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## United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, DC 20510-6025

<http://appropriations.senate.gov>

November 14, 2018

Matthew Whitaker  
Acting Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, DC 20530

Dear Acting Attorney General Whitaker:

We write to express our concerns about reports that the Trump Administration's "zero tolerance" policy may have diverted significant public safety resources away from prosecuting serious drug-trafficking offenses along the southern border.<sup>1</sup> As the Vice Chairman of the Appropriations Committee and the Ranking Member of the Commerce, Justice, Science, and Related Agencies Subcommittee, responsible for funding the Justice Department, we need to understand whether the Department's finite resources to prosecute drug trafficking offenders along our border are being funneled toward a policy that has failed to have its intended deterrent effect of reducing illegal border crossings.<sup>2</sup>

On April 6, 2018, former Attorney General Jeff Sessions officially announced the "zero tolerance" policy, instructing federal prosecutors in districts spanning our border with Mexico to pursue criminal charges against every adult attempting to enter the United States without authorization.<sup>3</sup> This directive immediately inundated our federal prosecutors with thousands of immigration misdemeanor cases – cases they could no longer pursue at their discretion, given resource constraints and other factors that prosecutors are typically trusted to consider. In some instances, drug-crimes prosecutors were reportedly re-assigned to handle immigration cases.<sup>4</sup>

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<sup>1</sup> See, e.g., Brad Heath, *As Feds Focused on Detaining Kids, Border Drug Prosecutions Plummeted*, USA TODAY (October 10, 2018, 2:45 AM), <https://www.usatoday.com/story/news/investigations/2018/10/10/border-drug-trafficking-prosecutions-plunged-zero-tolerance/1521128002/>.

<sup>2</sup> See, e.g., Tal Kopan, *Exclusive: Trump Admin Thought Family Separations Would Deter Immigrants. They Haven't*, CNN POLITICS (June 18, 2018, 12:25 PM), <https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html>

<sup>3</sup> See Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

<sup>4</sup> Heath, *supra* note 1.

As prosecutors scrambled to keep up with the mounting number of immigration cases – the majority of which resulted in no jail time and a small fine<sup>5</sup> – drug-trafficking prosecutions reportedly dropped by 30 percent or more along the border,<sup>6</sup> without any indication that drug trafficking activity has subsided. In a few districts, the decline was even sharper, with drug-trafficking prosecutions plummeting by 50 percent or more in the wake of the “zero tolerance” policy.<sup>7</sup>

These reports should come as no surprise. Within days of the “zero tolerance” policy taking effect, federal prosecutors began warning that immigration cases “will occupy substantially more of [their] resources . . . diverting staff, both support and attorneys, accordingly.”<sup>8</sup> A former Acting Director of U.S. Immigration and Customs Enforcement stated that “there’s no doubt in [his] mind that serious federal felony offenses are being declined because of the additional resources being spent on people crossing the southwest border.”<sup>9</sup>

Further, the “zero tolerance” policy has not accomplished its chief aim of deterring illegal border crossings,<sup>10</sup> given that border apprehensions, when compared to historical patterns, appear to have increased following implementation rather than decreased.<sup>11</sup>

In order to understand what factors are driving the decrease in drug cross-border drug prosecutions, we ask that you provide answers to the following questions along with any documentary support:

1. The April 6, 2018 memorandum announcing the “zero tolerance” policy states that if “adopting such a policy requires additional resources, each office shall identify and request such additional resources.” Did any of the U.S. Attorneys’ Offices subject to the “zero tolerance” policy request such additional resources? If so, please provide the details of such requests.
2. A few federal prosecutors – in one instance, the supervisor of the major crimes unit at a U.S. attorney’s office<sup>12</sup> – warned that this policy would divert resources from drug-related prosecutions, and said that drug smuggling cases “will be declined” as prosecutors

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<sup>5</sup> See Brad Heath, *Trump Administration’s ‘Zero Tolerance’ Border Prosecutions Led to Time Served, \$10 Fees*, USA TODAY (June 21, 2018, 6:40 PM), <https://www.usatoday.com/story/news/2018/06/21/trumps-zero-tolerance-border-prosecutions-led-time-served-and-10-fee/722237002/>.

<sup>6</sup> Heath, *supra* note 1.

<sup>7</sup> Heath, *supra* note 1 (citing a 50% decline in drug-trafficking cases in McAllen, Texas, and a 64% decline in drug-trafficking cases in Southern California).

<sup>8</sup> Brad Heath, *DOJ: Trump’s Immigration Crackdown ‘Diverting’ Resources from Drug Cases*, USA Today (June 22, 2018, 10:44 PM), <https://www.usatoday.com/story/news/2018/06/22/zero-tolerance-immigration-crackdown-diverting-resources-drug-cases/727532002/>.

<sup>9</sup> *Id.*

<sup>10</sup> See Adam Isacson, Maureen Meyer and Adeline Hite, *WOLA Report: The Zero Tolerance Policy*, WOLA (July 16, 2018), <https://www.wola.org/analysis/wola-report-zero-tolerance-policy/>.

<sup>11</sup> See Nick Miroff and Josh Dawsey, *Record Number of Families Crossing U.S. Border as Trump Threatens New Crackdown*, THE WASHINGTON POST (October 17, 2018), [https://www.washingtonpost.com/world/national-security/record-number-of-families-crossing-us-border-as-trump-threatens-new-crackdown/2018/10/17/fe422800-c73a-11e8-b2b5-79270f9cce17\\_story.html?utm\\_term=.104a0cdaee0b](https://www.washingtonpost.com/world/national-security/record-number-of-families-crossing-us-border-as-trump-threatens-new-crackdown/2018/10/17/fe422800-c73a-11e8-b2b5-79270f9cce17_story.html?utm_term=.104a0cdaee0b).

<sup>12</sup> Heath, *supra* note 8.



would have to triage caseloads. Did anyone responsible for overseeing the “zero tolerance” policy program directly consult with the line attorneys or supervisory federal prosecutors along the border about resource diversion? If so, what did those consultations entail, and how did the Justice Department address their specific concerns? If not, why not?

3. On May 2, 2018, former Attorney General Sessions assigned 35 new Assistant United States Attorneys (AUSAs) to exclusively handle immigration prosecutions in the Southern District of Texas, the Southern District of California, the Western District of Texas, the District of Arizona, and the District of New Mexico.<sup>13</sup> When did these AUSAs arrive to their assigned districts and begin taking on cases? For each of these districts, please provide the number of drug trafficking prosecutions that were initiated or declined during the months of March, April, May, June, July, August, and September of this current year. Please provide this same information by month for each year 2015-2017.
4. What accounts for the decrease in drug prosecutions initiated along the border between fiscal years 2017 and 2018?
5. How many drug trafficking cases investigated by the Drug Enforcement Administration, the Federal Bureau of Investigation, and Department of Homeland Security Homeland Security Investigations were referred to U.S. Attorneys’ Offices for prosecution during 2015-2018? Please indicate the lead law enforcement agency, the number of drug trafficking cases referred by month and District for each year, and the number of cases that were declined for prosecution by the U.S. Attorneys’ Offices.
6. Former Attorney General Sessions requested, and the Department of Defense provided, 21 active-duty Judge Advocate Generals (JAGs) to be appointed as Special Assistant United States Attorneys to work full-time on immigration prosecutions along the southern border.<sup>14</sup> A bipartisan group of Senators wrote to Secretary Mattis expressing concerns that these active-duty JAGs would be taken away from their critical duties in the military justice system to prosecute immigration cases they are not trained to handle.<sup>15</sup> What training did these JAGs receive from the Justice Department before taking on immigration cases? What was the time frame agreed to in the original Memorandum of Understanding with the Department of Defense? What was the total cost of these JAGs for this re-assignment? Are these 21 JAGs still serving in these districts and if so, how long will they continue to serve in this role?

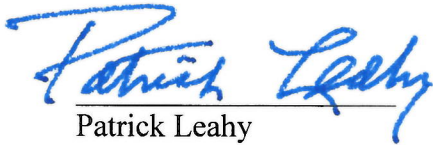
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<sup>13</sup> Press Release, U.S. Dep’t of Justice, Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis (May 2, 2018), <https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border>

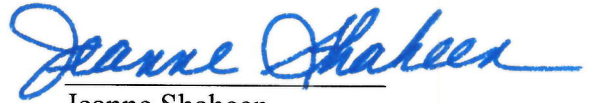
<sup>14</sup> Haley Britzky, *Mattis Approves Request to Send Military Lawyers to Southern Border*, AXIOS (June 20, 2018), <https://www.axios.com/mattis-approves-doj-request-active-duty-military-lawyers-be-sent-to-border-3ae208ba-0b71-41c2-a06f-0cbf482c9f3c.html>.

<sup>15</sup> Letter from Senators Kirsten Gillibrand, Joni Ernst and Patrick Leahy to Secretary of Defense James Mattis (June 21, 2018) (on file with Senator Kirsten Gillibrand), <https://www.gillibrand.senate.gov/imo/media/doc/Letter%20to%20SECDEF%20re%20border%20JAGs.pdf>

7. Reports indicate that a number of prosecutors in the impacted U.S. Attorneys' Offices who were working on drug-trafficking cases were reassigned to immigration cases under zero tolerance. How many prosecutors, both in total and by district, were re-assigned, including those reassigned part-time or on a temporary basis, from drug-trafficking cases or other felony cases to misdemeanor immigration cases under the "zero tolerance" policy?



Patrick Leahy  
United States Senator



Jeanne Shaheen  
United States Senator