



U.S. Immigration and Customs Enforcement

STATEMENT

OF

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REGARDING A HEARING ON

*“Reinterpretation of Flores Settlement and Its Impact on
Family Separation and Catch and Release”*

BEFORE THE

UNITED STATES SENATE
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE

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342 Senate Dirksen Office Building

Introduction

Chairman Johnson, Ranking Member McCaskill, and distinguished members of the Committee:

My name is Matthew T. Albence, and I am the Executive Associate Director of U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations and the Senior Official Performing the Duties of the Deputy Director. Thank you for the opportunity to appear before you today to discuss the impact of the *Flores* Settlement Agreement (FSA) on ICE's critical mission of protecting the homeland, securing the border, enforcing criminal and civil immigration laws in the interior of the United States, and ensuring the integrity of our nation's immigration system.

Our nation's immigration laws are extremely complex, and in many cases, outdated and full of loopholes. Moreover, the immigration laws have been increasingly subject to litigation before the federal courts, which has resulted in numerous court decisions, orders, and injunctions that have made it increasingly difficult for ICE to carry out its mission. The current legal landscape often makes it difficult for people to understand all that the dedicated, courageous, professional officers, agents, attorneys, and support staff of ICE do to protect the people of this great nation. To ensure the national security and public safety of the United States, our officers faithfully execute the immigration laws enacted by Congress, which may include enforcement action against any alien encountered in the course of their duties who is present in the United States in violation of immigration law.

Executive Orders

During his first two weeks in office, President Trump signed a series of Executive Orders that laid the policy groundwork for the Department of Homeland Security (DHS) and ICE to carry out the critical work of securing our borders, enforcing our immigration laws, and ensuring that individuals who pose a threat to national security or public safety, or who otherwise are in violation of the immigration laws, are not permitted to enter or remain in the United States. These Executive Orders established the Administration's policy of effective border security and immigration enforcement through the faithful execution of the laws passed by Congress.

On June 20, 2018, President Trump signed an Executive Order entitled, *Affording Congress an Opportunity to Address Family Separation*. This Executive Order clarified that it is the policy of the Administration 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. The goal of this Executive Order was to allow DHS to continue its judicious enforcement of U.S. immigration laws, while maintaining family unity for those illegally crossing the border. However, the FSA, as interpreted by court decisions, makes it operationally unfeasible for DHS and ICE to simultaneously enforce our immigration laws and maintain family unity, and DHS supports legislation that replaces this decades-old agreement with a contemporary solution that effectively addresses current immigration realities and border security requirements.

Challenges and Legislative Fixes

Since the initial surge at the Southwest border in Fiscal Year (FY) 2014, there has been a significant increase in the arrival of both family units and unaccompanied alien children (UACs) at the Southern border, a trend which continues despite the Administration's enhanced enforcement efforts. Thus far in FY 2018, as of the end of August, approximately 53,000 UACs and 135,000 members of alleged family units have been apprehended at the Southern border or deemed inadmissible at Ports of Entry. These numbers represent a marked increase from FY 2017, when approximately 49,000 UACs and 105,000 members of family units were apprehended or deemed inadmissible throughout the entire fiscal year.

Most of these family units and UACs are nationals of the Central American countries of El Salvador, Guatemala, and Honduras. While historically Mexico was the largest source of illegal immigration to the United States, the number of Mexican nationals attempting to cross the border illegally has dropped dramatically in recent years. This is significant, because removals of non-Mexican nationals take longer, and require ICE to use additional detention capacity, expend more time and effort to secure travel documents from the country of origin, and arrange costly air transportation. Additionally, pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), UACs from countries other than Canada and Mexico may not be permitted to withdraw their applications for admission, further encumbering the already overburdened immigration courts. With an immigration court backlog of over 700,000 cases on the non-detained docket alone, it takes years for many of these cases to work their way through the immigration court system, and few of those who receive final orders are ever actually returned to their country of origin. In fact, only approximately 3% of UACs from Honduras, El Salvador, or Guatemala encountered at the Southwest border in FY 2014 had been removed or returned by the end of FY 2017, despite the fact that by the end of FY 2017 approximately 26% of this cohort had been issued a final removal order.¹

One of the most significant impediments to the fair and effective enforcement of our immigration laws for family units and UACs is the FSA. In 1997, the former Immigration and Naturalization Service (INS) entered into the FSA, which was intended to address the detention and release of unaccompanied minors. Since it was executed, the FSA has spawned over twenty years of litigation regarding its interpretation and scope and has generated multiple court decisions resulting in expansive judicial interpretations of the original agreement in ways that have severely limited the government's ability to detain and remove UACs as well as family units. Pursuant to court decisions interpreting the FSA, DHS can generally only detain alien minors accompanied by a family member in a family residential center for approximately 20 days before releasing them, and the TVPRA generally requires that DHS transfer any UAC to the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances. However, when these UACs are released by HHS, or family units are released from DHS custody, many fail to appear for court hearings and actively ignore lawful removal orders issued against them. Notably, for family units encountered at the Southwest border in FY

¹ This figure includes aliens who accepted an order of voluntary departure but whose departure from the United States has not been confirmed. Approximately 44% of the cohort remained in removal proceedings as of the end of FY 2017.

2014, as of the end of FY 2017, 44% of those who remained in the United States were subject to a final removal order, of which 53% were issued *in absentia*. With respect to UACs, the Department of Justice's Executive Office for Immigration Review reports that from the beginning of FY 2016 through the end of June in FY 2018, nearly 19,000 UACs were ordered removed *in absentia*—an average of approximately 568 UACs per month.

This issue has not been effectively mitigated by the use of Alternatives to Detention (ATD), which has proved to be substantially less effective and cost-efficient in securing removals than detention. Specifically, while the ATD program averages 75,000 participants, in FY 2017, only 2,430 of those who were enrolled in the ATD program were removed from the country—this accounts for only one percent of the 226,119 removals conducted by ICE during that time. Aliens released on ATD have their cases heard on the non-detained immigration court dockets, where cases may linger for years before being resolved. Thus, while the cost of detention per day is higher than the cost of ATD per day, because those enrolled in the ATD program often stay enrolled for several years or more, while those subject to detention have an average length of stay of approximately 40 days, the costs of ATD outweighs the costs of detention in many cases. Nor are the costs of ATD any more justified by analyzing them on a per-removal basis. To illustrate, in FY 2014, ICE spent \$91 million on ATD, which resulted in 2,157 removals; by FY 2017, ICE spending on ATD had more than doubled to \$183 million but only resulted in 2,430 removals of aliens on ATD—an increase of only 273 removals for the additional \$92 million investment, and an average cost of \$75,360 per removal. Had this funding been utilized for detention, based on FY 2017 averages, ICE could have removed almost ten times the number of aliens as it did via ATD.

Moreover, because family units released from custody and placed on ATD abscond at high rates—rates significantly higher than non-family unit participants—many family units must be apprehended by ICE while at large. Specifically, in FY 2018, through July 31, 2018, the absconder rate for family units on ATD was 27.7%, compared to 16.4% for non-family unit participants. Such at-large apprehensions present a danger to ICE officers, who are the victims of assaults in the line of duty at alarmingly increasing rates. In FY 2017 and FY 2018, through the end of August, ICE's Office of Professional Responsibility and/or the DHS Office of the Inspector General investigated 73 reported assaults on ICE officers, 17 of which have resulted in an arrest, indictment, and/or conviction to date. Additionally, because ICE lacks sufficient resources to locate, arrest, and remove the tens of thousands of UACs and family units who have been ordered removed but are not in ICE custody, most of these aliens remain in the country, contributing to the more than 564,000 fugitive aliens on ICE's docket as of September 8, 2018.

Unfortunately, by requiring the release of family units before the conclusion of immigration proceedings, seemingly well-intentioned court rulings, like those related to the FSA, and legislation like the TVPRA in its current form create legal loopholes that are exploited by transnational criminal organizations and human smugglers. These same loopholes encourage parents to send their children on the dangerous journey north, and further incentivizes illegal immigration. As the record numbers indicate, these loopholes have created an enormous pull-factor. Amendments to the laws and immigration court processes are needed to help ensure the successful repatriation of aliens ordered removed by an immigration judge. Specifically, the following legislative changes are needed:

- Terminate the FSA and clarify the government's detention authority with respect to alien minors, including minors detained as part of a family unit.
- Amend the TVPRA to provide for the prompt repatriation of any UACs who are not victims of human trafficking and who do not express a fear of return to their home country, and provide for similar treatment of all UACs from both contiguous or noncontiguous countries to ensure they are swiftly and safely returned to their countries of origin.
- Amend the definition of "special immigrant juvenile" to require that the applicant demonstrate that reunification with both parents (together or separately) is not viable due to abuse, neglect, or abandonment, and that the applicant is a victim of trafficking. The current legal requirement is simply not operationally viable.
- Address the credible fear standard—a threshold standard for those subjected to expedited removal to be able to pursue asylum before the immigration courts. The current standard has proved to be ineffective in screening out those with fraudulent or frivolous claims, and it thus creates a pull factor and places a strain on the system that inhibits the government's ability to timely address meritorious asylum claims while allowing those without valid claims to remain in the United States.

Conclusion

Thank you again for the opportunity to appear before you today, and for your continued support of ICE and its essential law enforcement mission. We continue to respond to the trend of family units and UACs who are apprehended while illegally crossing into the United States, and to address this humanitarian and border security issue in a manner that is comprehensive, coordinated, and humane. Though DHS and ICE are continuing to examine these issues, ongoing litigation and recent court decisions require a permanent fix from Congress to provide operational clarity for officers in the field and to create a lasting solution that will secure the border. Congress must act now to eliminate the loopholes that create an incentive for new illegal immigration and provide ICE with the lawful authority and requisite funding needed to ensure that families can be detained together throughout the course of their immigration proceedings. Most family units claiming to have a fear of returning to their home countries are not ultimately granted asylum or any other relief or protection by immigration judges, and it is imperative that ICE can ensure that when such aliens are ordered removed from the United States they are actually removed pursuant to law.

I would be pleased to answer your questions.