

The Honorable Ron Johnson
Chairman
Senate Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Claire McCaskill
Ranking Member
Senate Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

October 2, 2018

Dear Chairman Johnson and Ranking Member McCaskill:

The Project on Government Oversight (POGO) and Open the Government, organizations dedicated to ensuring a transparent and accountable federal government, are writing to submit documentary evidence that Department of Homeland Security (DHS) Secretary Kirstjen Nielsen may have given false and/or materially misleading testimony before your committee on May 15, 2018.

During that hearing, Secretary Nielsen stated to Senator Kamala Harris, “we do not have a policy to separate children from their parents.” Nielsen stated that any separations that did occur were done solely for purposes of prosecution, not “for purposes of deterrence.”

Our organizations recently obtained a document in response to a Freedom of Information Act request that demonstrates that Nielsen personally signed off on a policy of separating parents and children to deter others from migrating to the United States.

The document, attached here,¹ is a memorandum to Nielsen from Kevin McAleenan, the commissioner of U.S. Customs and Border Protection; L. Francis Cissna, the director of U.S. Citizenship and Immigration Services, and Thomas Homan, then the acting director of U.S. Immigration and Customs Enforcement. The memo lays out three options for increasing illegal-entry prosecutions, only one of which discussed separating families. It recommend that option, “Option 3,” which would “pursue prosecution of all amenable adults who cross our border illegally, including those presenting with a family unit,” as “the most effective method to achieve operational objectives and the Administration’s goal to end ‘catch and release.’” The memo states that Nielsen has the authority to “direct the separation of parents or legal guardians and minors held in immigration detention so that the parents or legal guardians can be prosecuted.”

¹ The document is also available at <https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html>.

The document contains a redacted signature approving Option 3. The Department of Homeland Security has confirmed that the signature is Nielsen's.²

Open the Government and the Project On Government Oversight have also obtained an unredacted copy of the April 23 memo, which provides further evidence that contrary to her testimony, Nielsen understood that the purpose of family separation was deterrence.³ The memo acknowledges that prosecuting and separating parents would present “increased legal risk,” based on an attached legal analysis that has never been made public. It nevertheless recommends the policy because:

it is very difficult to complete immigration proceedings and remove adults who are present as part of FMUAs [family units] at the border. In fact, only 10 percent of non-Mexican FMUA apprehended during the Fiscal Year (FY) 2014 surge have been repatriated in the nearly four years since their illegal crossing. Of these options, prosecuting all amenable adults will increase the consequences for illegally entering the United States by enforcing existing law, protect children being smuggled by adults through transnational criminal organizations, and have the greatest impact on current flows.

The memo does not discuss any plan for reuniting separated families, or the harmful effects of separation on children, nor does it reflect any input from the government agencies that would be responsible for caring for the separated children.

Since the hearing, Nielsen has repeatedly claimed that separation was not a deliberate policy; that it was not meant as a deterrent; that parents and children were kept apart no longer than necessary; and that parents were not deported without an opportunity to reunite with their children:

- On June 17, she tweeted, “We do not have a policy of separating families at the border. Period.”⁴
- On June 18, at a press conference at the White House, she stated that “this administration did not create a policy of separating families at the border.” Asked by a reporter whether she was “intending for parents to be separated from children” or “intending to send a message,” Nielsen replied, “I find that offensive. No. Because why would I ever create a policy that purposely does that.”⁵

² Cora Currier, “Prosecuting Parents—and Separating Families—Was Meant to Deter Migration, Signed Memo Confirms,” *The Intercept*, September 25, 2018, <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/> (Downloaded October 1, 2018).

³ Unfortunately, we are unable to enclose the full document at our source’s request, but would be willing to discuss it further with Committee staff.

⁴ <https://twitter.com/secnielsen/status/1008467414235992069?lang=en>

⁵ The White House, “Press Briefing by Press Secretary Sarah Sanders and Department of Homeland Security Secretary Kirstjen Nielsen,” June 18, 2018, <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-department-homeland-security-secretary-kirstjen-nielsen-061818/> (Downloaded October 1, 2018).

- On July 19, in a public appearance at the Aspen Security Forum, Nielsen was asked about the logistics of reuniting children with parents who had been deported. She replied, “It's complicated because remember all of these adults who left without their kids left based on a decision to leave their children. So now we're saying to them, no, no, no, you have to take the children.”⁶
- On July 24, Nielsen told Fox News in response to a question about children deported without their parents that “the way the process works is the parents always have the choice to take the children with them. So, these are parents who have made the decision not to bring the children with them.”⁷

All of those statements were false, and provide evidence that Nielsen’s misleading testimony in May was not an inadvertent misstatement.

We respectfully request that the Committee take the following steps:

- (1) Request (by subpoena if necessary) an unredacted copy of the April 23 memo; the legal analysis from the Department of Homeland Security’s General Counsel that it references; and all other documents that Nielsen sent or received regarding “zero tolerance” prosecutions and family separation.
- (2) Require Secretary Nielsen to come before the Committee under oath to provide an explanation for her prior inaccurate testimony, her failure to correct it, and her other false statements regarding family separations.
- (3) If deemed appropriate after a thorough examination of the factual record by the Committee, make a referral to the Federal Bureau of Investigation for investigation of potential violations of 18 U.S.C. § 1001.

⁶ “Remarks of Homeland Security Secretary Kirstjen Nielsen, before the Aspen Security Forum Panel on ‘Securing the Homeland’” <https://aspensecurityforum.org/wp-content/uploads/2018/07/ASF-2018-Securing-the-Homeland.pdf> (Downloaded on October 1, 2018). In fact, many parents were deported without any opportunity to reunite with their children. See, e.g., Katherine Hawkins, “Where Family Separation Began: A Case in El Paso Shows Flores is the Solution, Not the Problem,” *Just Security*, June 22, 2018, <https://www.justsecurity.org/58363/family-separation-began-case-el-paso-shows-flores-solution-problem/> (Downloaded October 1, 2018); Miriam Jordan, “‘I Can’t Go Without My Son,’ a Mother Pleaded as She Was Deported to Guatemala,” *New York Times*, June 17, 2018, <https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html> (Downloaded October 1, 2018); Lomi Kriel, “Immigrant families separated at border struggle to find each other,” May 24, 2018, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Immigrant-families-separated-at-border-struggle-12938759.php> (Downloaded October 1, 2018); Ted Hesson, Renuka Rayasam, and Dan Diamond, “Most deported migrants were not asked about leaving children behind, Trump official says,” *Politico*, July 25, 2018, <https://www.politico.com/story/2018/07/25/deported-migrants-leaving-children-behind-712088> (Downloaded October 1, 2018).

⁷ Samuel Chamberlain, “DHS Secretary Nielsen says White House is 'on track' to reunite separated families by deadline,” Fox News, July 24, 2018, <https://www.foxnews.com/politics/dhs-secretary-nielsen-says-white-house-is-on-track-to-reunite-separated-families-by-deadline> (Downloaded October 1, 2018).

Thank you for your consideration.

Sincerely yours,

A handwritten signature in black ink that reads "Danielle Brian". The script is fluid and cursive.

Danielle Brian
Executive Director, Project On Government Oversight

A handwritten signature in black ink that reads "Lisa". The script is fluid and cursive.

Lisa Rosenberg,
Executive Director, Open the Government

cc: Members of the Senate Committee on Homeland Security and Governmental Affairs