



**Homeland
Security**

February 25, 2019

The Honorable Jim Jordan
Ranking Member
Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Ranking Member Jordan:

Thank you for your support of the Department of Homeland Security (DHS). Attached please find a letter addressed to Chairman Elijah E. Cummings regarding his intent to issue a subpoena to DHS for the production of documents that we are already producing on a rolling basis, per our agreement with the Committee. As explained in the letter, the issuance of a subpoena at this time is inappropriate, unnecessary, and premature.

DHS looks forward to continuing our work with the Committee through the accommodation process between the Executive and Legislative branches as you exercise your constitutionally mandated oversight function.

Sincerely,

Christine Ciccone

CHRISTINE M. CICCONE
Assistant Secretary for Legislative Affairs



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The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Cummings:

I write on behalf of the Department of Homeland Security (DHS) regarding your intent to issue a subpoena to the Department to compel the production of documents pertaining to the separation of children from their parents during the enforcement of U.S. immigration laws. For the reasons outlined in this letter, the Department believes that the issuance of a subpoena to DHS at this point in time is inappropriate, unnecessary, and premature. DHS looks forward to continuing our work with the Committee through the accommodation process between the Executive and Legislative branches as you exercise your constitutionally mandated oversight function.

Background

It is our understanding that on February 22, 2019 you notified Ranking Member Jim Jordan of your intent to issue subpoenas to DHS, the Department of Justice (DOJ), and the Department of Health and Human Services (HHS) for documents pertaining to the separation of children from their parents during the enforcement of U.S. immigration law.¹ That same day, Ranking Member Jordan wrote you a letter indicating his belief that a subpoena is unnecessary at this point because the Departments have worked in good faith to comply with your document requests, and he requested that the Committee vote on issuing the subpoenas.² The Committee has scheduled a business meeting for 9:30 a.m. on Tuesday, February 26, 2019 – presumably to vote on whether to issue the subpoenas.³

DHS Was Responsive to Requests on this Topic in the 115th Congress

On July 5, 2018, you joined a letter with Rep. Mark Meadows, then-Chairman of the Committee's Subcommittee on Government Operations. The letter was addressed to DHS, DOJ, and HHS and requested information on Executive Order 13841, "Affording Congress an

¹ Letter from Rep. Jim Jordan, Ranking Member, H. Comm. on Oversight and Reform, to Rep. Elijah Cummings, Chairman, H. Comm. on Oversight and Reform, Feb. 22, 2019.

² *Id.*

³ *Business Meeting Before H. Comm on Oversight and Reform*, 116th Cong., (Feb. 26, 2019).

Opportunity to Address Family Separation.”⁴ On July 18, 2018, representatives from the three Departments briefed you and other members of the Committee in response to the request. DHS sent a written response to you about this request on July 24, 2018.⁵ In addition, on August 24, Secretary Nielsen sent you another response requesting Congress “to close the legal loopholes that incentivize criminals, smugglers, and other nefarious actors from exploiting our immigration system to enter the United States illegally” and citing the ongoing litigation concerning the specific documents you requested.⁶

DHS fully complied with the Committee’s request from the 115th Congress, as indicated by the staff of then-Chairman Meadows, who considered that request fulfilled. For many reasons, including but not limited to the Privacy Act, DHS was unable to provide additional information to you in your then-Ranking Member capacity. Under congressional rules, ranking minority members of Committees have not been “endowed with the full power of the Congress” that Committee Chairmen have.⁷ In addition, the Office of Legal Counsel has concluded that the “Privacy Act prohibits the disclosure of the Privacy Act-protected information to the ranking minority member” because “ranking minority members are not authorized to make committee requests, act as the official recipient of information for a committee, or otherwise act on behalf of a committee.”⁸

DHS is Working in Good Faith to Fulfill Your Request in the 116th Congress

It has been less than three weeks since you requested the information you now seek to compel. On February 5, 2019, you wrote to the legislative affairs representatives of the three Departments to register your first request, as Chairman of the Committee, for this information.⁹

Upon receipt of that letter, DHS began the constitutionally mandated accommodation process relating to the documents you have requested. We contacted your staff immediately and exchanged a series of communications to better understand the nature of your request.

⁴ Letter from Rep. Mark Meadows, Chairman H. Subcomm. on Gov’t Operations, H. Comm. on Oversight and Gov’t Reform and Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight and Gov’t Reform, to Kirstjen Nielsen, Secretary, Dep’t Homeland Security, Jeff Sessions, Attorney General, U.S. Dep’t of Justice, and Alex Azar, Secretary, U.S. Dep’t of Health and Human Servs., July 5, 2018.

⁵ Letter from Kirstjen Nielsen, Secretary, Dep’t of Homeland Security, to Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight and Gov’t Reform, July 24, 2018.

⁶ Letter from Kirstjen Nielsen, Secretary, Dep’t of Homeland Security to Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight and Gov’t Reform, Aug. 24, 2018.

⁷ *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op O.L.C. 2 (2017), quoting *Watkins v. United States*, 354 U.S. 178, 201 (1957). For additional background, see generally Congressional Research Service Rpt 95-464A, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, 56 (Apt. 7, 1995), (e.g., “No House or committee rules authorize ranking minority members on their own to institute official committee investigations, hold hearings or to issue subpoenas” and “no judicial precedent has recognized a right in an individual member, other than the chair of the committee, to exercise the authority of a committee in the context of oversight without the permission of a majority of the committee or its chair.”)

⁸ *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op O.L.C. 289 (2001).

⁹ Letter from Rep. Elijah Cummings, Chairman, H. Comm. on Oversight and Reform to Christine Ciccone, et. al., Feb. 5, 2019.

As you may be aware, DHS has received numerous congressional requests for related documents and testimony and is working in good faith to respond to all of them. Indeed, we have already sent documents on a rolling basis and have committed to witness testimony. For example, DHS is producing multiple component witnesses for a public hearing tomorrow, February 26, 2019, and have worked diligently to provide documents requested by Congress prior to that hearing. Additionally, the Secretary is testifying before Congress next Wednesday, March 6, 2019, and our review teams are simultaneously working to ensure production of documents prior to that hearing.

On February 13, 2019, DHS staff met with bipartisan Committee staff in person to further discuss your request. The meeting was productive in assisting the Department in understanding the scope of the request, your priorities in requesting the documents, and quickly identifying responsive material. At the meeting, Committee staff agreed to accept documents on a rolling basis. On February 15, DHS staff sent a follow-up email to your staff providing a requested update regarding our effort to identify which DHS components would possess responsive materials for each of your 11 document requests.¹⁰ DHS has been working diligently to fulfill your request since the meeting and has provided weekly updates on that process. As noted, we have already provided documents to Congress in response to other requests and, consistent with prior discussions, we are providing a production responsive to this request today.

Respectfully, we believe that your proposed approach of seeking a subpoena at this point in time reflects a departure from the constitutionally-based process of accommodation between our co-equal branches of government. Decades of judicial precedence and historical practice recognizes that disagreements between the two branches over access to documents and information should generally be resolved through good-faith negotiations. Upon receipt of properly authorized congressional oversight request, Departments across administrations of both political parties have engaged in the accommodation process by supplying the requested information “to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.”¹¹ Issuing a subpoena before the Department has had the opportunity to engage in that accommodation process runs the risk—as you have previously warned—of “undermin[ing] the committee’s integrity, and destroy[ing] the committee’s credibility.”¹²

The Founders “expect[ed] that where conflicts in the scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”¹³ The Circuit Court for the District of Columbia further noted that each of our coequal

¹⁰ Email from Office of Legislative Affairs, Dep’t of Homeland Security, to Committee staff, H. Comm. On Oversight & Reform, Feb. 15, 2019.

¹¹ Memorandum for the Heads of Executive Departments and Agencies from President Ronald Reagan, Re: *Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982)

¹² Letter from Rep. Jim Jordan, Ranking Member, H. Comm. on Oversight and Reform, to Rep. Elijah Cummings, Chairman, H. Comm. on Oversight and Reform, Feb. 22, 2019, quoting *The IRS’s Systemic Delay and Scrutiny of Tea Party Applications before the H. Comm. on Oversight Government Reform*, 113th Cong. (statement of Rep. Elijah Cummings, Ranking Member, H. Comm. on Oversight and Gov’t Reform).

¹³ *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), see also Letter from Ass’t Att’y General Stephen E. Boyd to Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Feb. 7, 2019.

branches has “an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.”¹⁴

The Department believes that the use of compulsory process on agencies that are cooperating with your document request clearly runs afoul of our mandates to seek optimal accommodation on document productions.

In furtherance of DHS’s commitment to work with your Committee on the production of documents, enclosed are over 2,000 pages responsive to your request. On behalf of the Department, we sincerely hope to continue to work together to find a reasonable accommodation which allows the Committee to carry out its oversight responsibilities without the use of compulsory process.

Sincerely,

Christine Ciccone

CHRISTINE M. CICCONE
Assistant Secretary for Legislative Affairs

cc: The Honorable Jim Jordan
Ranking Member
Committee on Oversight and Reform

¹⁴ *Id.* at 130.