

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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September 18, 2019

Mr. Ken Cuccinelli  
Acting Director  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
111 Massachusetts Avenue, N.W.  
Washington, D.C. 20529

Mr. Matthew T. Albence  
Acting Director  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security  
500 12th Street, S.W.  
Washington, D.C. 20536

Dear Acting Director Cuccinelli and Acting Director Albence:

I am writing to express my grave concern over the Department's flagrant, last-minute breach of the agreement we reached last week regarding witness testimony at our emergency hearing on the Trump Administration's decision to deport critically ill children and their families. The Subcommittee agreed not to go forward with subpoenas compelling you to testify personally at that hearing in exchange for the Department agreeing to send officials from your offices to testify the following week. Unfortunately, the Department violated this agreement by ordering its witnesses—on the eve of the hearing—not to answer the very questions the Department promised to address without the need for subpoenas.

As you know, on August 30, 2019, I requested that both of you testify on this topic on September 6, 2019, at an emergency hearing before the Subcommittee on Civil Rights and Civil Liberties. I explained that the hearing was necessary because the Department had ordered seriously-ill children to leave the country within 33 days, which essentially would have amounted to death sentences for many of them.<sup>1</sup> Based on your failure to agree to testify, the

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<sup>1</sup> 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->

Committee prepared subpoenas and shared them with our Republican counterparts. After further negotiations, the Committee agreed to withdraw these subpoenas and postpone this hearing until September 11, 2019, in order to accommodate the Department's request. In exchange, the Department agreed to send witnesses from each of your offices to answer the Subcommittee's questions. The Department informed Committee staff that it "understands and appreciates the urgency of this situation," writing:

Per our conversation, the Department is able to offer voluntary witness testimony on Wednesday, September 11, 2019, on the topic of deferred action requests in response to the Subcommittee's letter of August 30, 2019.<sup>2</sup>

Despite this accommodation and the delay it caused, the Department sent a letter—the night before the hearing—claiming that it would no longer allow its witnesses to answer many 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."<sup>3</sup>

Later that same night, I sent a detailed letter back to the Department explaining that the Supreme Court has repeatedly rejected the argument that congressional oversight ceases just because a federal agency is sued. As I explained, the "existence of ongoing litigation does not change the facts of what occurred and should not impact your ability to share truthful information with Congress."<sup>4</sup> If it did, congressional oversight would grind to a virtual halt as House and Senate committees would be forced to postpone work on investigations every time private litigation is brought against federal agencies.

Nevertheless, during the hearing, the witnesses repeatedly cited this spurious argument to refuse answering even basic questions about the Administration's policy. For example, I had the following exchange with Daniel Renaud, the Associate Director of the Field Operations Directorate at U.S. Citizenship and Immigration Services (USCIS):

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DHS%20re%20Medical%20Deferred%20Action%20Invite.pdf).

<sup>2</sup> Email from Staff, Department of Homeland Security, to Staff, Committee on Oversight and Reform (Sept. 3, 2019).

<sup>3</sup> 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/DHS%20Letter%20to%20Chairman%20Raskin%2009.10.2019.pdf>).

<sup>4</sup> 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](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-10%20JBR%20to%20Cuccinelli%20Albence%20Re%20Deferred%20Action%20Hearing_0.pdf)).

- Chairman Raskin: Can you tell us why we have the new policy of rejecting the medical deferred action requests?
- Mr. Renaud: No. Because of the pending lawsuit and at the advice of counsel.
- Chairman Raskin: Can you tell me who ordered the policy?
- Mr. Renaud: I cannot.
- Chairman Raskin: Can you tell me where the policy came from?
- Mr. Renaud: For the same reason, I cannot.
- Chairman Raskin: Can you tell me when the policy was developed or when it will be finalized?
- Mr. Renaud: No, sir.
- Chairman Raskin: And can you tell me what the policy is?
- Mr. Renaud: Because of the pending litigation, I'm not able to share that information.<sup>5</sup>

I also had the following exchange with Mr. Renaud confirming his refusal to answer the Subcommittee's questions:

- 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?
- Mr. Renaud: That is my testimony, sir, yes.<sup>6</sup>

Despite these baseless refusals to answer basic factual questions, Committee Members made an additional effort at accommodation. They explained that the Department could meet its obligations to the Subcommittee by producing the information and documents requested in a letter sent on August 30, 2019, from myself, Committee Chairman Elijah Cummings, Committee Members Ayanna Pressley and Mark DeSaulnier, other Members of the Committee, and more than 100 other Members of the House and Senate. Committee Members made clear that the Department had until Friday, September 13, 2019, to comply.<sup>7</sup> Committee staff followed up

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<sup>5</sup> 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).

<sup>6</sup> *Id.*

<sup>7</sup> 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

with the Department the next day to confirm this offer. In an email to Department staff, Committee staff wrote:

Chairmen Cummings and Raskin consider this letter to be an official Committee request, and the Department should as well. If there is any doubt about this, please let us know, and we will take additional clarifying steps. Because of the Department's troubling actions at the hearing yesterday, its responsiveness to this letter by Friday's deadline will be a major factor in how the Committee proceeds in this investigation.<sup>8</sup>

The Department produced no information or documents by the September 13 deadline. Instead, Department staff sent an email to Committee staff claiming that the August 30 letter "cannot be considered by us as a Chairman's letter." Department staff did not provide any schedule for its response.<sup>9</sup>

The Department's actions are a clear breach of its agreement with the Committee. The Department's rationale for refusing to answer questions from Congress has been rejected by the Supreme Court, and the Department's stonewalling is obstructing our investigation.

For these reasons, the Subcommittee now requests that each of you testify personally at a hearing at 2 p.m. on September 26, 2019.

In addition, since the Department refused to treat our August 30 document request as a "Chairman's letter"—despite the fact that it was signed by me, full Committee Chairman Cummings, and more than 100 Members of Congress—set forth below are each of the specific requests from the August 30 letter in order to eliminate any possible doubt about the respect this request deserves:

1. How many non-military deferred action requests (excluding Service Center requests) has USCIS received from Fiscal Year (FY) 2015 to FY2019? Please provide the data broken down by fiscal year and note the number of these requests that pertain to medical deferred action.
2. What is USCIS's current policy with respect to deferred action, both in the medical-need context and in other contexts? Please provide copies of all current DHS—including USCIS and Immigration and Customs Enforcement (ICE)—guidance and policies regarding deferred action.

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Ken Cuccinelli, U.S. Citizenship and Immigration Services (Aug. 30, 2019) (online at <https://pressley.house.gov/sites/pressley.house.gov/files/083019%20Deferred%20Action%20Letter.pdf>).

<sup>8</sup> Email from Staff, Committee on Oversight and Reform, to Staff, Department of Homeland Security (Sept. 12, 2019).

<sup>9</sup> Email from Staff, Department of Homeland Security, to Staff, Committee on Oversight and Reform (Sept. 14, 2019).

3. The new USCIS policy reportedly took effect on August 7, 2019. As of that date, how many deferred action requests were pending at USCIS field offices? Please provide the number of requests at each field office and the dates on which they were submitted.
4. Since August 7, 2019, how many applicants for deferred action has USCIS denied under this new policy?
  - a. How many of these applicants requested deferred action on the basis of medical need?
  - b. How many of these applicants requested deferred action on other bases?
5. What was the rationale for the policy change? Please provide any emails, memoranda, guidance, or other documents discussing the rationale for the policy change.
  - a. Who were the most senior officials in the White House and in DHS who approved the change before August 7, 2019?
  - b. Please indicate whether, prior to this policy change's effective date of August 7, 2019, USCIS engaged with external stakeholders to solicit feedback on the anticipated consequences of this policy change.
6. Why did USCIS decide not to provide advance notice to the public or to Congress before this change was enacted?
7. What formal notice has been provided—to the public or to Congress—that this change has been enacted?
8. ICE was reportedly “blindsided” by this policy change. Did USCIS and ICE collaborate on this policy change before the August 7, 2019, enactment date? If so, for how long did USCIS and ICE work together on formulating this change? If not, why not?
  - a. Please provide any emails, memoranda, guidance, or other documents discussing the rationale and transition process for the policy change.
9. What processes and structures does ICE have in place to facilitate the processing of deferred action requests? Does ICE ever consider requests for deferred action prior to the completion of removal proceedings?
  - a. If not, does ICE intend to change its processes to account for USCIS's decision to no longer consider non-military deferred action requests?
  - b. How will DHS process deferred action requests for those who have had no contact with the removal system previously, who have standing for a

deferred action request, and who may incur a re-entry bar while waiting for immigration court proceedings to be completed? Will the government authorize their presence, so these families do not accrue unlawful presence?

10. How (if at all) does USCIS plan to transfer information on denied or currently pending requests to ICE in order to process deferred action requests?
11. What is the formal process in which ICE will consider deferred action requests?
  - a. What is ICE's process for receiving and considering future deferred action requests?
  - b. How will that information be communicated to individuals applying for deferred action via USCIS field offices?
  - c. An ICE spokesperson has reportedly said, "As with any request for deferred action, ICE reviews each case on its own merits and exercises appropriate discretion after reviewing all the facts involved." Does this suggest that ICE will use different criteria or standards than USCIS had been using when considering deferred action requests?
  - d. What standards will ICE use to consider deferred action requests?
12. The denial letters sent by USCIS provide less information than has reportedly been provided by USCIS and ICE spokespersons to the news media.
  - a. Why wasn't information regarding ICE consideration of deferred action requests stated in the denial letters sent by USCIS?
  - b. Why weren't the outstanding requests referred to ICE automatically for processing, instead of being rejected automatically?
13. Without deferred action, some of these individuals currently in the United States for medical treatment—including children—risk deteriorating health conditions and even death. Was this taken into account when the policy change was enacted? If so, how was it taken into account?
14. Prior to August 7, 2019, did USCIS conduct any studies concerning the anticipated chilling effect of requiring prospective deferred action applicants to seek that relief from ICE rather than USCIS? If so, please provide documentation of these studies and their results. If not, please explain why not.

Please note that the memorandum on this subject from Kathy Nuebel Kovarik, the Chief of the Office of Policy and Strategy at USCIS, that has been described in press reports should be produced along with any other responsive documents.<sup>10</sup> Please contact the Committee as soon as

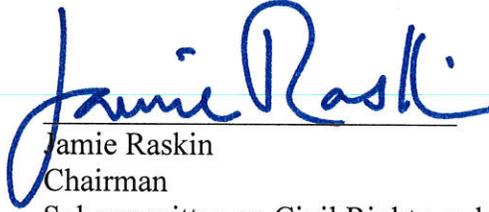
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<sup>10</sup> See, e.g., *Trump Official Urges End to Medical Exemption for Deportations*, Politico (Sept. 13, 2019)

Acting Director Cuccinelli  
Acting Director Albence  
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possible to confirm your attendance at the hearing on September 26, 2019, and please produce all responsive documents by September 24, 2019.

Sincerely,



Jamie Raskin  
Chairman  
Subcommittee on Civil Rights and Civil Liberties

Enclosure

cc: The Honorable Chip Roy, Ranking Member

## Responding to Committee Document Requests

1. In complying with this request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.
2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Committees.
3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.
4. The Committees' preference is to receive documents in electronic form (i.e., CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions.
5. Documents produced in electronic format should be organized, identified, and indexed electronically.
6. Electronic document productions should be prepared according to the following standards:
  - a. The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - b. Document numbers in the load file should match document Bates numbers and TIF file names.
  - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - d. All electronic documents produced to the Committees should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,

INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,  
BEGATTACH.

7. Documents produced to the Committees should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.
8. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.
9. When you produce documents, you should identify the paragraph(s) or request(s) in the Committees' letter to which the documents respond.
10. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.
11. The pendency of or potential for litigation shall not be a basis to withhold any information.
12. In accordance with 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
13. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
14. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
15. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege(s) asserted.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

18. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
19. All documents shall be Bates-stamped sequentially and produced sequentially.
20. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee on Oversight and Reform, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2105 of the Rayburn House Office Building. When documents are produced to the Committee on Financial Services, production sets shall be delivered to the Majority Staff in Room 2129 of the Rayburn House Office Building and the Minority Staff in Room 4340 of the O'Neill House Office Building. When documents are produced to the Permanent Select Committee on Intelligence, production sets shall be delivered to Majority and Minority Staff in Room HVC-304 of the Capital Visitor Center.
21. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a

part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
4. The term “including” shall be construed broadly to mean “including, but not limited to.”
5. The term “Company” means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.
6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; (b) the individual’s business or personal address and phone number; and (c) any and all known aliases.
7. The term “related to” or “referring or relating to,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
8. The term “employee” means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
9. The term “individual” means all natural persons and all persons or entities acting on their behalf.