



# Department of Justice

---

**STATEMENT OF**

**JOSEPH B. EDLOW  
DEPUTY ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL POLICY  
UNITED STATES DEPARTMENT OF JUSTICE**

**BEFORE THE**

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

**FOR A HEARING ENTITLED**

**“OVERSIGHT OF FAMILY SEPARATION AND CBP SHORT-TERM  
CUSTODY UNDER THE TRUMP ADMINISTRATION”**

**PRESENTED ON**

**JULY 25, 2019**

**Statement of**  
**Joseph B. Edlow**  
**Deputy Assistant Attorney General**  
**Office of Legal Policy**  
**Department of Justice**

**Before the**  
**House of Representatives Committee on the Judiciary**

**Entitled**  
**Oversight of Family Separation and CBP Short-Term Custody under the Trump**  
**Administration**

**July 25, 2019**

Mr. Chairman, Ranking Member Collins, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today regarding 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 additional opportunity to address this matter from the Department of Justice's perspective.

This is the second time that the Department of Justice ("Department") has addressed this matter formally with this distinguished Committee. 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 the nation's immigration laws.

Congress has mandated 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 journey. When individuals with children are in federal criminal custody for any offense, whether for an immigration-related offense or for any other violation of criminal law, there is by necessity, a separation from their children during that custody – and indeed the court in the *Ms. L* litigation specifically acknowledged that such separation is 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. This memorandum did not create a so-called policy of family separation.

On April 6, 2018, Attorney General Sessions issued a memorandum entitled “Zero-Tolerance for Offenses under 8 U.S.C. § 1325(a).” That memorandum directed federal prosecutors along the southern border, “to the extent practicable, and in consultation with DHS” to adopt a “zero-tolerance policy for all offenses referred for prosecution under section 1325(a)” by the Department of Homeland Security (“DHS”). Illegal or improper entry, among other criminal immigration offenses, is a prosecution priority for the Department of Justice. The President restated the prioritization of prosecuting illegal entry crimes in Executive Order 13841, which reiterated the current policy of enforcing the immigration laws passed by Congress.

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 DHS for prosecution, nor does it maintain a general exemption from prosecution for parents accompanied by their minor children. The Department of Justice also plays no operational or logistical role in the apprehension, care, or processing of aliens, regardless of whether they are adults or minors.

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 crime of illegal entry. Prior to President Trump’s Executive Order 13841 of June 20, 2018—and because the U.S. Marshals Service does not and cannot house minors with adults charged with criminal offenses—alien minors no longer had a parent or legal guardian and thus were determined to be unaccompanied alien children. These unaccompanied alien children 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”).

At the conclusion of the criminal proceeding and any sentence of imprisonment, 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.

If the alien seeks protection in the United States, his or her claim may eventually be reviewed by an immigration judge in the Executive Office for Immigration Review (“EOIR”), which is a component of the Department of Justice. As the facts of a case warrant, an immigration judge will determine an alien’s removability and adjudicate any claim to remain in the United States.

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 maintain custody of removable aliens. 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. The outdated *Flores* Settlement Agreement and subsequent reinterpretations constitute a roadblock to solutions for keeping families together once encountered at the border. Exploitation of our asylum laws, the difficulties in retaining custody over family units, and the UAC provisions of TVPRA have compounded these challenges and left the federal government with even fewer viable options to address our ever-growing crisis along the border.

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.