



TESTIMONY OF

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BEFORE

U.S. House of Representatives
Committee on the Judiciary

ON

“Oversight of Trump Administration’s Family Separation Policy”

February 26, 2019
Washington, DC

Chairman Nadler, Ranking Member Collins, and Members of the Committee, it is my honor to appear before you today to discuss U.S. Customs and Border Protection's (CBP) role in the Administration's Zero Tolerance prosecution initiative as part of our immigration enforcement efforts.

Timeline of Zero Tolerance Initiative

On April 6, 2018, the U.S. Department of Justice (DOJ) instituted Zero Tolerance, a policy to prosecute all referred violations of 8 U.S.C. § 1325(a), which prohibits both improper entry and *attempted* improper entry by an alien.

Subsequently, on May 4, 2018, the Secretary of Homeland Security, Kirstjen Nielsen, directed officers and agents to ensure that all adults deemed prosecutable for improper entry in violation of 8 U.S.C. § 1325(a) are referred to the Department of Justice for criminal prosecution. On May 5, 2018, acting at the Secretary's direction, the U.S. Border Patrol (USBP) began referring greater numbers of violators of 8 U.S.C. § 1325(a) for prosecution. The Zero Tolerance initiative applied to all amenable adults (including parents or legal guardians traveling with minor children).

Consequently, when a parent or legal guardian traveling with a child was accepted for prosecution by DOJ under Zero Tolerance, and was thus transferred to U.S. Marshals Service custody for the duration of their criminal proceedings, the child could not remain with the parent or legal guardian during criminal proceedings or subsequent incarceration. That child was referred to the custody and care of the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR).

On June 20, 2018, President Trump issued Executive Order 13841, *Affording Congress the Opportunity to Address Family Separation*, which directed DHS to detain families together for the pendency of any criminal improper entry or immigration proceedings, to the extent permitted by law and subject to the availability of resources. Within hours of issuance of the Executive Order, CBP leadership issued guidance to the field directing that parents or legal guardians who entered with children were no longer to be referred for prosecution for 8 U.S.C. § 1325(a). Following issuance of the Executive Order, CBP reunified more than 500 children in our custody with their parents or legal guardians.

In compliance with the Executive Order and the preliminary injunction in *Ms. L v. ICE* and all other appropriate legal authorities, CBP may separate an alien child from his or her parent or legal guardian when they enter the United States if that parent or guardian poses a danger to the child, or is otherwise unfit to care for the child, has a criminal history, has a communicable disease, or is transferred to a criminal detention setting for prosecution for a crime other than improper entry. CBP may also separate an alien child from an individual purporting to be a parent or legal guardian in certain circumstances, such as where CBP is unable to confirm that the adult is actually the parent or legal guardian, or if the child's safety is at risk. However, outside of these circumstances, CBP generally keeps family units together in its short-term holding facilities.

CBP's prosecution priorities under the Zero Tolerance initiative have continued to focus on achieving 100 percent prosecution of single adult aliens who illegally enter along the southwest

border. Delivery of consequences is an essential tool needed to enforce the law and stem the flow of illegal immigration.

Current Trends in CBP Apprehensions

After the decreases in illegal immigration seen in Fiscal Year (FY) 2017, trends in FY 2018 and now in FY 2019 are worrying. On average, the U.S. Border Patrol is apprehending over 1,600 people each day between our ports of entry on the southwest border. Between the beginning of FY 2019 through January 31, 2019, Border Patrol apprehended 200,832 individuals along the southwest border. That is a staggering 83 percent increase compared to the same timeframe last year. This means that in just four months the number of apprehensions is more than halfway to the 396,579 southwest border apprehensions we made in all of FY 2018.

I specifically call your attention to family units because we are currently experiencing an unprecedented influx of family units at our southwest border. Up until this decade, most of those crossing the border illegally were single adult males. Today, family units and unaccompanied alien children (UAC) make up 60 percent of illegal border crossings along the southwest border. These family units and UAC are predominantly from Central America, namely Guatemala, Honduras, and El Salvador.

December 2018 marked the third time in Border Patrol history that family unit apprehensions exceeded single adult apprehensions. This number reflects the continuation of a trend from the past several years; from FY 2013 to FY 2018, family unit apprehensions increased 621 percent. UAC apprehensions increased 105 percent from FY 2012 to FY 2018. From the beginning of this current fiscal year to December 31, 2018, family unit apprehensions increased 280 percent when compared to the same time period in FY 2018.

In addition, we are seeing an increase in situations in which family units and UAC come across the border in large groups of 100 people or more. From the beginning of this fiscal year through January 31, 2019, Border Patrol Agents apprehended 58 large groups along the southwest border attempting to enter the United States, totaling 9,725 individuals. These large groups require intensive resources to transport, process, and transfer them to our partners, which requires pulling Agents away from our law enforcement mission to perform those tasks. Additionally, our intelligence indicates that human smugglers use the timing and location for these mass crossings strategically for other purposes: large groups disrupt normal border security operations and thereby create a diversion for narcotics smugglers, criminal aliens, and single adult aliens—who would be referred for prosecution under Zero Tolerance if apprehended—to sneak across the border unimpeded.

Operational Impact of the Crisis on the Southwest Border

What the men and the women of CBP are seeing every day at and between our ports of entry is nothing short of a border security and humanitarian crisis. Many Border Patrol stations and CBP ports of entry were built decades ago. They were designed to temporarily detain single adults, who were usually men. Our facilities were not designed for the short- or long-term holding of family units and UAC. In the El Paso Sector alone, we have seen a 434 percent increase in apprehensions this fiscal year. Many of these are family units and UAC arriving in large groups, exacerbating capacity constraints in our facilities.

Our priority is to transfer these vulnerable populations to our partners as quickly as possible, but we are now stocking CBP facilities with items such as diapers, meals appropriate for children, and medical support. Our resources are limited, and we are doing more with less.

The current crisis at our southwest border requires us to increase our capacity to process and facilitate appropriate treatment for the aliens we encounter. This redirection of our resources comes at a cost, as it decreases the number of agents available to perform our law enforcement mission and increases risks along the border.

The rise in migration is, in part, a consequence of the gaps created by layers of laws, judicial rulings, and policies related to the treatment of minors. However well-intentioned, they hinder CBP's ability to fulfill its mission.

***Flores* Settlement Agreement**

The 1997 *Flores* Settlement Agreement, as interpreted by the courts, provides certain standards governing the treatment of all alien minors in U.S. Government custody. The Agreement requires the government to release alien minors from detention without unnecessary delay, or, if detention is required, to transfer them to non-secure, licensed programs "as expeditiously as possible." *Flores* also sets certain standards for the holding and detention of minors, and requires that minors be treated with dignity, respect, and special concern for their particular vulnerability. CBP complies with the *Flores* Settlement Agreement and treats all minors in its custody in accordance with its terms.

In 2014, in response to the surge of alien families crossing the border, DHS increased the number of family detention facilities. Soon after, the U.S. District Court for the Central District of California interpreted *Flores* as applying not only to minors who arrive in the United States unaccompanied, but also to those children who arrive with their parents or legal guardians. The court also ruled that ICE's family detention facilities are not licensed and are secure facilities. These rulings limited DHS's ability to detain family units for the duration of their immigration proceedings. Pursuant to this and other court decisions interpreting the *Flores* Settlement Agreement, DHS rarely detains accompanied children and their parents or legal guardians for longer than approximately twenty days.

As a consequence of the limitations on time-in-custody mandated by *Flores* and court decisions interpreting it, custody arrangements for adults who arrive in this country alone are treated differently from adults who are parents or legal guardians who arrive with a child.

UAC Provision of Trafficking Victims Protection Reauthorization Act of 2008

There are similar treatment differences associated with the provision enacted in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, providing certain protections to UAC. Specifically, the TVPRA requires that, once a child is determined to be a UAC, the child must be transferred to HHS ORR within 72 hours, absent exceptional circumstances, unless the UAC is a national or habitual resident of a contiguous country and is determined to be eligible to withdraw his or her application for admission (i.e., not a trafficking victim and does not have a fear of return), and able to be repatriated to that contiguous country. UAC from countries other than Canada and Mexico are exempt from being expeditiously returned pursuant to the TVPRA, which further encumbers the already overburdened immigration courts. Currently, more than 80 percent of UAC encountered by Border Patrol are

from the non-contiguous countries of Guatemala, Honduras, and El Salvador; therefore, they fall outside the TVPRA expeditious return framework.

Asylum Claims

CBP carries out its mission of border security while adhering to legal obligations for the protection of vulnerable and persecuted persons. The laws of the United States, which are consistent with international treaties to which we are a party allow people to seek asylum on the grounds that they fear being persecuted in their country of origin because of their race, religion, nationality, membership in a particular social group, or political opinion. CBP understands the importance of complying with the law and takes its legal obligations seriously.

CBP has designed policies and procedures based on these legal standards to protect vulnerable and persecuted persons in accordance with these legal obligations.

If a CBP officer or agent encounters an alien who is subject to expedited removal at or between ports of entry, and the person expresses fear of being returned to his or her home country, CBP processes that individual for a credible or reasonable fear screening with an asylum officer from U.S. Citizenship and Immigration Services for adjudication of that claim. CBP officers and agents neither make credible or reasonable fear determinations, nor weigh the validity of any claim of fear.

Addressing the Crisis

There are solutions to this crisis, and many of them have broad, bipartisan support. We need to continue to work with governments in Central America to improve economic opportunities, address poverty and hunger, and improve governance and security. We must continue to work with the new administration in Mexico to address the transnational criminal organizations that prey on migrants.

To help address the influx in the El Paso Sector, CBP is currently taking steps to establish a Centralized Processing Center (CPC). This will help us protect the health and safety of those in custody while streamlining operations and reducing time-in-custody. The El Paso CPC, modeled in part after the CPC established in 2015 in the Rio Grande Valley Sector, will provide a centralized location for processing family units and UAC in an appropriate environment and will facilitate consistent medical assessments in one location.

We must invest in border security, including a modern border wall system. Since the first barriers were constructed in San Diego Sector in 1991, U.S. Border Patrol field commanders have continued to advocate for border wall because of the enduring capability it creates to impede and/or deny attempted illegal entries and because it gives us additional time to carry out successful law enforcement resolutions. CBP and its legacy agencies have invested in border barriers throughout the last three decades, and these historic investments—most significantly the bipartisan passage of the Secure Fence Act in 2006—have received broad support. Today, CBP is constructing a border wall system that includes a combination of various types of infrastructure such as an internally hardened steel bollard wall, all-weather roads, lighting, enforcement cameras and other related technology. While anchored by the border wall and the impedance and denial capability it brings, the wall system's complementary investments in roads, lighting, and technology address domain awareness, access, and mobility needs as well.

Ultimately, we must confront and address the vulnerabilities in our legal framework in order to achieve lasting change at the border. Each action taken by lawmakers, the judiciary, policymakers, and operators—while made in good faith by people grappling with complex issues—can have unintended effects on our immigration system and our national security. I look forward to continuing to work with this Committee to address antiquated laws that allow individual aliens and dangerous transnational criminal organizations to exploit our immigration system.

Thank you for the opportunity to appear before you today. I look forward to your questions.