaders.³ The agents were then reportedly informed they "have to follow the law" and would incur personal liability if they followed the President's directive.⁴

¹ Maggie Haberman, Annie Karni and Eric Schmitt, *Trump Urged Homeland Security Official to Close Border Despite an Earlier Promise of a Delay*, N.Y. TIMES (April 12, 2019); Jake Tapper, *Trump told CBP head he'd pardon him if he were sent to jail for violating immigration law*, CNN, April 12, 2019.

² Jake Tapper, *Trump pushed to close El Paso border, told admin officials to resume family separations and agents not to admit migrants*, CNN, April 9, 2019.

³ *Id.*

⁴ *Id.*

The reported discussion between you, President Trump, and other Department personnel follows a troubling pattern of conduct that has emerged over the past two years that appears to demonstrate that President Trump views the pardon power as a political tool, or even worse, as an expedient mechanism for circumventing the law or avoiding the consequences of his own conduct.⁵

While there are few textual restraints on the President's power contained within the Pardon Clause, the scope of this Clause—like any other constitutional provision—cannot be read in isolation from the rest of the Constitution's text. Article II contains the Take Care Clause, which requires the President to “take Care that the Laws be faithfully executed,”⁶ and the mandatory presidential Oath, which requires the President to swear to “faithfully execute the office of President[.]”⁷ A corrupt pardon offer would violate the Constitution's command that the president “faithfully” execute the law. Offering a pardon to encourage an officer of the U.S. government to undertake an illegal action appears on its face to be an unconstitutional abuse of power. To interpret the Constitution otherwise would permit the Executive Branch to undermine the constitutional role the coequal branches play in creating and enforcing the law.

The President's directive to close the Southern border entirely would also run counter to the executive branch's duty to faithfully execute the law. When Border Patrol Agents encounter “aliens” who are crossing between ports of entry, they are already on U.S. soil. Under section 235 of the Immigration and Nationality Act, any “alien” who is “present in the United States” regardless of how they entered are applicants for admission and have the right to seek asylum.⁸ DHS must process and provide a screening for any arriving alien with “an intention to apply for asylum.”⁹ Additionally, international law, such as the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees—which the United States is a signatory to and has been implemented into U.S. law—also requires government officials to process individuals who seek

⁵ For example, there have been media reports, and the Committee has been gathering evidence that Michael Cohen, the President's former personal attorney, may have been offered the promise of a pardon by lawyers representing President Trump, in hopes of convincing him not to reveal damaging information about the President. Matthew Choi, *Trump and Cohen in a Twitter tussle over pardon claims*, POLITICO, Mar. 8, 2019. In addition, President Trump pardoned former Maricopa County Sheriff Joe Arpaio—a political supporter convicted of criminal contempt for defying a federal court order in August 2017. The following April, President Trump pardoned I. Lewis “Scooter” Libby, former Vice President Dick Cheney's chief of staff, who had been convicted of perjury and obstruction of justice in relation to the FBI's probe into the leaking of a covert CIA officer's identity. Peter Baker, *Trump Pardons Scooter Libby in a Case That Mirrors His Own*, N.Y. TIMES, April 13, 2018. These pardons raised the concern that the President may have been signaling the possibility of a pardon to certain individuals—including his former National Security Advisor, Michael Flynn and his former campaign manager, Paul Manafort—as a means of discouraging them from cooperating with the Special Counsel's investigators. The aforementioned Cohen allegations fit into this pattern as well.

⁶ U.S. Const. art. II, § 3, cl. 5.

⁷ U.S. Const. art. II, § 1, cl. 8.

⁸ 8 U.S.C. § 1225(a)(1).

⁹ 8 U.S.C. § 1225(b)(1)(ii); 8 U.S.C. § 1225(a)(3) (“All [noncitizens] . . . who are applicants for admission or otherwise seeking admission . . . shall be inspected by immigration officers.”) (emphasis added).

protection at our border.¹⁰ To instruct DHS officials to do otherwise would explicitly violate these provisions and the law.

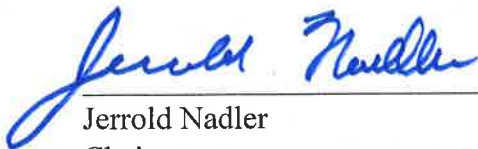
These allegations, if true, would represent a grave breach of the duties of the President. Congress has an independent constitutional duty to provide oversight of the administration of government by the Executive Branch. As such, we respectfully request the following by no later than April 30, 2019:

1. A list identifying all Department employees present for your meeting with President Trump in Calexico, California on or around April 5, 2019. This shall include any individuals who heard, or with whom you shared contemporaneous accounts of, your discussions with the President.
2. A list identifying all Department employees present for President Trump's April 5, 2019 meeting with border patrol agents, including but not limited to any DHS personnel instructed by President Trump to not let migrants into the country.
3. Documents and communications relating to Secretary Nielsen's meeting with President Trump on or about March 21, 2019 to discuss reinstating the zero-tolerance policy and closing the U.S.-Mexico border at El Paso, Texas. This shall include any contemporaneous accounts of the meeting shared by Secretary Nielsen with DHS personnel.

In addition, we further request that you make yourself and other Department personnel—who may have witnessed the President's purported directive to close the southern border and other ports, to deny lawful asylum seekers entry into the United States, or to provide legal remedies for personnel ignoring U.S. law—available for testimony before the Committee.

Thank you for your prompt attention to this matter. We look forward to working more closely with your office in the 116th Congress.

Sincerely,



Jerrold Nadler
Chairman
House Committee on the Judiciary



Steve Cohen
Chairman
Subcommittee on the Constitution, Civil
Rights, and Civil Liberties
House Committee on the Judiciary

¹⁰ United Nations High Commissioner for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Article 33, available at <http://www.unhcr.org/en-us/3b66c2aa10>.

Zoe Lofgren



Chairwoman

Subcommittee on Immigration and Citizenship

House Committee on the Judiciary

cc: Honorable Doug Collins, Ranking Member, House Committee on the Judiciary
Honorable Ken Buck, Ranking Member, Subcommittee on Immigration and Citizenship,
House Committee on the Judiciary
Honorable Mike Johnson, Ranking Member, Subcommittee on the Constitution, Civil
Rights, and Civil Liberties, House Committee on the Judiciary