

New Report by Office of Inspector General Suggests Kristjen Nielsen May Have Perjured Herself Before Congress

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A new report from the Department of Homeland Security's Office of Inspector General (OIG) indicates that former Homeland Security Secretary **Kirstjen Nielsen** may have given false testimony to Congress about whether the Trump Administration was taking steps to reduce the processing of refugees at the U.S.-Mexico border.

In December 2018, then-Secretary Kirstjen Nielsen appeared at a Congressional oversight hearing in which she answered questions related to border security actions and immigration enforcement policies. During the hearing, Nielsen expressed condolences to the family of the 7-year-old migrant girl who died of dehydration and shock after being apprehended by U.S. Customs and Border Protection (CBP). She also discussed Trump's plans for implementing what would later be called the "Remain in Mexico" policy.

At the time, the Trump administration was also asking that the Supreme Court uphold its asylum ban, arguing that advocacy groups such as the ACLU shouldn't be allowed to litigate on behalf of refugees.

Even shortly after the hearing, there were many questions about the accuracy of Nielsen's response. Analysis in early 2019 by the Cato Institute discussed the Trump Administration's having drastically reduced processing of migrants at the border. Immigration policy analyst **David J. Bier** wrote in February 2019:

"The Department of Homeland Security (DHS) has been turning away asylum seekers, families, and other migrants without paperwork as they attempt to apply for entry at legal ports along the U.S.-Mexico border. Migrants are then forced to wait days, weeks, or months homeless in Mexico. The policy clearly violates U.S. asylum law, which has no limit on asylum applications, and according to the DHS Office of the Inspector General, the practice results in many choosing to enter illegally."

The October 2020 OIG report, however, has brought this back into the spotlight. Immigration legal experts said that the OIG report showed Nielsen lied under oath to Congress.

The report released by the OIG on October 27, 2020 found that "in May 2018, DHS and CBP leaders anticipated an increase in undocumented aliens seeking entry at the southern border." In response, it found, Secretary Nielsen looked into conducting "Queue Management" – turning away some of the undocumented aliens by having CPB officers stand at a "limit line" at the U.S.-Mexico border." Arguably the most damning line was this:

“After learning that 650 aliens would be prevented from entering ports every day, in June 2018, then-DHS Secretary Kirstjen Nielsen authorized the practice.”

The report also found that that Nielsen “told the ports that processing inadmissible aliens (who include asylum seekers) was not one of CPB’s main priorities, and they should consider re-assigning staff away from processing such aliens to focus instead of detecting and apprehension of narcotics and currency smugglers.”

Clearly, Nielsen’s statements to the committee do not square with the findings in the OIG report. But do the differences rise to the level of perjury?

The federal perjury statute is 18 U.S. Code § 1621. It says:

Whoever—

(1)having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2)in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Nielsen gave sworn testimony before a competent tribunal authorized to administer an oath. What’s open for discussion is: 1) whether she willfully stated anything that she did not believe to be true; and 2) whether, if so, those things count as “any material matter.”

Let’s start with “any material matter.” The generally-accepted legal definition of “material” is “relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.”

In the case of Nielsen’s testimony before Congress, “the case” would probably be defined as Congress’s oversight of DHS border security actions. True, it wasn’t a “hearing” in the sense that it was testimony during litigation, but oversight hearings count, and witnesses are expected to give truthful testimony. Given that the topic about which Nielsen was speaking—actions at the border—was precisely what the hearing was meant to investigate, there appears to be little doubt that her comments related to a “material matter” for purposes of perjury.

Let’s move on to whether Nielsen’s statement that she was not doing anything that would reduce capacity to handle the number of people at the ports. If the OIG’s report is taken at face value, it appears to constitute a direct conflict with Nielsen’s answer. Nielsen might offer an explanation that her answer was truthful in that it distinguished between “port hardening” and “queuing.” Still, Nielsen’s final exchange with Nadler produced a clear “no” to the question of whether processing capabilities were purposefully reduced.

The OIG report does cast serious doubt as to the veracity of that answer. Likely, Nielsen's strongest argument against perjury would be that she did not know that "Queue Management" would *actually* reduce the number of migrants that could be processed at the border. Such an argument might prove difficult given the administration's overtly hardline approach to refugees.