



Office of the Inspector General
United States Department of Justice

Statement of Michael E. Horowitz
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before the

U.S. House of Representatives
Committee on Oversight and Reform

concerning

"Accountability and Lessons Learned from the Trump Administration's Child
Separation Policy"

February 4, 2021

Chairwoman Maloney, Ranking Member Comer, and Members of the Committee:

Thank you for inviting me to testify at today's hearing regarding the Office of the Inspector General's (OIG) [review](#) of the Department of Justice's (Department and DOJ) planning and implementation of its zero tolerance policy and its coordination with the Departments of Homeland Security (DHS) and Health and Human Services (HHS). I appreciate the opportunity to present our findings to the Committee.

In my statement today, I will provide a brief background of the zero tolerance policy and highlight our report's most significant findings. Our findings are the product of a comprehensive review of approximately 10,000 pages of emails, records, and handwritten notes; 45 interviews; and five site visits (prior to the pandemic) to U.S. Attorney's Offices (USAO) and United States Marshals Service (USMS) districts on the Southwest border. I note that, unfortunately, the OIG was not able to interview former Attorney General Jeff Sessions as part of this review because he left the Department shortly after the initiation of our review. As this Committee is aware, the OIG does not have the ability to compel the testimony of former Department employees. This has been a perennial problem for the OIG in connection with many of our reviews and investigations, and one that this Committee previously sought to address on a bipartisan basis. While the earlier bill was passed by voice vote by the House of Representatives, it did not receive a vote in the Senate. I hope the Committee will re-initiate its bipartisan efforts to provide this authority to my office and others in the IG Community to promote accountability and enhance our ability to provide the most comprehensive reports possible to inform your oversight and legislative efforts.

At the outset, I want to commend the work of the OIG review team for producing this report, which provides additional transparency regarding the Department's role in the zero tolerance policy and the resulting family separations on the Southwest border, and provides important recommendations to improve DOJ operations.

Policy Background

As we detail in our report, the announcement of the zero tolerance policy was the culmination of a yearlong effort by the Department to increase criminal immigration enforcement on the border. DOJ officials told us that then Attorney General Sessions was not satisfied with the Southwest border USAOs' response to an April 2017 memorandum that he had issued, and throughout 2017 the Office of the Attorney General (OAG) had discussions, within DOJ and with DHS, about potential policy changes to address the number of apprehensions on the Southwest border. These discussions included the prosecution of family unit adults apprehended at the border and the separation of children. On April 6, 2018, Attorney General Sessions announced that DOJ had adopted a "zero tolerance policy" for immigration offenses involving illegal entry and attempted illegal

entry into the United States. The policy required each USAO on the Southwest border to prosecute all DHS criminal referrals for illegal entry violations, including misdemeanors.

The following month, on May 4, with the urging of Attorney General Sessions, DHS changed its policy of not referring family unit adults to DOJ for criminal prosecution. Prosecuting adults who entered the country illegally with children represented a significant change in DHS and DOJ criminal immigration enforcement practice. Historically, when DHS apprehended adults with children, DHS, with the concurrence of the Southwest border USAOs, would not refer the adult to DOJ for criminal prosecution. Instead, DHS would place the family unit in administrative deportation proceedings. However, as a result of the DOJ zero tolerance policy and the change in DHS policy, DHS began referring family unit adults to DOJ for criminal prosecution, resulting in children being separated from their family unit members.

During a May 7, 2018, speech in San Diego, California, Attorney General Sessions detailed his views about the newly announced DOJ policy. Sessions stated, "I have put in place a 'zero tolerance' policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law." Following implementation of the policy, thousands of children were separated from their families. On June 20, 2018, then President Trump issued an Executive Order that largely curtailed the DHS practice of referring family unit adults to DOJ for prosecution. Last week, Acting Attorney General Monty Wilkinson formally rescinded the Department's zero tolerance policy.

Report's Key Findings

Our review concluded that the Department's single-minded focus on increasing immigration prosecutions during the zero tolerance policy came at the expense of careful and appropriate consideration of the impact of child separations. Specifically, we found that DOJ leadership, and in particular, the Office of the Attorney General, failed to effectively prepare for or manage the implementation of the zero tolerance policy.

We also found that then-Attorney General Sessions and a small number of other DOJ officials understood at the time the zero tolerance policy was issued in April 2018 that DHS would change its long-standing practice of not referring family unit adults for prosecution in response to the zero tolerance policy. The Attorney General further understood that prosecution of these family unit adults would result in children being separated from families, at least temporarily. We therefore found that OAG was a driving force in the DHS decision to begin referring family unit adults for prosecution.

We further found that the OAG's expectations for how the family separation 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. For example, Attorney General Sessions told the Southwest border U.S. Attorneys that prosecution of family unit adults would be swift and would be followed by immediate reunification of the separated family. However, federal law requires DHS to place separated children in the custody of the Department of Health and Human Services' (HHS) Office of Refugee Resettlement within 72 hours of their apprehension. Completing a prosecution within such a timeline was, in most cases, a practical and legal impossibility, even if a defendant sought to plead guilty and be sentenced immediately. Indeed, the Southwest border USAOs had reported to DOJ headquarters that prosecuted adults typically remained in DOJ custody for 3 to 7 days and in some districts even longer. Yet, we determined that Department leadership did not take steps, after receiving this information and learning about DHS's and HHS's difficulties in identifying the location of separated children, to reconsider their prior assumptions about the ability to immediately reunify separated families.

Additionally, we found that the Department did not effectively plan for or coordinate with the USAOs, the USMS, DHS, or HHS about the impact that family unit adult prosecutions under the zero tolerance policy would have on children. For example, the Southwest border U.S. Attorney's told us that they did not learn about Attorney General Sessions' expectation that adult family unit members traveling with children would be prosecuted by their offices as part of the zero tolerance policy until just before or after May 4 (the date when DHS announced its change in policy). Further, while DOJ officials were aware of the many operational, resource, and management challenges that would result for the USMS, the USAOs, and the federal courts from the increase in immigration prosecutions under the zero tolerance policy, they did not attempt to address them until after the policy was issued. For example, the USMS was provided with no advance notice of the zero tolerance policy, and we learned that the unplanned for, substantial increase in defendants that the USMS was required to manage and house due to the zero tolerance policy resulted in a USMS funding shortfall for fiscal year 2019 of \$227 million. That shortfall was not resolved until July 2019 when Congress approved an emergency supplemental appropriation of \$155 million for the USMS and the Department requested and received approval to reprogram an additional \$72 million.

Finally, in formulating the zero tolerance policy, we determined that Sessions and OAG officials referenced an initiative conducted from March to November 2017 by the U.S. Border Patrol's El Paso Sector and the USAOs for the Western District of Texas (WDTX) and later the District of New Mexico (the El Paso Initiative). The El Paso Initiative sought to increase illegal entry prosecutions and allowed for prosecution of family unit adults, resulting in the separation of approximately 280 families. These separations, and the government's inability in many cases to identify the whereabouts of separated children, generated concerns from prosecutors, judges, and other stakeholders, and highlighted many of the child separation issues that would later present themselves during implementation of the zero tolerance policy. We found that the OAG did not seek readily

available information that would have identified for them, in advance of the announcement of the zero tolerance policy, the serious issues that arose as a result of the El Paso Initiative's prosecution of family unit adults and the corresponding child separations. Rather, DOJ officials focused solely on the increase in illegal entry prosecutions resulting from the El Paso Initiative.

As a result of our detailed findings, our report made three recommendations to assist the Department and the USMS in implementing future policies, and the Department and USMS concurred with the recommendations.

I understand that the complete report, and its detailed discussion of these issues, has been made available to all Committee members, and I would be pleased to answer any questions the Committee may have. I thank you again for the opportunity to testify about these important issues.