

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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MEMORANDUM

October 10, 2019

To: Members of the Committee on Oversight and Reform

Fr: Chairman Elijah E. Cummings

Re: Notice of Intent to Issue Subpoenas

This memorandum provides Committee Members with notice of my intent to issue subpoenas to compel Acting Director of U.S. Citizenship and Immigration Services (USCIS) Ken Cuccinelli and Acting Director of U.S. Immigration and Customs Enforcement (ICE) Matthew T. Albence to testify before the Subcommittee on Civil Rights and Civil Liberties on Thursday, October 17, 2019, and to produce documents described in the attached schedules.

The Committee has been investigating the Trump Administration's decision to deport critically ill children and their families since August 2019, shortly after this new policy was adopted. Throughout the Committee's investigation, the Administration has refused to produce requested documents, and agency officials have refused to answer questions regarding why the Administration sought to deport these children, who was responsible for this decision, and how requests for deferred action will be handled going forward. The Administration claimed that it was withholding this information because it was in "active litigation" with a private party—an argument the Supreme Court has rejected as a basis to withhold documents from Congress.

Following overwhelming objections from this Committee and the American people regarding this policy change, the Administration reversed course on September 19, 2019. However, the agencies have continued to refuse to produce the requested documents or make agency officials available to answer the Committee's questions. The Committee has tried for more than a month to obtain this information voluntarily, but USCIS and ICE have obstructed the investigation.

I. BACKGROUND

On August 7, 2019, USCIS stopped considering requests for deferred action from immigrants with non-military special circumstances. Deferred action allows individuals with compelling humanitarian need—including children with life-threatening conditions such as cancer, muscular dystrophy, and cystic fibrosis—to remain in the country. These children are in the United States to receive medical care that is unavailable in their home countries, and some

participate in clinical trials that support the development of new medical treatments.¹ Deferrals do not provide a pathway to citizenship, but they provide successful applicants a reprieve from immigration actions in two-year increments, the ability to qualify for health benefits, and legal status to work in the United States to support their families.²

On August 30, 2019, Rep. Jamie Raskin, the Chairman of the Subcommittee on Civil Rights and Civil Liberties, invited USCIS and ICE to attend an emergency hearing on September 6, 2019.³ On the same date, I sent a letter along with Chairman Raskin, Committee Members Ayanna Pressley and Mark DeSaulnier, other Members of the Committee, and more than 100 other Members of the House and Senate, seeking information and documents from USCIS and ICE by September 13, 2019.⁴

On September 2, 2019, the Administration announced that it had reopened deferral requests that were pending on or before August 7, 2019, but the Administration did not explain what would happen to families who applied after August 7, 2019.⁵

When the Department of Homeland Security (DHS) initially failed to make witnesses available voluntarily on September 6, 2019, Committee staff explained that I was prepared to

¹ *Sick Migrants Undergoing Lifesaving Care Can Now Be Deported*, New York Times (Aug. 29, 2019) (online at www.nytimes.com/2019/08/29/us/immigrant-medical-treatment-deferred-action.html); *'Deportation . . . With This Type of Medical Condition is a Death Sentence': Outrage Grows Over Federal Policy Change*, Boston Globe (Aug. 29, 2019) (online at www.bostonglobe.com/metro/2019/08/29/deportation-from-united-states-with-this-type-medical-condition-death-sentence-representative-ayanna-pressley-said/I2Fm6F5b85EKKdLMaLMi3M/story.html); *Undocumented Immigrants with Serious Illnesses Had a Lifeline. Now It May Be Gone*, Miami Herald (Aug. 28, 2019) (online at www.miamiherald.com/news/local/immigration/article234426937.html).

² *Trump Administration Ends Protection That Lets Migrants Avoid Deportation While Receiving Medical Care*, Time (Aug. 27, 2019) (online at www.time.com/5662256/trump-immigration-deportation-medical-care); *'I Feel Like I'm Signing My Son's Death Warrant.' Children at Boston Hospitals Face Deportation*, Boston Globe (Aug. 26, 2019) (online at www.bostonglobe.com/metro/2019/08/26/immigrant-families-with-severely-ill-children-face-deportation-advocates-say/EMXZQURTzE0U25L6xQIYBN/story.html).

³ Letter from Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, to Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services (Aug. 30, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-08-30.Raskin%20to%20Cuccinelli-USCIS%20re%20Deferred%20Action%20Hearing%20Invite.pdf>); Letter from Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, to Acting Director Matthew T. Albence, U.S. Immigration and Customs Enforcement (Aug. 30, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-08-30.Raskin%20to%20Albence-ICE-DHS%20re%20Medical%20Deferred%20Action%20Invite.pdf>).

⁴ Letter from Rep. Ayanna Pressley et al. to Acting Secretary Kevin McAleenan, Department of Homeland Security, Acting Director Matthew T. Albence, U.S. Immigration and Customs Enforcement, and Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services (Aug. 30, 2019) (online at pressley.house.gov/sites/pressley.house.gov/files/083019%20Deferred%20Action%20Letter.pdf).

⁵ U.S. Citizenship and Immigration Services, *USCIS Re-Opens Previously Pending Deferral Requests* (Sept. 2, 2019) (online at www.uscis.gov/news/alerts/uscis-re-opens-previously-pending-deferral-requests).

issue subpoenas to compel USCIS and ICE to appear. In response to requests from DHS and Republican Committee Members, the Committee agreed to postpone the hearing by several days, and the Department agreed to send witnesses voluntarily, explaining that the Department “understands and appreciates the urgency of this situation.”⁶

On September 10, 2019—the night before the hearing—the Department sent a letter claiming that it would no longer allow its witnesses to answer most questions because a private party had sued the Department. The Department claimed that its witnesses would be “very limited in our ability to engage publicly on this topic” because “the Department is now in active litigation on the issue.”⁷

Later that same night, Chairman Raskin sent a detailed letter back to the Department explaining that the Supreme Court has repeatedly rejected the argument that congressional oversight ceases merely because a federal agency is sued.⁸ Chairman Raskin also addressed the Department’s attempt to rebuff oversight of “predecisional” or deliberative conversations, noting that “the fact that the Department is now scrambling to repair the damage this policy caused does not excuse agency witnesses from testifying.”⁹

At the September 11, 2019, hearing, Department witnesses refused to answer any questions about the policy change, breaching its agreement with the Committee. For example, Chairman Raskin had the following exchange with the USCIS witness, Daniel Renaud, Associate Director of the Field Operations Directorate:

Chairman Raskin: You can’t tell me why there’s a new policy. You can’t tell me what motivated the new policy, and you can’t tell me what the new policy is. Is that a correct assessment of the situation?

⁶ Email from Staff, Department of Homeland Security, to Staff, Committee on Oversight and Reform (Sept. 3, 2019).

⁷ Letter from Christine M. Ciccone, Assistant Secretary for Legislative Affairs, Department of Homeland Security, to Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform (Sept. 10, 2019) (online at [https://oversight.house.gov/sites/democrats.oversight.house.gov/files/the Department%20Letter%20to%20Chairman%20Raskin%2009.10.2019.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/the%20Department%20Letter%20to%20Chairman%20Raskin%2009.10.2019.pdf)).

⁸ Letter from Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, to Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services, and Acting Director Matthew T. Albence, U.S. Immigration and Customs Enforcement (Sept. 10, 2019) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-10%20JBR%20to%20Cuccinelli%20Albence%20Re%20Deferred%20Action%20Hearing_0.pdf); *Hutcheson v. United States*, 369 U.S. 599 (1962); *Sinclair v. United States*, 279 U.S. 263 (1929).

⁹ Letter from Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, to Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services, and Acting Director Matthew T. Albence, U.S. Immigration and Customs Enforcement (Sept. 10, 2019) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-10%20JBR%20to%20Cuccinelli%20Albence%20Re%20Deferred%20Action%20Hearing_0.pdf).

Mr. Renaud: That is my testimony, sir, yes.¹⁰

In light of the witnesses' refusals to answer basic factual questions at the September 11 hearing, Subcommittee Members asked the agencies to produce the information and documents requested in the August 30, 2019, letter by the September 13, 2019, deadline.¹¹ Committee staff followed up with the Department the next day to confirm this request should be considered "an official Committee request" and noted that the Department's responsiveness "will be a major factor in how the Committee proceeds in this investigation."¹²

The Department produced no information or documents by the September 13, 2019, deadline. Instead, Department staff wrote to Committee staff claiming that the August 30 letter "cannot be considered by us as a Chairman's letter." Department staff did not provide further explanation or a timeline for its response.¹³

Chairman Raskin responded in a September 18, 2019, letter, requesting the testimony of Acting Director Cuccinelli and Acting Director Albence at a September 26, 2019, hearing and reiterating the document requests in the August 30 letter. Chairman Raskin demanded a response to the overdue requests by September 24, 2019.¹⁴

On September 19, 2019, Acting Director Cuccinelli wrote to Chairman Raskin that USCIS had reversed course at the direction of Acting Secretary McAleenan and was "returning to the deferred action process that was in place on August 6, 2019." He also stated that he would not attend the September 26, 2019, hearing, claiming it was on a "resolved issue." However, his letter also stated that Acting Secretary McAleenan had directed USCIS to grant deferred action only "based on compelling facts and circumstances." The letter provided no information on how USCIS would implement this new directive.¹⁵

¹⁰ Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, *Hearing on the Administration's Apparent Revocation of Medical Deferred Action for Critically Ill Children* (Sept. 11, 2019).

¹¹ Letter from Rep. Ayanna Pressley et al., to Acting Secretary Kevin McAleenan, Department of Homeland Security, Acting Director Matthew T. Albence, U.S. Immigration and Customs Enforcement, and Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services (Aug. 30, 2019) (online at pressley.house.gov/sites/pressley.house.gov/files/083019%20Deferred%20Action%20Letter.pdf).

¹² Email from Staff, Committee on Oversight and Reform to Staff, Department of Homeland Security (Sept. 12, 2019).

¹³ Email from Staff, Department of Homeland Security, to Staff, Committee on Oversight and Reform (Sept. 14, 2019).

¹⁴ Letter from Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, to Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services, and Acting Director Matthew T. Albence, U.S. Immigration and Customs Enforcement (Sept. 18, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-09-18.JR%20to%20Cuccinelli%20Albence-DHS%20on%20Deporting%20Ill%20Children.pdf>).

¹⁵ Letter from Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services, to Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform (Sept. 19, 2019) (online at

On September 24, 2019, USCIS and ICE submitted partial answers to the Committee’s requests, but withheld critical information and provided none of the requested documents. In a letter to Chairman Raskin, Acting Director Cuccinelli stated that he would respond to the Committee’s questions only “to the extent possible while litigation is ongoing and to the extent communications regarding changes to the deferred action process is an internal and deliberative matter.”¹⁶ USCIS also refused to produce a memo to Acting Secretary McAleenan that reportedly recommended that USCIS should not re-open consideration of deferred action requests.¹⁷

Acting Director Albence also refused to respond to the Committee’s inquiries that he claimed involved “deliberative” communications—even though the deliberative process privilege is a common law privilege that both Democrats and Republicans have agreed cannot be used to withhold information from Congress.¹⁸

The limited information the agencies have provided contradicts previous public statements by the Department. For example, USCIS confirmed that discussions between ICE and USCIS “did take place prior to August 7, 2019, though ICE did not have role in the final decision to proceed on August 7, 2019.”¹⁹ However, ICE officials previously told the press that

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Chairman%20Raskin%20Letter.pdf>.

¹⁶ Letter from Acting Director Ken Cuccinelli, U.S. Citizenship and Immigration Services, to Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform (Sept. 24, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCIS%20Response%20to%20Chairman%20Raskin%209-18-19%20Letter.pdf>).

¹⁷ *Trump Official Urges End to Medical Exemption for Deportations*, Politico (Sept. 13, 2019) (online at www.politico.com/story/2019/09/13/uscis-memo-deportations-undocumented-immigrants-1494616).

¹⁸ Letter from Acting Director Matthew Albence, U.S. Immigration and Customs Enforcement, to Chairman Jamie Raskin, Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform (Sept. 24, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Response%20to%20Chairman%20Raskin%20re%20USCIS%20Medical%20Deferred%20Action%20Requests%20-%20corrected%20%281%29.pdf>); *see also In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (holding that deliberative process privilege is “primarily a common law privilege” and distinguishing it from the presidential communications privilege that is “rooted in constitutional separation of powers principles and the President’s unique constitutional role”); Letter from Chairman Jason Chaffetz, et al., Committee on Oversight and Government Reform, to Huban Gowadia, Acting Administrator, Transportation Security Administration (May 2, 2017) (stating that the “House of Representatives derives its authority from the United States Constitution and is bound only by the privileges derived therefrom” and that “neither the Committee nor the United States House of Representatives recognizes purported non-disclosure privileges associated with the common law”) (online at <https://republicans-oversight.house.gov/wp-content/uploads/2017/05/2017-05-02-JEC-EEC-to-Gowadia-TSA.pdf>).

¹⁹ U.S. Citizenship and Immigration Services Response to Chairman Raskin’s September 18, 2019 Letter (Sept. 24, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Response%20to%20Chairman%20Raskin%209-18-19%20Letter%20-%20Enclosure.pdf>).

ICE was “blindsided” by USCIS’s decision.²⁰ During the Subcommittee’s September 11, 2019, hearing, neither USCIS nor ICE witnesses mentioned any discussions between them.

On September 25, 2019, Committee staff wrote to USCIS and ICE that, in light of the agencies’ refusal to cooperate voluntarily, “the Committee plans to postpone tomorrow’s hearing and consult with our Members regarding next steps.” Committee staff reiterated that the agencies may not shield information from Congress based on ongoing litigation and deliberative process privilege, particularly when the “process in question led to a shocking, inhumane decision that could have resulted in the death of children if it were not reversed under pressure from this Committee and the public.”²¹

II. AUTHORITY FOR SUBPOENA

The Committee intends to issue subpoenas on Tuesday, October 15, 2019, and I intend to so do consistent with the bipartisan agreement reached during the Committee’s organizational meeting on January 29, 2019. According to that agreement, a subpoena “should be used only when attempts to reach an accommodation with a witness have reached an impasse.” As described above, USCIS and ICE have refused to voluntarily provide witness testimony or documents that are critical to the Committee’s inquiry.

The Committee is seeking to understand why consideration of deferred action requests was stopped abruptly on August 7, 2019, and whether the standards and process put in place for deferred action in September are sufficient to protect critically ill children and their families. Families affected by the Administration’s policy changes, including constituents of Committee Members, need this information without further delay.

Because we are in recess for this two-week period, the calendar does not permit scheduling a business meeting to hold a vote on this subpoena with sufficient time to ensure the appearance of Acting Director Cuccinelli and Acting Director Albence at the hearing before the Subcommittee on Civil Rights and Civil Liberties on October 17, 2019. With respect to holding a Committee vote, our agreement states that “[t]here will be exceptions to this policy,” such as when “the calendar does not permit the Committee to schedule a markup.”

Although we will not hold a markup, I am attaching a copy of the subpoena schedule for your review, I am providing this memorandum to all Members with additional background, and I am seeking feedback through a poll of individual Member offices, which are requested to provide any information they would like to be considered on their positions with respect to this subpoena.

²⁰ *After Public Outcry, Feds Agree to Reopen Certain Medical Deferral Requests*, WBUR (Sept. 3, 2019) (online at www.wbur.org/news/2019/09/03/uscis-ice-immigration-deferred-action-requests-reopened).

²¹ Email from Staff, Committee on Oversight and Reform, to Staff, Department of Homeland Security (Sept. 25, 2019).

The Committee's investigation may inform legislative reforms that the House may consider, such as legislation to protect critically ill children and others who rely on deferred action or to require additional disclosure to Congress or the public of policy changes impacting vulnerable immigrants.

If you have any questions or would like more information, please contact Committee staff at (202) 225-5051.

SCHEDULE

In accordance with the attached schedule instructions, you, Kenneth Thomas Cuccinelli, are required to produce all records described below:

1. All current Department of Homeland Security (DHS)—including U.S. Citizenship and Immigration Services (USCIS)—guidance and policies regarding deferred action.
2. Any emails, memoranda, guidance, or other documents discussing the rationale and transition process for the deferred action policy change that took effect on August 7, 2019.
3. All documents, including emails and other communications with the White House or DHS officials about the deferred action policy change that took effect on August 7, 2019.
4. All documents regarding collaboration between USCIS and U.S. Immigration and Customs Enforcement (ICE) on this policy change before the August 7, 2019, enactment date.
5. Documentation of any studies, and the results of these studies, conducted by USCIS concerning the anticipated chilling effect of requiring prospective deferred action applicants to seek that relief from ICE rather than USCIS.
6. Any briefing materials on deferred action from the September 9, 2019, meeting that discussed this topic, including, but not limited to, the memorandum on this subject from Kathy Nuebel Kovarik, Chief of the Office of Policy and Strategy at USCIS, to Acting Secretary Keven McAleenan.

SCHEDULE

In accordance with the attached schedule instructions, you, Matthew T. Albence, are required to produce all records described below:

1. Any emails, memoranda, guidance, or other documents discussing the rationale and transition process for the deferred action policy change that took effect on August 7, 2019.
2. All documents regarding collaboration between U.S. Citizenship and Immigration Services (USCIS) and ICE on the deferred action policy change before the August 7, 2019, enactment date.
3. Any briefing materials on deferred action from the September 9, 2019, meeting that discussed this topic, including, but not limited to, the memorandum on this subject from Kathy Nuebel Kovarik, Chief of the Office of Policy and Strategy at USCIS, to Acting Secretary Keven McAleenan.