

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.¹ Based on your failure to agree to testify, the

¹ 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, 2019.²

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."³

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."⁴ 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):

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

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

³ 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>).

⁴ 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).

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.⁵

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.⁶

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.⁷ Committee staff followed up

⁵ 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).

⁶ *Id.*

⁷ 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.⁸

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.⁹

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.

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>).

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

⁹ 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.

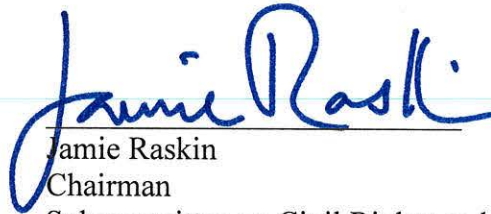
Please note that the memorandum on this subject from Kathy Nuebel Kovarik, the Chief of the Office of Policy and Strategy at USCIS, that has been described in press reports should be produced along with any other responsive documents.¹⁰ Please contact the Committee as soon as

¹⁰ 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



**U.S. Citizenship
and Immigration
Services**

September 19, 2019

The Honorable Jamie Raskin
Chairman, Subcommittee on Civil Rights and Civil Liberties
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Raskin:


Thank you for your invitation to testify before your committee regarding deferred action. U.S. Citizenship and Immigration Services (USCIS) accommodated the committee by sending our Associate Director of Field Operations last week to testify on the same issue. Moreover, since your hearing last week, at the direction of Acting Secretary Kevin McAleenan, USCIS is returning to the deferred action process that was in place on August 6, 2019. Given the insufficient time DHS would have to prepare and clear testimony, and the fact that the hearing is on a resolved issue, we will not be able to accommodate your last minute and duplicative request.

As stated previously, USCIS does not operate a medical deferred action program. As you are aware, on September 2, 2019, USCIS announced that all requests for non-military deferred action pending on August 7, 2019, would be reopened and considered. USCIS has already notified all individuals whose deferred action requests were denied and is in the process of considering those requests.

Acting Secretary McAleenan directed USCIS to reopen consideration of non-military deferred action requests on a discretionary, case-by-case basis, except as otherwise required by an applicable statute, regulation, or court order. The Acting Secretary further directed USCIS to ensure that the procedure for considering and responding to deferred action requests is consistent throughout USCIS and that discretionary, case-by-case deferred action is granted only based on compelling facts and circumstances. USCIS has reopened consideration of non-military deferred action requests.

As a reminder, DHS policy requires committees to provide invitations for Departmental witnesses to DHS at least fourteen days before a hearing. This policy is based on longstanding Executive Branch practices. Again, I appreciate the invitation, but I respectfully decline.

Respectfully,


Ken Cuccinelli II
Acting Director