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DOJ OIG Releases Report on 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

Department of Justice (DOJ) Inspector General Michael E. Horowitz today released a review of the Department's planning and implementation of its zero tolerance policy and its coordination with the Departments of Homeland Security (DHS) and Health and Human Services (HHS). The DOJ Office of the Inspector General (DOJ OIG) found that DOJ failed to effectively prepare for and manage the policy's implementation.

The Zero Tolerance Policy. The zero tolerance policy, announced by then Attorney General Jeff Sessions on April 6, 2018, required U.S. Attorneys on the Southwest border to criminally prosecute all individuals who were referred by DHS for illegally crossing the Southwest border, including for misdemeanor offenses. After the zero tolerance policy was issued in April 2018, Sessions advocated for DHS to begin referring more individuals for prosecution, including adults who entered the country illegally with children. Sessions and a small number of other DOJ officials understood that DHS referrals of "family unit adults" to DOJ for prosecution would result in family separations, at least temporarily. On May 4, in a change from its long-standing practice, DHS changed its policy and began referring to DOJ for criminal prosecution adults who were apprehended entering the country with children. The OIG found that the Office of the Attorney General was a driving force in this DHS decision. On May 7, 2018, Sessions announced publicly that the Department would prosecute these family unit adults and that their children would be separated from them. By the time the practice of separating families was largely curtailed by a presidential Executive Order on June 20, 2018, over 3,000 children had been separated from their parents.

Coordination with Southwest Border U.S. Attorneys. The DOJ OIG found that, in advance of the DHS policy change on May 4, 2018, DOJ had not effectively coordinated with the Southwest border U.S. Attorneys or advised them that DOJ expected that family unit referrals would begin. As a result, the Southwest border U.S. Attorneys 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. Additionally, although language in the text of the zero tolerance policy seemed to provide Southwest border U.S. Attorneys with discretion to decline cases if prosecution was not "practicable," the OIG found that Sessions expected them to prosecute as many illegal reentry cases as possible, including adult family unit cases, until all available resources were exhausted.

Family Separation and Coordination with Other Agencies. We found that Sessions' expectations for how the family separations process would work significantly underestimated its complexities and demonstrated a deficient understanding of the legal requirements related to the care and custody of separated children. (Former Attorney General Sessions did not agree to be interviewed by the OIG in connection with this review.) Further, we found that although DOJ officials were aware in advance of a range of challenges that could result from the increase in immigration prosecutions and from family separations under the policy, the officials did not begin to coordinate with the Southwest border U.S. Attorney's Offices, the U.S. Marshals Service (USMS), HHS, or the federal courts to address many of those issues until after the policy was issued.

Impact of Policy. Although DOJ leadership told the OIG that their priority was to increase the number of immigration-related prosecutions in order to “restore legality” to the Southwest border and decrease the number of illegal entries into the United States, the OIG’s review ultimately determined that the Department’s single-minded focus on increasing prosecutions came at the expense of careful and appropriate consideration of the impact that prosecution of family unit adults and family separation would have on children traveling with them and the government’s ability to later reunite the children with their parents. We further determined that Department leadership did not take steps, after learning about difficulties in identifying the location of separated children, to reconsider their prior assumptions about the ability to immediately reunify separated families.

To assist the Department in implementing future policies, the OIG made three recommendations to the Department and the USMS. The Department and the USMS agreed with all three of the recommendations.

Consistent with the standard practice in all of our reviews, we provided a draft of this report to the Department on August 27, 2020, for the purpose of factual accuracy review. The Department provided comments on September 28, 2020, and at that time, requested that the OIG interview other Department personnel who had responsibilities related to immigration or DHS policy issues. Additionally, also consistent with our standard practice and for the purpose of ensuring factual accuracy, in September 2020 we contacted certain individuals who were interviewed during the review to provide them an opportunity to review the portions of the draft report that pertained to their testimony to the OIG.

Report: Today’s report and an interactive timeline of events are available on the OIG’s website at the following link: <https://oig.justice.gov/reports/review-department-justices-planning-and-implementation-its-zero-tolerance-policy-and-its>.

Video: To accompany today’s report, the OIG has released a two-minute video of the Inspector General discussing the report’s findings. The video and a downloadable transcript are available at the following link: <https://oig.justice.gov/news/multimedia/video/message-inspector-general-review-department-justices-planning-and>.

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