

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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MEMORANDUM

February 3, 2021

To: Democratic Members of the Committee on Oversight and Reform

Fr: Majority Staff

Re: Hearing on “Accountability and Lessons Learned from the Trump Administration’s Child Separation Policy”

On **Thursday, February 4, 2021, at 10:00 a.m. ET**, the Committee will hold a remote hearing over WebEx on the Department of Justice (DOJ) Inspector General’s recent report entitled, “Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services.”

In April 2018, the Trump Administration instituted a “zero tolerance policy” to prosecute all cases of unauthorized entry at the southern border, including those in which immigrants were seeking asylum. The Department of Homeland Security (DHS) soon began referring all such cases for prosecution, leading thousands of children to be separated from their families. Hundreds of these children remain separated to this day, and yesterday, President Biden announced the formation of a task force to reunite these families.

The DOJ Inspector General report contains new revelations about the efforts by then-Attorney General Jeff Sessions, then-Deputy Attorney General Rod Rosenstein, and other top DOJ officials to push DHS to adopt the policy of referring for prosecution all parents crossing without authorization—a policy that DOJ officials knew would lead to the forced separation of thousands of children.

The DOJ Inspector General report follows numerous other investigations of the Trump Administration’s zero tolerance policy, including an Oversight Committee investigation that revealed how the Trump Administration misled the public on the Administration’s rationale for the zero tolerance policy while downplaying the harm caused by child separations. In addition, the House Judiciary Committee, three nonpartisan inspectors general, and the Government Accountability Office (GAO) all investigated the Trump Administration’s zero tolerance policy. A summary of those findings is included in the Appendix.

I. OVERSIGHT COMMITTEE'S ZERO TOLERANCE POLICY INVESTIGATION

On June 22, 2018, then-Ranking Member Elijah E. Cummings launched an investigation into the Trump Administration's zero tolerance policy with requests to DOJ, DHS, and the Department of Health and Human Services (HHS) for information on each child and parent separated under the policy.¹ Former Committee Member Mark Meadows joined then-Ranking Member Cummings in sending a bipartisan request for this information on July 5, 2018.²

On February 26, 2019, following unsuccessful attempts to secure voluntary compliance, the Committee voted on a bipartisan basis to authorize subpoenas compelling DOJ, DHS, and HHS to produce the information requested in the letter on July 5, 2018. These were the first subpoenas authorized by the Committee in the 116th Congress.³

In July 2019, the Oversight Committee and the Subcommittee on Civil Rights and Civil Liberties held three hearings on immigration detention and child separations under the Trump Administration.⁴ Following an analysis of records of more than 1,500 separated children and parents, the Committee issued a staff report.⁵ The staff report found:

- **The Trump Administration's child separations were more harmful, traumatic, and chaotic than previously known.** The records showed that the Trump Administration separated several infants and toddlers under the age of two from their parents, detained hundreds of children in Border Patrol facilities for longer than the 72 hours permitted by law, and kept hundreds of children in

¹ Letter from Ranking Member Elijah E. Cummings, Committee on Oversight and Reform, et al. to Secretary Kirstjen M. Nielsen, Department of Homeland Security, Secretary Alex M. Azar II, Department of Health and Human Services, and Attorney General Jeff Sessions, Department of Justice (June 22, 2018) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-22.OGR%20Dems%20to%20Nielsen-DHS%20Azar-HHS%20Sessions-DOJ%20re%20Family%20Separations.pdf>).

² Letter from Chairman Mark Meadows, Subcommittee on Government Operations, and Ranking Member Elijah E. Cummings, Committee on Oversight and Government Reform, to Secretary Kirstjen M. Nielsen, Department of Homeland Security, Secretary Alex M. Azar II, Department of Health and Human Services, and Attorney General Jeff Sessions, Department of Justice (July 5, 2018) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Meadows-Cummings%20Letter%20Requesting%20Info%20on%20Separated%20Children.pdf>).

³ Committee on Oversight and Reform, *Press Release: Oversight Committee Approves First Subpoenas of the 116th Congress—And They Are Bipartisan* (Feb. 26, 2019) (online at <https://oversight.house.gov/news/press-releases/oversight-committee-approves-first-subpoenas-of-the-116th-congress-and-they-are>).

⁴ Committee on Oversight and Reform, *Hearing with the Acting Secretary of Homeland Security Kevin K. McAleenan*, 116th Cong. (July 18, 2019); Committee on Oversight and Reform, *Hearing on the Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment*, 116th Cong. (July 12, 2019); Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties, *Hearing on Kids in Cages: Inhumane Treatment at the Border*, 116th Cong. (July 10, 2019).

⁵ Staff, Committee on Oversight and Reform, *Child Separations by the Trump Administration* (July 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf>).

shelters overseen by the HHS Office of Refugee Resettlement (ORR) for months, or even longer in some cases.

- **The Trump Administration misled the American people about the reason for separating children.** The Trump Administration claimed that separating children was necessary to criminally prosecute parents, but the records showed that some parents were never sent to federal criminal custody, and others were only briefly taken into custody. In some cases, parents were readmitted to the same facilities they left just hours before, but their children had already been removed. These parents were then sent to separate detention facilities and in some cases deported without their children.
- **Child Separations Continued Through the Trump Administration.** Committee staff analyzed records showing that scores of children who were separated in 2018 remained separated in long-term foster care or government shelters well into 2019. Advocates representing separated children stated in court filings that they still cannot reach the parents of more than 600 children still separated from their families.⁶

During this period, top Trump Administration officials repeatedly confirmed on the record that their policy of separating children from their families was intended to create a deterrent effect:

- **White House Chief of Staff John F. Kelly:** “They don’t integrate well, they don’t have skills. They’re not bad people. They’re coming here for a reason. And I sympathize with the reason. But the laws are the laws. But a big name of the game is deterrence. ... It could be a tough deterrent—would be a tough deterrent.”⁷
- **Attorney General Jeff Sessions:** “Yes, hopefully people will get the message and come through the border at the port of entry and not break across the border unlawfully.”⁸
- **HHS Acting Assistant Secretary Steven Wagner:** “We expect that the new policy will result in a deterrence effect.”⁹

⁶ *Senior U.S. Justice Officials Pushed Family Separations, Watchdog Finds*, Reuters (Jan. 14, 2021) (online at www.reuters.com/article/us-usa-immigration-families-idUSKBN29J2QC).

⁷ *Transcript: White House Chief of Staff John Kelly’s Interview With NPR*, National Public Radio (May 11, 2018) (online at www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr).

⁸ *Sessions Admits Policy Is a Deterrent*, CNN (online at www.cnn.com/videos/politics/2018/06/19/sessions-defends-controversial-immigration-policy-deterrent-sot.cnn).

⁹ Press Call with Acting Assistant Secretary Steve Wagner, Administration for Children and Families, Department of Health and Human Services (June 19, 2018) (online at <https://twitter.com/christinawilkie/status/1009082892641755137>).

II. DOJ INSPECTOR GENERAL REPORT

The DOJ Inspector General conducted a wide-ranging review of the actions of DOJ officials leading up to the April 2018 announcement of the zero tolerance policy and through the duration of child separations under the policy between April and June 2018.¹⁰ The report confirms that former Attorney General Sessions and other top DOJ officials understood the implications of implementing the zero tolerance policy. Former Attorney General Sessions declined to be interviewed for the report.

The Inspector General found that, despite statements to the contrary from DOJ leadership, Attorney General Sessions and his immediate advisors were a “driving force” in pushing DHS to change its policies and begin referring all parents—even those with very young children—for criminal prosecution instead of administrative processing. Attorney General Sessions and his advisors did so, knowing that referring parents for criminal prosecution would lead to the forced separation of families. The report also reveals the extent to which they failed to coordinate or communicate with officials at other key agencies in carrying out the policy.

The Inspector General’s report concluded that “the Department’s single-minded focus on increasing immigration prosecutions came at the expense of careful and appropriate consideration of the impact of family unit prosecutions and child separations.”¹¹ The report also found:

- **Attorney General Sessions and DOJ Leadership Knew That the “Zero Tolerance” Policy Would Cause Children to be Separated from Their Parents.** When Attorney General Sessions announced the new zero tolerance policy in April 2018, he and Department leadership understood that this policy would lead to the separation of children from their families. Nevertheless, the Inspector General found that the Department “failed to effectively prepare for, or manage, the implementation of the zero tolerance policy,” with tragic consequences for the children and families involved.¹²
- **Attorney General Sessions and DOJ Officials Ignored Dire Warning Signs From El Paso Pilot Program.** A 2017 child separation pilot program known as the “El Paso Initiative,” carried out by the U.S. Attorney in the Western District of Texas and the Border Patrol office in that region for much of the summer and fall of 2017, led to the separation of approximately 280 families—many of whom the Trump Administration would later have great difficulty reunifying due to its

¹⁰ Department of Justice, Office of Inspector General, *Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services* (Jan. 14, 2021) (online at https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf), at 33.

¹¹ *Id.* at i.

¹² *Id.*

inability to track the separated children.¹³ Attorney General Sessions and other officials touted the El Paso Initiative as a model and failed to “seek readily available information that would have identified for them the serious issues that arose” in the course of that initiative.¹⁴ Talking points prepared for a May 2018 White House meeting stated: “The Western District of Texas employed a pilot program that involved the prosecution of adults in family units last fall—and it worked.”¹⁵

- **Trump Officials Disregarded Experts’ Objections and Failed to Coordinate with Agencies Responsible for Implementing the Zero Tolerance Policy.** Although they knew the zero tolerance policy would separate children from their parents, DOJ leaders failed to coordinate with stakeholders involved in implementing the policy. Attorney General Sessions’ top advisors significantly underestimated the complexities associated with the family separation process and “demonstrated a deficient understanding of the legal requirements related to the care and custody of separated children.” This failure to prepare for the implementation of the policy created “operational, resource, and management challenges” for the agencies involved and exacerbated the negative effects of the zero tolerance policy.¹⁶
- **DOJ Leadership Sharply Limited the Discretion of U.S. Attorneys Charged with Executing the Zero Tolerance Policy.** When DHS began referring all arriving parents for prosecution in May 2018, U.S. Attorneys from the border region “learned of the policy change from their DHS counterparts and did not receive guidance about the change from DOJ headquarters until after the policy change was made by DHS.”¹⁷ Despite language in the zero tolerance policy announcement memo requiring execution of the policy only “to the extent practicable,” Attorney General Sessions intended that U.S. Attorneys would be constrained in their discretion of whether to take up prosecutions.¹⁸
- **DOJ Leadership Refused to Rescind the Zero Tolerance Policy, Even as Concerns About the Impact on Separated Children Mounted.** Top DOJ officials were made aware that other agencies were unable to track which children had been separated from which parents. When U.S. Attorneys informed Department officials that parents remained in custody for “3 to 7 days and a significantly longer period in some districts,” Attorney General Sessions and his advisors refused to change any directives to mitigate the impact on separated

¹³ *Id.* at 15.

¹⁴ *Id.* at ii.

¹⁵ *Id.* at 30.

¹⁶ *Id.* at i.

¹⁷ *Id.* at ii.

¹⁸ *Id.* at 8.

children and families.¹⁹ U.S. Attorneys across the border region repeatedly told both Sessions and Deputy Attorney General Rod Rosenstein, as well as their top advisors, that their offices were not prepared to handle the surge of prosecutions of parents arriving with children. Sessions ignored their pleas for help, stating on a May 11, 2018, call, “We need to take away children.”²⁰

III. BIDEN ADMINISTRATION EFFORTS TO REUNITE SEPARATED FAMILIES

More than two years have passed since a federal judge halted the Trump Administration’s zero tolerance policy, yet hundreds of children remain separated from their parents. On October 29, 2020, then-candidate Biden announced his intention to create a task force to reunify all families separated by the Trump Administration’s “moral failing.”²¹

In one of the Biden Administration’s first immigration actions, Acting Attorney General Monty Wilkinson formally rescinded the Trump Administration’s zero tolerance policy. In a memorandum to all U.S. Attorneys on January 26, 2021, Mr. Wilkinson removed the policy from DOJ guidance to federal prosecutors. Prosecutors instead were instructed to “exercise discretion” over misdemeanor border offenses.²²

On February 2, 2021, President Biden signed an Executive Order authorizing an interagency task force to reunify separated children with their parents.²³ The Executive Order states that the task force will be led by DHS Secretary Alejandro Mayorkas and will include the Secretary of State, Secretary of HHS, and the Attorney General, as well as other officials from their agencies. The Executive Order sets forth the task force’s mission as:

- Identifying all children who were separated from their families at the United States-Mexico border between January 20, 2017, and January 20, 2021, in connection with the operation of the zero tolerance policy.
- To the greatest extent possible, facilitating and enabling the reunification of each of the identified children with their families.

The Executive Order directs the task force to provide several categories of recommendations to the President, including “the provision of additional services and support to

¹⁹ *Id.* at 50

²⁰ *Id.* at 39.

²¹ *Biden Pledges Task Force to Reunite Children Separated at U.S-Mexico Border*, Reuters (Oct. 29, 2020) (online at www.reuters.com/article/us-usa-election-immigration-biden/biden-pledges-task-force-to-reunite-children-separated-at-u-s-mexico-border-idUSKBN27E322).

²² Memorandum from Monty Wilkinson, Acting Attorney General, Department of Justice, to Federal Prosecutors (Jan. 26, 2021) (online at www.justice.gov/ag/page/file/1360706/download).

²³ The White House, *Executive Order on Establishment of Interagency Task Force on the Reunification of Families* (Feb. 2, 2021) (online at www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-on-the-establishment-of-interagency-task-force-on-the-reunification-of-families/).

the children and their families, including trauma and mental health services” and “reunification of any additional family members of the children who were separated, such as siblings, where there is a compelling humanitarian interest in doing so.”

Finally, the Executive Order formally revokes a June 2018 Executive Order from President Trump that sought to justify the child separations and authorized a review of immigration policies in light of the zero tolerance policy’s failures.

IV. WITNESS

The Honorable Michael E. Horowitz

Inspector General

U.S. Department of Justice

Staff contacts: Aaron Blacksberg, Kelly Hennessy, Cameron MacPherson, and Courtney French at (202) 225-5051.

APPENDIX: Previous Zero Tolerance Policy Investigations

The report from the DOJ Inspector General augments other reports from the DHS Inspector General, the HHS Inspector General, and the Government Accountability Office (GAO). These reports found numerous problems with the planning, implementation, and coordination of the Trump Administration’s zero tolerance policy that exacerbated the harms of child separations. These investigations, along with the DOJ Inspector General report that is the focus of this hearing, were conducted in response to several congressional requests, including a June 2018 letter from then-Oversight Committee Ranking Member Elijah E. Cummings and several other House Committee Ranking Members.²⁴

September 2018 DHS Inspector General Report

In September 2018, five months after the Trump Administration began implementing its zero tolerance policy, the DHS Inspector General issued a report entitled, “Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy.”²⁵ The DHS Inspector General found:

- Although the Trump Administration falsely claimed in June 2018 that it had a “central database” to track separated families, investigators “found no evidence that such a database exists.” The Inspector General had difficulty obtaining information on separated children from DHS and found that “the data DHS eventually supplied was incomplete and inconsistent, raising questions about its reliability.”
- The Trump Administration provided inconsistent or incorrect information—and in some cases, no information at all—to parents about the location of their children or when they would be reunited. The Inspector General found that this failure led to “some parents not understanding that their children would be separated from them and/or being unable to communicate with their children after separation.”
- The Inspector General found that enforcement of the child separation policy took away critical resources from other DHS missions, including “patrolling and securing the border.”

²⁴ Letter from Ranking Members, Committee on Oversight and Reform, to Inspector General Michael E. Horowitz, Department of Justice, Inspector General Daniel R. Levinson, Department of Health and Human Services, and Acting Inspector General John V. Kelly, Department of Homeland Security (June 29, 2018) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-29.EEC%20Nadler%20Thompson%20Scott%20Pallone%20to%20Horowitz-DOJ%20IG%20Levinson-HHS%20IG%20Kelly-DHS%20IG%20re%20Family%20Separations.pdf>).

²⁵ Department of Homeland Security, Office of Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) (online at www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf).

October 2018 GAO Report

In October 2018, GAO issued a report entitled, “Unaccompanied Children, Agency Efforts to Reunify Children Separated from Parents at the Border.”²⁶ GAO found:

- DHS and HHS “did not take specific steps in advance of the April 2018 [zero tolerance] memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to ORR [Office of Refugee Resettlement].”
- HHS officials with ORR noticed an alarming increase in the number of separated children in their care as early as March 2017. In response to ORR questions to DHS in November 2017, DHS officials “stated that DHS did not have an official policy to separate families.”
- ORR officials said they considered planning for increased child separations in early 2018, but noted that “HHS leadership advised ORR not to engage in such planning since DHS officials told them that DHS did not have an official policy of separating parents and children.”

January 2019 HHS Inspector General Report

In January 2019, the HHS Inspector General issued a report entitled, “Separated Children Placed in Office of Refugee Resettlement Care.”²⁷ The report found that “thousands” of separations may have occurred before the zero tolerance policy was formally adopted. The HHS Inspector General found:

- Efforts to reunify children pursuant to a court order were hindered by “the absence of an existing, integrated HHS-DHS system to identify and track separated families.”
- Child separations continued following that court order, and “efforts to identify and assess more recent separations may be hampered by incomplete information.”
- The report concluded: “The total number and current status of all children separated from their parents or guardians by DHS and referred to ORR’s care is unknown.”

²⁶ Government Accountability Office, *Unaccompanied Children, Agency Efforts to Reunify Children Separated from Parents at the Border* (Oct. 24, 2018) (GAO-19-163) (online at www.gao.gov/assets/700/694918.pdf).

²⁷ Department of Health and Human Services, Office of Inspector General, *Separated Children Placed in Office of Refugee Resettlement Care* (Jan. 17, 2019) (online at www.oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf).

November 2019 DHS Inspector General Report

Following additional revelations in the Committee’s July 2019 staff report, the DHS Inspector General put out a second report in November 2019 entitled, “DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families.”²⁸ The DHS Inspector General found:

- Customs and Border Protection failed to address “known IT deficiencies” before implementing the Trump Administration’s zero tolerance policy in May 2018. As a result of these deficiencies, DHS faced “significant challenges interfacing and coordinating with HHS” in 2018 to ensure separated children were properly tracked and promptly transferred to HHS custody.
- At least 1,300 potential family relationships were not properly recorded. A three-year-old child later identified as separated by HHS had not been identified by Border Patrol and as a result was not included in the federal lawsuit that led to court-ordered reunifications.
- The Inspector General could not verify the number of families separated under the Trump Administration’s zero tolerance policy.

March 2020 HHS Inspector General Report

In March 2020, the HHS Inspector General issued a report entitled, “Management Challenges Impeded HHS’s Responses to the Zero Tolerance Policy.”²⁹ The HHS Inspector General found:

- HHS had no advance notice of the implementation of the zero tolerance policy, though there were standard “interagency channels for coordinating immigration policy across Federal Departments” that should have been used to notify of such a policy change.
- HHS staff noticed increasing family separations and warned top HHS officials, who did not act on those warnings. The Inspector General concluded: “HHS’s lack of planning for the possibility of larger-scale family separation left the Department unable to provide prompt and appropriate care for separated children when the zero tolerance policy was implemented.”

²⁸ Department of Homeland Security, Office of Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families* (Nov. 25, 2019) (online at www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf).

²⁹ Department of Health and Human Services, Office of Inspector General, *Management Challenges Impeded HHS’s Responses to the Zero-Tolerance Policy* (Mar. 5, 2020) (online at <https://oig.hhs.gov/oei/reports/oei-BL-18-00510.pdf>).

- There were “no procedures or systems” capable of tracking the separated children and parents in HHS and DHS custody for later reunification, and as a result, “HHS struggled to identify separated children.”

October 2020 House Judiciary Committee Staff Report

The House Judiciary Committee issued a staff report in October 2020 based on that Committee’s investigation into the zero tolerance policy, entitled, “The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos.”³⁰ Below are key findings from this report:

- Even before a formal family separations policy had even been developed, the Administration was accelerating separations. By March 2017, the number of separated children transferred to ORR custody had increased by nearly 900 percent, as compared to November 2016.
- In July 2017, without warning, the Administration implemented a family separation pilot program in the El Paso Border Patrol Sector. During the pilot program, the Administration discovered that it was unable to track separated family members in a way that would facilitate eventual reunification.
- Knowing about these problems, and without addressing issues with federal agency tracking systems, the Administration chose to expand the policy across the southern border in May 2018.
- The Administration failed to provide advance notice of the policy to front line agents and officers, which caused unnecessary chaos and inconsistent implementation of the policy across border sectors.

These reports show that all relevant federal agencies knew about widespread problems before implementing the zero tolerance policy that ultimately led to the chaos and confusion that the Oversight Committee’s investigation uncovered. The recent DOJ Inspector General report builds on these findings with new information about how Attorney General Sessions, Deputy Attorney General Rod Rosenstein, and other top DOJ officials were a “driving force” in pushing for policy changes to enable forced separations of children from their parents, with virtually no warning to other agencies and over the objections of other officials.

³⁰ Majority Staff, Committee on the Judiciary, *The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos* (Oct. 2020) (online at https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf).