



U.S. Immigration and Customs Enforcement

STATEMENT

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REGARDING A HEARING ON

“Oversight of the Trump Administration’s Family Separation Policy”

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

Tuesday, February 26, 2019
2141 Rayburn House Office Building

Introduction

Chairman Nadler, Ranking Member Collins, and distinguished members of the Committee, my name is Nathalie Asher and I am the Acting Executive Associate Director for U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO). As a career law enforcement officer with more than two decades of experience, I appreciate the opportunity to appear before you today to discuss ICE's role in supporting the Administration's family reunification efforts, as well as its critical mission of protecting the homeland and ensuring the integrity of our nation's immigration system through the enforcement of our country's immigration laws.

Pursuant to its statutory responsibilities, ICE is one of several agencies involved in the processing of unaccompanied alien children (UAC) and family units. ICE plays a critical role by quickly and safely transporting UAC from U.S. Customs and Border Protection (CBP) custody to the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR), and supports HHS vetting of potential UAC sponsors. The agency is also charged with housing alien families together at family residential centers (FRCs),¹ and with effectuating removal orders at the conclusion of immigration proceedings. From the time the "Zero Tolerance" Policy was announced in April 2018, until the President issued an Executive Order with regard to maintaining family unity in June 2018, ICE was called upon to assist CBP by providing transportation for children who had been separated at the border to HHS, as well as detention beds for adults who had been referred for prosecution and were later transferred to ICE custody. Subsequently, ICE assisted with the effort to reunify families by identifying separated parents in its custody, establishing communication between parents and their children in HHS custody, transporting parents to designated ICE facilities where they were reunified with their children, and housing a limited number of families together in its FRCs.

Zero Tolerance Policy and Family Separation

On April 6, 2018, the Attorney General announced a "Zero Tolerance" policy, in which United States Attorney's Offices along the Southwest Border would prosecute, to the extent practicable, all offenses referred for prosecution under 8 U.S.C. § 1325(a). Subsequently, on May 4, 2018, the Secretary of Homeland Security directed DHS law enforcement officers and agents to ensure that all adults amenable to prosecution for improper entry in violation of 8 U.S.C. § 1325(a) be referred to the Department of Justice (DOJ) for criminal prosecution. On May 5, 2018, CBP began implementing this policy, resulting in the transfer of adults who had entered illegally to U.S. Marshals Service (USMS) custody and their referral for pending prosecution. In many cases, when adults are transferred to the USMS for prosecution, their children become UAC as defined in Section 279(g)(2) of Title 6 of the U.S. Code. Pursuant to the *Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA), DHS generally must transfer any UAC in its custody to HHS for care and custody within 72 hours of determining the child to be a UAC, absent exceptional circumstances. As a result, approximately 2,700 children who were separated

¹ As a result of the *Flores* Settlement Agreement (FSA), and judicial orders interpreting the FSA, ICE is generally only able to detain accompanied minors for approximately 20 days. As a result, most family units are only detained by ICE for a very limited period.

from their parents or legal guardians at the border were transferred to HHS, while their parents were transferred to USMS custody, and subsequently ICE custody.

On June 20, 2018, President Trump signed an Executive Order entitled, *Affording Congress an Opportunity to Address Family Separation*. This Order clarified that it is the Administration's policy to rigorously enforce our immigration laws, including by pursuing criminal prosecutions for illegal entry under 8 U.S.C. § 1325(a), until and unless Congress directs otherwise. At the same time, the Administration will maintain family unity, including by detaining alien families together during the pendency of legal proceedings, where appropriate and consistent with law and available resources.

Family Reunification Efforts and Associated Challenges

On February 26, 2018, the American Civil Liberties Union (ACLU) filed a lawsuit in the U.S. District Court for the Southern District of California, *Ms. L. v. ICE*, alleging that the separation of parents and children who were apprehended at or between ports of entry violated the parents' constitutional right to maintain family unity during immigration proceedings. The lawsuit asked the court for an order prohibiting such separations. On June 6, 2018, the court denied the Government's motion to dismiss, finding that the plaintiffs had alleged sufficient facts and a plausible claim for relief.

On June 26, 2018, the court certified a class of plaintiffs consisting of parents who have been, are, or will be transferred to DHS custody, and whose children were separated from them at the border and are or will be detained in HHS custody. The court excluded parents with criminal histories or communicable diseases, and those apprehended in the interior, from the class. The court also ordered DHS and HHS to reunify eligible parents with their minor children under the age of five within 14 days (Phase One) and to reunify eligible parents with their minor children age five and older within 30 days (Phase Two).

Despite significant logistical challenges, ICE and its partners have done everything possible to comply with these orders—an effort that had personnel working 24 hours a day and has been praised by the Court, which noted during the July 27, 2018 status conference that the Government deserved “great credit” for its efforts. To be clear, throughout the reunification process, the Government's primary goal has been the protection and care of the children involved, and ICE has carried out its supporting role in the reunification effort with this in mind.

Phase One of this process, reunifying eligible parents with their minor children under the age of five, was completed on July 12, 2018. On August 16, 2018, the parties to the litigation in the case of *Ms. L v. ICE* filed a reunification plan regarding removed parents. In compliance with *Ms. L v. ICE*, the government continues to provide regular updates to the Court on the status of reunification efforts. These updates are available on the public docket for *Ms. L v. ICE*, No. 18-428 (S.D. Cal. Filed Feb. 26, 2018).

While ICE has longstanding procedures which dictate family separations, reunifications, and the transfer of UAC to HHS custody, separations occurring in ICE custody are infrequent, and are typically conducted based on concerns for a child's welfare. Such factors could include

the adult's criminal or immigration history, observed behaviors or actions that cause DHS to become concerned for the welfare of the child, concern about false parental or familial relationship, or a suspicion of smuggling. Because such occurrences are rare for ICE, the agency was previously able to handle them individually, taking into account all relevant factors to ensure that each case was managed appropriately. However, due to the volume of separations that occurred after the Zero Tolerance policy went into effect, and the fact that such separations occurred prior to ICE's involvement, ICE has had to develop a process for coordinating closely with partner agencies, and for sharing relevant data.

During the reunification process, ICE ERO's primary role consisted of ensuring that separated parents in ICE custody were identified, parents could communicate with their children in HHS custody, and parents could be transported to a designated center for reunification. ICE worked closely with CBP and HHS to identify parents in its custody whose children had been transferred to HHS—a challenging process which involved manual comparison of information across agencies. While all three agencies have now implemented data sharing processes, prior to August 2, 2018, the manual process to identify parents who had been separated from a minor child was highly resource-intensive. Additionally, to ensure that parents could communicate with their children in HHS custody, ICE officers and HHS staff worked together to facilitate communications via telephone, Skype, and FaceTime. ICE also produced posters in multiple languages to explain how parents could request an opportunity to communicate with their children who were in HHS custody.

In order to support the reunification of parents in ICE custody with their children, ICE ERO's Areas of Responsibility (AORs) in San Antonio, El Paso, and Phoenix were designated as centers of reunification for children, ages five to seventeen, whose parents were in DHS custody, and were eligible to be reunified based on an HHS evaluation of parentage, fitness, and safety considerations. ICE then worked to transport parents who were in custody elsewhere to the designated AORs for reunification. During release, ICE closely coordinated with local non-governmental organizations to effectuate a safe release plan, and to ensure that necessary services such as food, shelter, clothing, and travel were available.

In addition to current reunification efforts, ICE and its federal partners continue to coordinate to ensure that any separations of parents and children are recorded and tracked appropriately when they do occur. As a result of this effort, CBP, HHS, and ICE have enhanced their data sharing, with both CBP and ICE now able to access HHS's UAC Portal directly and to enter relevant information into the system. Additionally, on August 2, 2018, USBP updated its system to refine the process by which it tracks family units to include when family members are separated from each other, and ICE also updated its system, the ENFORCE Alien Removal Module, to reflect the new information entered by CBP. As a result, all members of family units encountered after this date are now clearly identified in ICE's system, a significant improvement that will help address the information challenges that occurred during the court-ordered reunification process.

Challenges and Legislative Fixes

Beginning with the initial surge in fiscal year (FY) 2014, there has been a significant increase in the arrival of both family units and UAC across the Southwest Border, a trend which

continues despite the Administration's enhanced enforcement efforts. In FY 2018, approximately 59,000 UAC and 161,000 members of family units were apprehended or determined to be inadmissible at the Southwest Border, an increase from FY 2017, when approximately 49,000 UAC and 105,000 members of family units were apprehended or determined to be inadmissible. These numbers place further strain on our already overburdened immigration system, and DHS and ICE are faced with the challenging task of upholding our immigration system and the laws passed by Congress, while maintaining family unity and protecting those in custody.

It is important to note that current laws and court rulings that favor the release of family units and UAC often require the federal government to release members of these populations into communities across the United States. This practice not only leads to legitimate family units failing to appear for court hearings and failing to comply with removal orders, but also incentivizes smugglers to place children into the hands of adult strangers, so that they can pose as families and be released from immigration custody. In fact, between April 19, 2018 and September 30, 2018, DHS identified 336 claimed family unit members who were separated due to the lack of a family relationship, an obvious safety issue. While the data does not show nor does DHS assert that all or most apprehended family units are illegitimate, it does indicate that there is a significant problem, and DHS must have the ability to protect the best interest and welfare of minors involved in potential smuggling or trafficking situations.

One of the major challenges ICE faces with regard to family units is the *Flores* Settlement Agreement (FSA), and judicial orders interpreting it. Courts have interpreted the FSA as not only applying to UAC, but also to minors who are accompanied by their parents. Pursuant to such orders (and court orders regarding the licensure of family residential centers), DHS is generally precluded from detaining family units beyond approximately 20 days in order to allow for a decision by an asylum officer on whether the parent and/or child has a credible fear of returning to their home country. Because most cases take much longer to conclude, family units are often not in ICE custody when a final removal order is issued, and ICE lacks the resources to locate, arrest, and remove the thousands of family unit members who fail to appear or depart as ordered.

While the DOJ's Executive Office for Immigration Review (EOIR) Accelerated Family Unit Docket issued 2,542 final orders of removal, the vast majority of these family unit members failed to show up for their court hearing, and 2,460 of these final orders—96.7%—were issued *in absentia*.² Between the continuing influx of family units, the growing immigration court backlog of more than 800,000 cases, and the fact that there are often no consequences for those who fail to depart as ordered, very few members of family units will be removed unless the push and pull factors that incentivize families to make the dangerous journey to this country are addressed. As a result of these issues, of the family units from Central America who were apprehended at the Southwest Border in FY 2017, more than 98% remain in the country today.

Because ICE does not have sufficient family detention beds in its three designated FRCs to address the numbers of family units and can generally only hold them for approximately 20

² EOIR has reported that it issued more than 45,000 removal orders *in absentia* in FY 2018.

days due to the FSA and judicial decisions interpreting it, most members of this population remain non-detained with little or no oversight. Although ICE has sought to deal with the rapid increase in this population through additional strategies, such as Alternatives to Detention (ATD), this has proven ineffective in the management of arriving aliens. While ICE is currently utilizing ATD for certain qualified family units, there are significant challenges with using the program to manage members of this population, and absconder rates are much higher for this group because most have no existing ties to the community and may not know their final geographic destination. In FY 2018, the absconder rate for traditional ATD participants was 16%, while it was 27.4% for family units. Ultimately, without the necessary authority to enable ICE to detain family units for the duration of legal proceedings, to hold those accountable who fail to comply with ATD or release conditions, and without sufficient resources to apprehend those who abscond, this situation will result in virtual impunity for those who violate our immigration laws and the flow of aliens into the United States will continue, if not increase.

Conclusion

Our nation continues to experience an unprecedented crisis on our Southern Border that is the result of outdated laws—created by federal law and various court decisions—that prevent the detention of illegal alien minors and family units during the pendency of their removal proceedings, and that inhibit the government from effectively removing those who receive final orders from an immigration judge. As a result, legislative changes are needed to ensure that DHS and ICE have the necessary authorities to ensure the safe and successful repatriation of persons ordered removed by an immigration judge, in addition to ensuring that ICE has adequate resources to continue to execute its mission. Without the necessary funding and legislative changes, the integrity of our immigration system will continue to be undermined.

Thank you again for the opportunity to appear before you today, and for your continued support of ICE. I would be pleased to answer any questions.