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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

June 22, 2018

CHRISTOPHER R. HIXON, STAFF DIRECTOR
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

The Honorable Kirstjen Nielsen
Secretary
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, DC 20016

Dear Madam Secretary:

On May 7, 2018, Attorney General Jeff Sessions announced a new policy that will require the prosecution of every adult who crosses the border illegally.¹ When families were apprehended crossing the border, this policy, commonly referred to as the “zero tolerance” policy, resulted in the widespread, forcible separation of children from their parents.

After an outcry from Congress and the American people, President Donald Trump signed an Executive Order on June 20, 2018, that temporarily ended separations.² However, the order did not end the zero tolerance policy.³ Under the order, the Department of Homeland Security is instructed to “maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members.”⁴ As the order acknowledges, the prolonged detention of families with children quickly runs into legal limitations, including the

¹ Department of Justice, *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018).

² Exec. Order, “Affording Congress an Opportunity to Address Family Separation” (June 20, 2018).

³ Since order was issued, at least one report suggested the Border Patrol will stop referring for prosecution migrant parents who illegally cross into the U.S. However, the same report indicates this is only a temporary measure until Immigration and Customs Enforcement secures sufficient facilities to detain families. Regardless, this report has not been confirmed by DHS and the decision for prosecution still rests with the Department of Justice, whose zero tolerance policy is unchanged. *Border Patrol will stop referring migrant parents who cross into the U.S. illegally with children for prosecution, official says*, Washington Post (June 21, 2018) (https://www.washingtonpost.com/world/national-security/us-will-stop-prosecuting-parents-who-cross-the-border-illegally-with-children-official-says/2018/06/21/4902b194-7564-11e8-805c-4b67019fcfe4_story.html?utm_term=.ec5ba0ce2240).

⁴ Exec. Order, “Affording Congress an Opportunity to Address Family Separation” (June 20, 2018).

1997 *Flores* settlement.⁵ While the President instructed the Department of Justice (DOJ) to seek relief from these restrictions, this leeway is not assured.⁶ The order allows for the renewed separation of children from families should the courts prohibit extended family detentions.⁷

The order did not address the hundreds of separated families prior to June 20, 2018. After the zero tolerance policy began, the Department of Homeland Security (DHS) separated thousands of children from their families and turned them over to the Department of Health and Human Services (HHS) for custody and placement. According to DHS, between May 5, 2018, and June 9, 2018, DHS separated 2,342 children from their parents.⁸ The average daily number of children placed into the custody of HHS jumped from approximately three to 70.⁹

In order to ensure proper Congressional oversight regarding the zero tolerance policy and the Executive Order, including the reunification of families under the order and the potential for family separations to resume in the future, I ask that you provide the following information:

1. What steps, if any, has DHS taken since June 20 to reunite separated families? If none, please identify any provisions in the Executive Order or the law that prohibit DHS from reuniting families.
2. Since May 7, what is the average length of time that separated children have remained separated from their parents? Since May 7, how many separated families have been reunited? Since June 20?
3. Should the courts determine that the prolonged detention of families is prohibited, will DHS resume separating children from families? Please describe DHS's plans in the event that the administration is unable to secure an amendment to the *Flores* settlement.

⁵ *Flores v. Meese—Stipulated Settlement Agreement* (C. D. Cal. 1997).

⁶ *Top DOJ official: Government can only detain families together for up to 20 days*. The Hill (June 20, 2018).

⁷ Exec. Order, "Affording Congress an Opportunity to Address Family Separation" (June 20, 2018).

⁸ Department of Homeland Security, Department of Health and Human Services, Department of Justice, Briefing with Congressional Staff (June 18, 2018).

⁹ Between October 2017 and April 2018. *Complaint targets separation of immigrant families at border*, Washington Post (May 31, 2018) (https://www.washingtonpost.com/national/complaint-targets-separation-of-immigrant-families-at-border/2018/05/31/58bc031e-6534-11e8-81ca-bb14593aaa6_story.html?noredirect=on&utm_term=.337a6902c86e); Department of Homeland Security, Department of Health and Human Services, Department of Justice, Briefing with Congressional Staff (June 18, 2018).

4. Please provide the number of children DHS referred to HHS each month since January 1, 2018. How many of these children were unaccompanied when they were apprehended? How many were accompanied by a parent, guardian, or family member? Of those accompanied, how many were under the age of 14, under the age of 5, and under the age of 1?
5. Please provide all policies and guidance, if any, given to Customs and Border Protection (CBP) officers and agents on how to separate accompanied children from their families, including communicating both to an accompanied child and a parent about an impending act of separation, the appropriate use of force to separate a child from their parent, the information to be provided to children and parents about each other's location and when and how they may be reunited, and the access given to parents regarding the health, welfare, and immigration case status of their children.
6. Since May 7, how many complaints has DHS received of excessive force, dishonesty, or unprofessionalism in executing family separations? How are such complaints investigated? How many, if any, have been substantiated? What consequences have culpable officers or agents, if any, faced?
7. After immigrants convicted of illegal entry serve their sentence, they are generally turned over to the custody of ICE pending removal. Meanwhile, their children are in the custody of HHS. Since May 7, of those criminally convicted immigrants with children in the custody of HHS, how many have been turned over to ICE for removal? Of those immigrants in the custody of ICE, how many were reunited with their children prior to removal? Who in DHS is responsible for tracking the criminal case of that individual and the custody of the child so they may be reunited upon the completion of any time served?
8. Please provide all policies or guidance regarding the sharing information between HHS and DHS about the custody, immigration case status, and care of children and the detention, immigration, and deportation proceedings of their parents. Do any of these policies ensure that parents are not deported from the United States without reunification with their children or with the knowledge of where their child is being held and how to contact them?
9. CBP is responsible for up to 72 hours of care for separated children until they are transferred to HHS. What child care training, if any, do agents receive? Since May 7, how many times has CBP had to care for a child beyond 72 hours due to insufficient capacity at HHS?
10. Since May 7, have any CBP facilities had insufficient capacity to process, detain or care for separated children or detained families? Has DHS taken any steps to provide additional resources to facilities responsible for caring for children since May 1, or to secure new detention space? If so, please provide a detailed list of all additional resources being allocated or locations under consideration, their funding source, and

in the case of officer or agent support, where those officers or agents will be detailed from. Does DHS plan to expand facility space to process and care for detained children and families? If so, please provide a detailed description of those plans.

11. What alternatives to detention does DHS currently use to monitor individuals awaiting immigration proceedings? How many individuals are currently being monitored this way? How many of them are part of family units?
12. In your comments following the announcement of this policy, you have advocated that asylum seekers should approach ports of entry as opposed to crossing the border between ports of entry.¹⁰ Please provide, by month, the number of total and family unit asylum requests at ports of entry since January 1, 2017. Has DHS made any changes to operations at ports of entry to handle the influx? If so, please describe the steps that DHS has taken.
13. Since May 7, 2018, have any children who entered at ports of entry accompanied by a parent, guardian, or family member (or any individual claiming to be a parent, guardian, or family member) who claimed asylum been separated from their families? If so, please provide the total number, the reason for each separation, and whether the children have been reunited.
14. Please provide, by month, the number of total and family unit apprehensions since the zero-tolerance policy was announced. If the number of apprehensions are higher than the corresponding month in 2017, please explain whether the zero-tolerance policy should be considered effective, and why or why not.

I ask that you respond to this letter as soon as possible but in no event later than July 13, 2018. In addition, I also ask that you provide a briefing to my staff no later than June 28, 2018 on the zero tolerance policy and the implementation of the Executive Order. Finally, I ask that you provide Committee staff access to requested DHS detention facilities holding detained families no later than July 13, 2018. If you are unable to meet this deadline, or should you have any questions, please contact Caitlin Warner at (202) 224-2627 or Caitlin_Warner@hsgac.senate.gov. Please send any official correspondence related to this request to Rina Patel at Rina_Patel@hsgac.senate.gov. Thank you for your attention to this matter.

¹⁰ Senate Committee on Homeland Security and Governmental Affairs, *Hearing on Authorities and Resources Needed to Protect and Secure the United States* (May 15, 2018).

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Sincerely,

A handwritten signature in blue ink that reads "Claire McCaskill". The signature is fluid and cursive, with the first name "Claire" being more prominent and the last name "McCaskill" following in a similar style.

Claire McCaskill
Ranking Member

cc: Ron Johnson
Chairman