



# U.S. Immigration and Customs Enforcement

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STATEMENT

OF

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REGARDING A HEARING ON

*“At the Breaking Point:  
The Humanitarian and Security Crisis at our Southern Border”*

BEFORE THE

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON BORDER SECURITY AND IMMIGRATION

Wednesday, May 8, 2019

Chairman Cornyn, Ranking Member Durbin, and distinguished members of the Subcommittee, my name is Nathalie Asher and I am the Acting Executive Associate Director for U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO). As a career law enforcement officer with more than two decades of experience, I appreciate the opportunity to appear before you today to discuss the current crisis at the southern border, as well as ICE's critical mission of protecting the homeland and ensuring the integrity of our nation's immigration system through the enforcement of our immigration laws.

We continue to face a humanitarian and security crisis at our southern border. Each month during the first quarter of the fiscal year, approximately 60,000 migrants illegally crossed the border, or presented themselves at a port of entry without proper documentation, and the numbers have continued to rise. In March 2019, this number jumped to more than 103,000 including more than 50,000 members of family units. This dramatic increase of arrests by U.S. Customs and Border Protection (CBP) has placed a strain on our entire immigration system, stretched resources thin across the U.S. Department of Homeland Security (DHS), and has ICE balancing its public safety mission in the interior of the United States with the influx of aliens at the border.

The current migration patterns through our southern border are not only characterized by a significant increase in the number of aliens crossing into the United States, but also reflect a major shift in demographics. In the past, the vast majority of those crossing illegally, or arriving without proper documentation, were single male adults from Mexico who could be quickly and effectively removed. Beginning with the initial surge in Fiscal Year (FY) 2014, there has been a significant increase in the arrival of both family units and unaccompanied alien children (UAC) across the southern border, a trend which continues despite the Administration's focus on enforcement efforts. Now, over 60 percent of those seeking to cross the border are family units and UAC, most of them from the Northern Triangle countries of Guatemala, Honduras, and El Salvador.

In FY 2018, approximately 59,000 UAC and 161,000 members of family units were apprehended at or near the southern border, an increase from FY 2017 when approximately 49,000 UAC and 105,000 members of family units were apprehended at or near the southern border. This trend shows no signs of slowing down in FY 2019; in the first six months of this fiscal year alone, CBP processed more than 38,000 UAC and 215,000 members of family units trending at 45 percent and 218 percent above FY 2018 numbers. So far in FY 2019, ICE has had approximately 297,000 total book-ins into custody, over 222,000 of whom were arrested by CBP, and has removed more than 137,000 aliens from the country. These numbers are straining our already overburdened immigration system, and are making the task of upholding our immigration laws and protecting those in custody increasingly challenging.

Currently, two of ICE's greatest challenges are limited detention beds for adults and the inability to detain family units for the length of time necessary for their cases to be decided, in large part due to the *Flores* Settlement Agreement (FSA) and judicial decisions that interpret it. With regard to detention capacity, the record numbers of CBP apprehensions at the border impact our interior enforcement efforts because Congressional funding limits the number of adult

beds available to ICE. Because many recent border crossers are subject to mandatory detention under the Immigration and Nationality Act (INA), their apprehension leaves limited detention capacity for those who are arrested in the interior of the country, including those with criminal records, some of whom may also be mandatory detainees.<sup>1</sup> In FY 2018, our officers arrested 158,581 aliens in the interior of the country, over 90 percent of whom had a criminal conviction, pending criminal charge, or a previously issued final order of removal, demonstrating our continued focus on public safety.

Today, ICE continues to carry out its public safety mission to protect communities across the country. However, the pressure at the border has stretched all of our resources thin, from detention bedspace and domestic transportation resources to removal flights and officer and attorney time. We continue to look for efficiencies, and to enlist the help of partners at every level of government in order to address the current crisis. While the current influx at the border has created challenges for every immigration agency, from ICE's perspective, it is critical that our agency receive sufficient resources to continue to uphold its core public safety mission within communities nationwide as we cannot secure the border without strong interior enforcement.

ICE faces resource challenges with regard to the adult population, and it faces additional legal and policy challenges when it comes to enforcing our immigration laws as they relate to family units. Among these are the FSA and the judicial orders that interpret it. Pursuant to the orders interpreting the FSA, DHS generally is precluded from detaining family units beyond approximately 20 days in order to allow for a decision by an immigration judge on whether the parent and/or child can remain in the United States. Due to such challenges, since mid-December 2018, ICE has released over 160,000 family unit members into the United States with instructions to report to a local ERO field office and immigration court.

Due to limitations on DHS's ability to detain family units during removal proceedings, the U.S. Department of Justice's Executive Office for Immigration Review (EOIR) created an Expedited Docket in 10 cities across the country. From the end of September through late-April, EOIR has issued 7,724 orders of removal to aliens on that docket, including to many who failed to appear for their court hearings. Specifically, 6,764 of these orders—87.5 percent—were issued *in absentia* after the aliens failed to appear. So far, approximately one out of every six new cases filed on these dockets has resulted in an *in absentia* order of removal because the alien failed to appear. Between the continuing influx of family units, the growing immigration court backlog of almost 900,000 cases, and the fact that there are often no consequences for those who fail to depart as ordered, very few members of family units will be removed; the push and pull factors that incentivize families to make the dangerous journey to this country must be addressed. As a result of these issues, of the family units from Central America who were apprehended at the southern border in FY 2017, more than 98 percent remain in the country today.

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<sup>1</sup> Individuals may be subject to mandatory detention based on certain criminal convictions and criminal activity, among other reasons.

Additionally, because ICE can generally only hold members of family units for approximately 20 days due to the FSA and the judicial decisions interpreting it, most members of this population remain non-detained with little or no oversight. Although ICE has sought to deal with the rapid increase in this population through additional strategies, such as Alternatives to Detention (ATD), this has proven ineffective in the management of recent entrants. While we are currently utilizing ATD for certain qualified family units, there are significant challenges with using the program to manage members of this population, and absconder rates are much higher for this group because most have no existing ties to the community and may not know their final geographic destination. In FY 2018, the absconder rate for traditional ATD participants was 16 percent, while it was 27.4 percent for family units. Additionally, the ATD program does not further ICE's statutory mission of removing those who are illegally present in the United States and have been order removed by an immigration judge. Of ICE's 256,085 removals in FY 2018, only 2,914 of the individuals enrolled in the ATD program were removed, just 1 percent of overall removals. Further, while the ATD program is effective in ensuring that its vetted participants show up to specified court hearings, it is not a substitute for detention and is not suitable for everyone. 74% of individuals detained by ICE are subject to mandatory detention by statute, pose a danger to the community, or present a risk of flight that cannot be effectively mitigated by ATD. Ultimately, without the necessary authority to enable ICE to detain family units for the duration of their immigration proceedings, without the proper ability to hold those accountable who fail to comply with ATD or release conditions, and without sufficient resources to apprehend those who abscond, this situation will result in virtual impunity for those who violate our immigration laws. In such circumstances, the flow of aliens into the United States, many of whom enter illegally, will continue, if not increase.

Unfortunately, by requiring the release of family units before the conclusion of immigration proceedings, court rulings which govern the length of stay for certain population in ICE custody, such as those related to the FSA, and legislation like the *Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA) have left gaps in our immigration laws that are exploited by transnational criminal organizations and human smugglers. These gaps encourage parents to send their children on the dangerous journey north, and we have found that they incentivize smugglers to place children into the hands of adult strangers so that they can pose as families and be released from immigration custody. Fraudulent family claims are a significant problem, and DHS must have the ability to protect the safety and welfare of minors involved in potential smuggling or trafficking situations. DHS and ICE are currently taking steps to address this serious vulnerability and to ensure that we know which aliens are members of a family unit and which ones are not.

As the record numbers of aliens arriving at our border indicate, these gaps have created an enormous pull-factor. Amendments to the laws and immigration court proceedings are needed to help ensure the successful repatriation of aliens ordered removed by an immigration judge. Specifically, the following legislative changes are needed in order to successfully address the current situation:

- Terminate the FSA and clarify the government’s detention authority with respect to alien minors, including minors detained as part of a family unit, to ensure that families are kept together while awaiting immigration proceedings.
- Amend the TVPRA to provide for the prompt repatriation of any UAC who are not victims of human trafficking or who do not have a fear of return to their home country and provide for similar treatment of all UAC from either 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 must demonstrate that reunification with both parents (together or separately) in the United States is not viable due to abuse, neglect, or abandonment, and that the applicant is a victim of trafficking. The current legal requirement is 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 meritless claims, as on average, only about 12 out of every 100 credible fear claims result in a grant of asylum. 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.
- Adding to this pull factor is the backlog of cases in immigration court, causing years-long delays in the adjudication of asylum claims, during which time aliens receive work permits and obtain equities and community ties they would not otherwise have if their removal proceedings in court were adjudicated faster and closer in time to their arrival. Congress has funded the increase in immigration judges, but has not appropriated to ICE a corresponding number of attorneys and legal staff.

## **Conclusion**

Our nation continues to experience an unprecedented illegal immigration crisis on our southern border resulting from outdated requirements and court decisions that prevent the detention of alien minors and family units during the pendency of their removal proceedings, and inhibit the government from effectively removing those who receive final orders from an immigration judge. Legislative changes are needed to ensure we have the necessary authorities to ensure the safe and successful repatriation of persons ordered removed, in addition to ensuring that ICE has adequate resources to continue to execute its mission. Without the necessary funding and legislative changes, the integrity of our immigration system will continue to be undermined.

Thank you again for the opportunity to appear before you today, and for your continued support of ICE. I would be pleased to answer any questions.