



Department of Justice

STATEMENT OF

**JAMES MCHENRY
DIRECTOR
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

FOR A HEARING ENTITLED

**“OVERSIGHT OF TRUMP ADMINISTRATION’S FAMILY SEPARATION
POLICY”**

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Statement of
James McHenry
Director
Executive Office for Immigration Review
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Before the
House of Representatives Committee on the Judiciary

Entitled
Oversight of Trump Administration’s Family Separation Policy
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Mr. Chairman, Ranking Member Collins, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today regarding the Department of Justice’s (“Department”) role in the Zero Tolerance Prosecution Initiative and the federal government’s activities along the southern border during the Spring and Summer of 2018. I welcome the opportunity to address this matter from the Department’s perspective.

The Department’s mission is: “[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those who commit crimes; and to ensure fair and impartial administration of justice for all Americans.” In following this mission, and in carrying out specific authorities defined by Congress, the Department plays a key role in enforcing this nation’s immigration laws.

First and foremost, through the U.S. Attorneys’ offices, in conjunction with the U.S. Marshals Service (“USMS”) and the Bureau of Prisons, the Department enforces the criminal laws enacted by Congress and seeks punishment for those guilty of unlawful behavior. Congress has provided that certain violations of the nation’s immigration laws be subject to criminal sanction. The Department’s law enforcement role applies no less to these immigration crimes than it does to other categories of offenses. It is clear that Congress created criminal immigration offenses with the expectation that they would be enforced. Congress made it a crime to cross the border illegally—seeking to deter that dangerous behavior and direct those seeking refuge in the United States to ports of entry. When individuals with children are in federal criminal custody for any offense, there will necessarily be a separation from their children during that custody—and indeed the court in the *Ms. L* litigation specifically acknowledged that to be entirely appropriate.

Section 13 of the President’s Executive Order 13767 directs the Attorney General to establish guidelines and allocate resources to ensure that federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border. The Order did not create a so-called family separation policy. In fulfillment of that Order, on April 11, 2017, then Attorney General Sessions issued a memorandum to all federal prosecutors outlining certain

immigration-related offenses, including improper entry under 8 U.S.C. §1325, as high priorities for prosecution. Additionally, the Attorney General directed each district to designate a Border Security Coordinator to be responsible for, among other activities, overseeing the investigation and prosecution of these offenses.

On April 6, 2018, Attorney General Sessions issued a memorandum entitled “Zero-Tolerance for Offenses under 8 U.S.C. §1325(a).” That memo directed federal prosecutors along the southern border to adopt a “zero-tolerance policy for all offenses referred for prosecution under section 1325(a)” by the Department of Homeland Security (“DHS”). That memorandum remains in force today, and illegal or improper entry, among other criminal immigration offenses, remains a prosecution priority for the Department. Furthermore, the President restated the prioritization of prosecuting illegal entry crimes in Executive Order 13841, which also reiterated that the current policy is to enforce the immigration laws passed by Congress. The April 6 memorandum did not create a so-called policy of family separation.

The Zero-Tolerance Prosecution initiative is simple—it makes clear that those who violate our criminal immigration laws and are referred for prosecution by DHS should in fact be prosecuted.

The Department does not dictate which cases are referred by the DHS for prosecution, nor does it maintain a general exemption from prosecution for parents accompanied by their minor children. Indeed, doing so would create a terrible incentive encouraging adults to bring young children on the dangerous journey to illegally cross the border to avoid prosecution and immigration detention. The Department also has no operational or logistical role in the apprehension, care, or processing of aliens, regardless of whether they are adults or minors. Accordingly, the Department does not have an operational or a logistical role in the separation of alien children from their parents nor in the reunification process.

Upon apprehension and initial processing by U.S. Customs and Border Protection, a component agency of the DHS, adults referred for prosecution under 8 U.S.C. §1325 generally are transferred to the custody of the USMS for the pendency of their criminal matters.

While the vast majority of aliens prosecuted under 8 U.S.C. §1325 are adults who entered alone, many adults have illegally entered the United States with minors and were prosecuted for the crimes of illegal entry or reentry. Prior to President Trump’s Executive Order 13841 of June 20, 2018—and because the USMS does not and cannot house minors with adults charged with criminal offenses—alien minors without a parent or legal guardian available to provide care and physical custody were transferred by the DHS to the Department of Health and Human Services (“HHS”) in accordance with the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”). Once the USMS took custody of the parents, pursuant to statute, minors remaining in DHS custody would, by definition, become unaccompanied alien children and were treated accordingly.

At the conclusion of the criminal proceeding and any sentence of imprisonment, the DHS generally assumes custody of the adult alien for whatever action it deems appropriate, consistent with applicable law. Criminal proceedings are separate from administrative immigration

proceedings, and prosecution for illegal entry under the auspices of the Zero Tolerance Prosecution initiative does not foreclose an alien's ability to seek asylum or other protection in the United States. Consequently, depending on the particular circumstances of the adult, he or she may seek protection or relief from removal or, alternatively, may not contest removal from, or voluntarily depart, the United States.

If the adult alien seeks protection in the United States, that claim generally is considered by the DHS in the first instance. As the claim progresses, it may eventually be reviewed by an immigration judge in the Executive Office for Immigration Review, which is a component of the Department of Justice. As the facts of a case warrant, an immigration judge will determine an adult alien's removability and adjudicate any claim to remain in the United States. Unaccompanied alien children placed in immigration proceedings pursuant to law will also have their cases heard by an immigration judge.

As the issue of family separation and reunification has reached the federal courts, however, the Department continues to provide representation to those agencies that do provide care for aliens subject to removal. Consequently, I may be limited in my ability to speak to certain issues today, either because they are currently in litigation or because they are more properly directed to another agency. Nevertheless, the Department recognizes the seriousness of the situation and is appropriately advising both the DHS and HHS as they continue to abide by any orders issued by federal courts on these matters.

The current immigration system faces numerous legal and logistical challenges. Nationwide immigration enforcement is being dictated by court orders, rather than by sound policy choices via rulemaking allowing public comment or Congressional action. Operationally, space and resource constraints inhibit flexibility in responding appropriately to sudden influxes of illegal aliens, particularly family units.

Nevertheless, as the formal title of Executive Order 13841, "Affording Congress an Opportunity to Address Family Separation," indicates, the Department stands ready to work with Congress to respond to these challenges and to improve existing laws to avoid a reoccurrence of the present situation.

Thank you for this opportunity to speak before you today, I look forward to further discussions on these issues.