



TESTIMONY OF

Brian S. Hastings
Chief
Law Enforcement Operations
U.S. Border Patrol
U.S. Customs and Border Protection

BEFORE

U.S. House of Representatives
Committee on the Judiciary

ON

“Oversight of Family Separation and CBP Short-Term Custody Under the Trump
Administration”

July 25, 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 Zero Tolerance initiative, and discuss the actions CBP has taken to address the current situation on the southwest border.

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, to the extent practicable.

Subsequently, on May 4, 2018, former Secretary of Homeland Security Nielsen directed officers and agents to refer all illegal border crossers to the DOJ for criminal prosecution pursuant to 8 U.S.C. § 1325(a) to the extent practicable. On May 5, 2018, acting at the Secretary's direction, 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 his or her minor children).

Consequently, when a parent or legal guardian traveling with his or her child was accepted for prosecution by DOJ under Zero Tolerance, and was 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. This is standard for criminal prosecutions when the defendant is incarcerated. Because the detained parent was not able to provide care and physical custody to the child, the child became an Unaccompanied Alien Child, or "UAC," as defined by 6 U.S.C. § 279(g). Section 235(b)(3) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 generally requires a UAC in the custody of DHS be 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 their child(ren) no longer be referred for prosecution under 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 who were previously in criminal proceedings but returned to our custody. This is separate from any reunifications subsequently conducted by DHS and HHS pursuant to *Ms. L v. ICE*.

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.

Conditions Under Which Families May Be Separated

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 there is a determination that the parent or legal guardian poses a danger to the child, 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 (8 U.S.C. § 1325). 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. By definition, a family unit must include at least one parent or legal guardian; it does not include relatives that are not parents or legal guardians, such as cousins or grandparents if those individuals are not legal guardians.

Current Crisis on the Southwest Border

As this Committee is aware, CBP is currently experiencing an unprecedented and unsustainable situation at the southwest border that is spreading CBP resources too thin. In fact, the current situation at the southwest border is nothing short of a border security and humanitarian crisis. From October 1, 2018 to June 30, 2019, the number of individuals apprehended or found inadmissible by CBP on the southwest border reached 780,633, an increase of 103 percent over the same time the previous fiscal year. That averages two enforcement actions every minute of every day for 272 days. Border Patrol's southwest border apprehensions, a subset of these enforcement actions, reached more than 688,375 at the end of June 2019. That number represents more apprehensions than fiscal year totals for the previous ten years. Although we saw a decrease in the levels of apprehensions in June of this year compared to previous months, migration remains high, continues to tax our finite law enforcement resources, and detracts from our national security mission.

Each day, we see the cascading effects of mass immigration both at and between our ports of entry (POEs). The vast majority of migrants are Central American families and unaccompanied alien children (UAC). In FY 2019 to date, UAC and family units represent 66 percent of all individuals apprehended by the Border Patrol at the southwest border.

The majority of individuals encountered now originate from the three countries of Central America known as the Northern Triangle: Guatemala, Honduras, and El Salvador. The number of Northern Triangle migrants exceeded the number of Mexican migrants in four of the past five fiscal years, and in June 2019, 70 percent of all southwest border apprehensions came from the Northern Triangle. Unlike single adult migrants from Mexico, UAC and families from Central America cannot be swiftly repatriated.

Exacerbating these challenges, the U.S. Border Patrol is now apprehending large groups of migrants between POEs; 198 groups of migrants, each comprising over 100 members (primarily Guatemalan and Honduran families), have been apprehended between POEs so far this fiscal

year. Last month, Border Patrol reached an unfortunate record when more than 1,000 migrants illegally entered the United States in the largest single group ever encountered. The group included more than 900 family units and more than 60 UAC.

The increased shift to these more vulnerable migrant populations, combined with the overwhelming numbers, profoundly affects our ability to patrol the border and diminishes our ability to prevent deadly narcotics and dangerous people from entering our country. It also detracts from our ability to facilitate lawful trade and travel.

Similar to what we see *between* POEs, CBP is experiencing increased numbers of migrants at POEs, including family units and other aliens who arrive without documents sufficient for lawful entry. Large groups of inadmissible aliens, sometimes in the hundreds, arriving at POEs also strain our processes and divert our officers from their priority missions, as our officers necessarily and rightly shift their focus to processing these migrants in a humane and efficient manner.

The consequences of this mass migration are far-reaching. In high-flow sectors, Border Patrol has been forced to divert between 40 and 60 percent of its manpower away from the border security mission to provide humanitarian care to families and children. This means fewer agents are available to stop drugs and dangerous criminals from entering the United States. Further, this crisis has depleted detention capacity of U.S. Immigration and Customs Enforcement (ICE) and greatly overwhelmed its resources, thereby affecting ICE's ability to transport migrants away from overcrowded Border Patrol facilities.

To help the Border Patrol with processing the unprecedented number of migrants, CBP temporarily shifted more than 700 CBP Officers from POEs to Border Patrol stations away from the ports. Fewer officers at POEs means that pedestrians, passenger vehicles, and commercial trucks trying to cross the border may experience delays. Some POEs have been forced to close some travel lanes and curtail some weekend cargo processing hours, all affecting the flow of commerce and travel in the United States.

In addition, the influx of family units has led to CBP facilities operating at unprecedented and unsustainable occupancy levels. Short-term holding facilities at POEs and Border Patrol stations were designed neither for the large volume of inadmissible and apprehended persons nor for the long-term custody after processing is complete. CBP's ability to transfer people out of its custody is dependent upon the capacity of our partners. Other agencies have the time to arrange placement before individuals enter their custody, and immigration courts can spread their dockets out over years. However, CBP must process individuals as they are encountered or apprehended, and must maintain custody until our partners can accept them. By way of reference, we generally consider 4,000 detainees to be a high number of migrants in custody, and consider 6,000 detainees to be a crisis level. On any given day for the past several months, CBP has held between 8,000 and 12,000 detainees in custody. In May, the number was as high as 19,500 detainees.

While the men and women of CBP pride themselves on providing appropriate care for those in its custody, the volume of family units and UAC poses significant challenges. CBP has

deployed soft-sided facilities in Donna and El Paso, Texas, and Yuma, Arizona, designed to meet the needs of family units. The temporary structures are weatherproof, climate-controlled, and provide areas for eating, sleeping, recreation and personal hygiene. These facilities include shower trailers, chemical toilets and sinks, laundry trailers, sleeping mats, personal property storage boxes, lockers, power, kitchen equipment, food/snacks/water, clothing, and hygiene kits. Border Patrol has invested over \$230 million in humanitarian support such as consumables, including meals, snacks, baby formula, shampoo, diapers, and other hygiene items; enhanced medical support; and increased transportation services.

A Broken Immigration System

While many factors drive illegal migration, 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. Unfortunately, this well-intentioned mosaic of legal requirements helped create the conditions underlying the humanitarian crisis at our southwest border today by providing clear incentives to attempt to cross our southwest border illegally, with a child.

Flores Settlement Agreement

The 1997 *Flores* Settlement Agreement, including its interpretation by the courts, provides certain standards governing the treatment, detention, and release 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.¹ The court also stated 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.

In part 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.

¹ *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015).

UAC Provision of Trafficking Victims Protection Reauthorization Act of 2008

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, also requires that the U.S. government extend 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 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 voluntarily (i.e., not a trafficking victim, does not have a fear of return, and is able to make an independent decision to withdraw). UAC from countries other than Canada and Mexico are exempt from the TVPRA provision allowing for the voluntary return of Canadian and Mexican UAC. 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 voluntary return framework, cannot avail themselves of a voluntary return provision like UAC from Canada or Mexico, and further encumber the already-overburdened immigration courts.

Asylum Claims

In recent years, CBP has seen a significant increase in the number and percentage of aliens who seek admission or unlawfully enter the United States and then assert an intent to apply for asylum or fear of persecution. This dramatic increase strains border security resources, immigration enforcement and courts, and other federal resources.

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 have a well-founded fear of persecution in their country of nationality (or of last habitual residence, if stateless) on account of their race, religion, nationality, membership in a particular social group, or political opinion. Our laws also prohibit the removal of individuals to countries where they face a likelihood of torture. 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 an intention to apply for asylum, a fear of persecution or torture, or a fear of being returned to his or her home country, CBP processes that individual for a credible fear screening interview with an asylum officer to determine whether the individual possesses a “credible fear” of persecution or torture. CBP officers and agents processing aliens for expedited removal do not make credible fear determinations for expedited removal.

We Need Congress to Act

These legal and statutory requirements have significant ramifications. Central American families are coming to our border now because they know that DHS must release them quickly—generally within 20 days—and that they will be allowed to stay in the United States indefinitely

while awaiting inevitably protracted immigration court proceedings. To be clear, these families, and those posing as families, are generally not concerned with being caught by the Border Patrol—they are actually turning themselves in, knowing that they will be processed and released with a court date years in the future, often times with permission to work while their case is pending. Smugglers are exploiting this dynamic to encourage more migration and are benefiting from it financially every day under the current outdated laws that are encouraging this to occur.

The perception that our system will allow families to stay in the United States indefinitely is clearly a major pull factor used by smugglers to convince migrants to journey to our border. Economic migration is not, and has never been, a basis for asylum and those who exploit the low credible fear threshold deprive those who actually qualify for asylum the humanitarian protection they deserve.

Along with important push factors, which include high levels of insecurity, limited economic opportunity, and weak governance in many parts of Central America, this perception about our immigration system incentivizes migrants to put their lives in the hands of smugglers and make the dangerous trek north to the southwest border. We see the cost of these pull and push factors every day in profits derived by transnational criminal organizations, in the lives lost along the journey, and in the flight of generations of youth from the countries of the Northern Triangle.

Additionally, regardless of whether an individual who has entered illegally has made a fear claim, they are increasingly unlikely to be repatriated in an expeditious manner. Assurance of release due to court rulings, compounded by a multi-year immigration court backlog, means that there is virtually no border enforcement for families. Only 1.5% of family units from Central America apprehended in FY 2017 have been removed to their countries of origin. In fact, many will end up not having valid claims to remain in the United States when their court proceeding concludes.

Conclusion

We have dedicated every available resource to address the mass migration to our borders, including personnel, technology, and innovative outreach and engagement with international and non-governmental industry partners. However, despite our efforts, the system is overwhelmed. The nation is facing a full-blown security and humanitarian crisis along our southwest border. We ask Congress to acknowledge the crisis and help us by taking legislative action in support of CBP, our partners and the rule of law.

Thank you for the opportunity to testify. I look forward to your questions.