



One Hundred Sixteenth Congress
Committee on Homeland Security
U.S. House of Representatives
Washington, DC 20515

November 9, 2020

The Honorable Chad Wolf
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Mr. Wolf:

Throughout the Trump Administration, including during the time in which you have purportedly served as the Acting Secretary, the Department of Homeland Security (DHS) has repeatedly withheld from the Committee the documents and information it has sought as part of its ongoing oversight of the Department's actions. Both you and the Department have even willfully defied subpoenas issued by the Committee.

The Department's repeated refusal to cooperate with the Committee's oversight requests—which are essential to effectuating the separation of powers established by the U.S. Constitution—stands in direct contravention of the legal obligations of the Department, as have the Trump Administration's many improper and politically motivated actions. However, the Committee's investigations of these actions will continue until we have understood all of the facts and circumstances surrounding the many harms caused by the Trump Administration's policies.

Now, with the forthcoming transition of presidential administrations, I write today to make clear the Committee's expectation that the Department will preserve, in accordance with all applicable Federal laws, all records created during the Trump Administration.

I also write to set forth the Committee's expectations regarding the Department's provision of documents and communications previously subpoenaed by the Committee, as well as the many documents and communications requested by the Committee as part of our ongoing investigations.

Finally, the Committee is making new requests for documents and communications pertaining to the Department's personnel actions and contracting actions, including any such actions taken between now and January 20, 2021.

Requirements for the Preservation of All Records

As you are aware, the Federal Records Act (FRA) requires all departments and agencies in the Executive Branch to collect, retain, and preserve records that document “the transaction of public business” or contain “informational value.”¹ The Committee writes to remind you and the entire Department of your obligations under the FRA.

Under 44 U.S.C. § 3101, the head of each Federal agency is required to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.” Pursuant to 44 U.S.C. § 3301(a)(2), these protections extend to all types of information, whether stored physically, digitally, or electronically. As such, this requirement encompasses such items as tweets and all other forms of social media posts as well as press releases, among other records.

Federal officials and employees who violate the FRA are subject to criminal penalties. Under 18 U.S.C. § 2071(b), any agency employee who “willfully and unlawfully” conceals, removes, mutilates, obliterates, destroys, or attempts any such action against a federal record, is subject to fine and/or imprisonment for up to three years. In addition, any federal office holder convicted of violating the FRA can lose his/her position and can be disqualified from holding future federal office. Moreover, under 44 U.S.C. § 3106(b), you have a responsibility to notify the Archivist of any actual, impending, or threatened unlawful action against records at your agency.

The Committee intends to closely observe the compliance of the Department—and all of its component agencies—with these requirements. **As part of the Committee’s oversight, the Committee requests to receive by November 18, 2020, assurances, in writing, that Departmental records, documents, data, and information have not been and will not be destroyed, modified, removed, transferred, or otherwise rendered inaccessible during the transition.**

Department’s Obligation to Comply with Outstanding Subpoenas and Pending Document Requests

As part of its ongoing investigations of the actions taken by DHS and its component agencies during the Trump Administration, the Committee has been forced to issue several subpoenas for documents due to the Department’s repeated stonewalling.

Subpoena on Family Separations and Treatment of Children in Custody

On November 20, 2019, following the Department’s failure to produce all documents the Committee had first requested almost a year earlier, the Committee issued a subpoena requiring the production by noon on December 11, 2019, of documents pertaining to the separation of children from their parents and the care of children in the custody of Customs and Border Protection (CBP), including the treatment of two children who died in CBP custody.² The

¹ 44 U.S.C. § 3301(a)(1)(A).

² Letter and Accompanying Schedule and Subpoena Instructions, from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad F. Wolf, Department of Homeland Security (Nov. 20, 2019).

Department has thus far failed to comply in full with this subpoena. **The Committee demands immediate and full compliance with its outstanding subpoena.**

The Committee's many questions about the Department's immoral family separation policies—among other issues—remain unanswered, particularly those surrounding the status of all separated children.

As we discussed during your last appearance before the Committee on March 3, 2020, the DHS Inspector General has issued a report finding that “DHS estimated that Border Patrol agents separated 3,014 children from their families while the policy was in place,” and “DHS also estimated it had completed 2,155 reunifications” among this group of children—meaning that at the time the Inspector General's report was issued, 859 children had not been reunified with their parents.³

Regarding DHS's estimate of the number of children separated from their parents by the Border Patrol, the Inspector General's report states: “We tried, but could not confirm the accuracy of Border Patrol's reported estimate that 3,014 children were separated during the policy period.” After conducting its own review, the Inspector General found an additional 1,369 children “with potential family relationships that were not accurately recorded by CBP, which could result in unrecorded family separations.”⁴

During the hearing on March 3, Congresswoman Bonnie Watson Coleman asked numerous questions about the status of both the 859 children who remained separated from their families at the time the Inspector General's report was issued, as well as the additional 1,369 children that the Inspector General indicated may have been separated from their families. Although you asserted that, “The Department has not lost any children,” you were unable to indicate the number of children from among either the group of 859 or the group of 1,369 who had not been reunified with their families, including the number who could not be reunified due to health and safety concerns.⁵

Following the March 3 hearing, the Committee wrote to you seeking a status update on each child whose location was uncertain, but you never provided the information the Committee sought.⁶ Instead, the Department sent an absurd letter in which it asserted that “the Committee's request for unique written updates of 859 children allegedly not reunited at the time of the Office of Inspector General's (OIG) report as well as another 1,369 children who were ‘potentially separated from their families’ cannot be accommodated at this time.” The Department's letter further asserted

³ Department of Homeland Security, Office of Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, OIG-20-06 (Nov. 25, 2019) (online at www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf).

⁴ *Id.*

⁵ House Committee on Homeland Security, Hearing on *A Review of the Fiscal Year 2021 Budget Request for the Department of Homeland Security*, 116th Congress (March 3, 2020).

⁶ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad Wolf, Department of Homeland Security (March 4, 2020).

that “even assuming the OIG’s estimates were accurate, it would be unreasonable to expect DHS to be able to provide up to 2,228 unique current updates so expeditiously.”⁷

The Committee renews its demand for an update on the status of all 2,228 children identified in the Inspector General’s report and requests this information no later than December 1, 2020.

Subpoena for Documents Related to Exclusion of New York Residents from Trusted Traveler Programs

On October 9, 2020, the Committee issued a subpoena for documents pertaining to the inaccurate and misleading testimony that Department officials gave to the Committee regarding the Department’s arbitrary, capricious, and politically motivated decision to bar New York residents from the Trusted Traveler programs.⁸ The subpoena required the production of all responsive documents by October 23, 2020, but the Department has not yet complied with this subpoena—even though it is obvious from court filings that numerous documents responsive to this subpoena are in the Department’s possession.⁹ **The Committee demands immediate and full compliance with its outstanding subpoena.**

Additional Document Requests

In addition to its repeated failure to comply with Committee subpoenas, the Department has repeatedly failed to provide documents the Committee has requested to enable us to understand even the most basic information regarding the Department’s actions, including those pertaining to:

- Federal procurement of personal protective equipment during the coronavirus pandemic;¹⁰
- the operation of Project Airbridge, as well as the role of Jared Kushner in supply chain management efforts;¹¹
- projected caseloads and mortality due to COVID-19;¹²

⁷ Letter from Acting Assistant Secretary for Legislative Affairs Aaron L. Calkins, Department of Homeland Security, to Chairman Bennie G. Thompson, Committee on Homeland Security (March 20, 2020).

⁸ Schedule and Subpoena Instructions from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad F. Wolf, Department of Homeland Security (Oct. 9, 2020) (online at <https://homeland.house.gov/imo/media/doc/Subpoena1009.pdf>).

⁹ Letter from Audrey Strauss, Acting United States Attorney, Southern District of New York, Department of Justice, to the Honorable Jesse M. Furman, United States District Judge, Re: *New York v. Chad F. Wolf, et al.*, No. 20 Civ. 1127 (JMF) (S.D.N.Y.); *Lewis-McCoy, et al. v. Chad Wolf, et al.*, No. 20 Civ. 1142 (JMF) (S.D.N.Y.) (Sept. 4, 2020).

¹⁰ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad F. Wolf, Department of Homeland Security, and Secretary Alex M. Azar II, Department of Health and Human Services (March 23, 2020) (online at <https://homeland.house.gov/imo/media/doc/DHS%20HHS%20PPE%20Letter.pdf>).

¹¹ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, and Chairwoman Carolyn B. Maloney, to the Honorable Peter T. Gaynor, Federal Emergency Management Agency (April 7, 2020) (online at <https://homeland.house.gov/imo/media/doc/040720%20Joint%20FEMA%20letter%20re%20PPE.pdf>).

¹² Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad F. Wolf, Department of Homeland Security, and Secretary Alex M. Azar II, Department of Health and Human Services (May 6, 2020) (online at <https://homeland.house.gov/imo/media/doc/Letter%20to%20HHS%20and%20DHS%20on%20projections.pdf>).

- construction at the expense of U.S. taxpayers of an ineffective wall along the Southwest border;¹³
- waiver of restrictions limiting the entry into the United States of individuals from the United Kingdom so that the President’s foreign political ally could attend the President’s political rally;¹⁴
- creation and deployment of the “Protecting American Communities Task Force” and the Department’s true understanding of extremist involvement in protest activity;¹⁵
- deployment of DHS personnel to Portland, Oregon;¹⁶
- issuance by CBP of contracts for the construction of segments of wall along the Southwest border;¹⁷
- the alleged abuse of detainees at the Irwin County Detention Center;¹⁸ and
- costs incurred by the Secret Service to protect President Trump and his family members.¹⁹

The Committee hereby renews all of these requests and expects all requested documents to be produced no later than December 1, 2020.

Documents Regarding Personnel Actions and Contracting Actions

The Committee will be conducting close oversight of the Department’s actions during the remaining days of the Trump Administration. As part of that oversight, the Committee requests that the Department produce all documents referring or relating to certain personnel actions and contracting actions. Specific requests are set forth below.

Document Requests Regarding Personnel Actions

As you know, Title 5 of the U.S. Code sets forth the statutory processes governing most personnel actions within the career Federal civil service. In general, appointments to the civil service must

¹³ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Kevin K. McAleenan, Department of Homeland Security (Oct. 18, 2019).

¹⁴ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad F. Wolf, Department of Homeland Security (June 22, 2020) (online at <https://homeland.house.gov/imo/media/doc/2020-06-22%20T%20DHS%20Act%20Sec%20-%20Seeking%20documents%20re%20Nigel%20Farage.pdf>).

¹⁵ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to the Honorable Chad F. Wolf, Department of Homeland Security (July 6, 2020) (online at <https://homeland.house.gov/imo/media/doc/2020-07-06%20T%20DHS%20Act%20Sec%20-%20Monuments%20.pdf>).

¹⁶ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, et. al., to the Honorable Chad F. Wolf, Department of Homeland Security (July 20, 2020) (online at <https://homeland.house.gov/imo/media/doc/2020-07-20%20T%20Wolf%20re%20Portland%20Protests.pdf>).

¹⁷ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, and Chairwoman Kathleen Rice, Subcommittee on Border Security, Facilitation, and Operations, to Senior Official Performing the Duties of Commissioner, Customs and Border Protection (Aug. 27, 2020) (online at <https://homeland.house.gov/imo/media/doc/CBP%20Letter%20Wall%20Contracting.pdf>).

¹⁸ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, et. al., to Senior Official Performing the Duties of Director Tony H. Pham, Immigration and Customs Enforcement (Sept. 21, 2020) (online at <https://homeland.house.gov/imo/media/doc/ICDC%20investigation%20letter.pdf>).

¹⁹ Letter from Chairman Bennie G. Thompson, Committee on Homeland Security, to Director James M. Murray, U.S. Secret Service (Jan. 15, 2020) (online at <https://homeland.house.gov/imo/media/doc/SecretServiceCostRequest.pdf>).

be made consistent with the merit system principles set forth at 5 U.S.C. §§ 2301-2307. Of note, 5 U.S.C. § 2303 identifies prohibited personnel practices which, among other actions, prohibit the granting of “any preference or advantage” to applicants. As such, federal law generally prohibits the granting of any type of favoritism to any current political appointee who seeks a position in the career civil service.

I note that President Trump recently issued an executive order that seeks to continue the Administration’s assault on the civil service by instructing agencies to convert an extensive array of positions from the competitive service to the excepted service by listing them on a new Schedule F.²⁰ The Executive Order requires the heads of agencies to “conduct, within 90 days of the date of this order, a preliminary review of agency positions covered by subchapter II of chapter 75 of title 5, United States Code” to determine which would be converted to the new Schedule F.²¹ I urge that any such reviews already underway **be halted** and that no additional reviews be conducted to ensure that career civil servants are not subjected to any additional and pointless actions that will further erode the already low morale at the Department.

Specific requirements for the implementation of the merit principles have been promulgated in 5 CFR Subchapter B. Of course, the Edward ‘Ted’ Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. 114-136, sets forth reporting requirements regarding the appointment to civil service positions of political appointees. In addition, the Office of Personnel Management (OPM) has in the past issued guidance pertaining to the conversion of political appointees, including requirements for OPM review of such conversions.

The Committee requests that DHS provide to the Committee by December 1, 2020, all documents from January 1, 2020, through the present referring or relating to:

1. The appointment into any position within the Department or any component agency—whether in the competitive service, excepted service, or Senior Executive Service—of any individual who previously held any political appointment within the Trump Administration, including but not limited to all documents provided to OPM to seek approval for the appointment (whether or not the appointment was approved or executed); and
2. The transfer from any position within the Federal government to any position within DHS or any component agency—whether in the competitive service, the excepted service, or the Senior Executive Service—of any individual who previously held any political appointment within the Trump Administration.

The Committee also requests that all documents referring or relating to any appointment or transfer meeting the criteria set forth above and made between now and January 20, 2021, be provided to the Committee no later than 5 business days after: (1) in the case of appointments that DHS completes without seeking OPM approval, the execution of the appointment; (2) in the case of appointments for which DHS seeks OPM approval, the issuance to DHS by OPM of approval or

²⁰ The White House, Executive Order on Creating Schedule F in the Excepted Service (Oct. 21, 2020) (online at <https://www.whitehouse.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/>).

²¹ *Id.*

disapproval for the request (regardless of whether the appointment is executed); and (3) for each transfer, the date of execution of each transfer, even if the transferred individual has not begun his/her new assignment in DHS.

In addition, the Committee requests that by November 20, 2020, the Department provide all documents and communications referring or relating to the appointment of any Special Government Employees—regardless of the method of appointment—between January 1, 2020 and the present. The Committee also requests that all documents referring or relating to the appointment by any method of a Special Government Employee between now and January 20, 2021, be provided to the Committee no later than five business days after the appointment is approved, regardless of whether or not the appointment is executed.

Requests Regarding Contracting Actions

Given President Trump's persistent and vocal attempts to influence the Federal procurement process, the Committee is committed to ensuring taxpayer funds are properly expended during the remainder of his term. It is also imperative that the Department not make any long-term contractual commitments during this time.

The Committee requests that DHS notify the Committee no later than five business days of the execution of any contracting actions that occur between now and January 20, 2021, that meet any of the following criteria:

1. Any award or modification with a total value exceeding \$250,000 using procedures not covered by the Federal Acquisition Regulations, such as other transaction agreements or the Commercial Solutions Opening Pilot Program authorized under Sec. 880 of the fiscal year 2017 National Defense Authorization Act (Pub. L. 114-328);
2. Any award or modification with a total value exceeding \$1 million using procedures other than full and open competition, as outlined in the Federal Acquisition Regulations; and
3. Any modification regardless of value to an otherwise expiring contract that may require the Department to obligate additional funding beyond January 20, 2021.

Thank you for your immediate attention to these matters.

Sincerely,



BENNIE G. THOMPSON
Chairman